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ALLAHABAD SECTION

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ALLAHABAD HIGH COURT

1954

CHIEF JUSTICE :

The Hon'ble Bidhubhusan Malik, M.A., LL.B., Bar-at-law.

ACTING CHIEF JUSTICE :

The Hon'ble Orby Howell Mootham, Bar-at-law. (Acted from 15th February to 28th February.)

PUISNE JUDGES :

The Hon'ble Mr. Justice Orby Howell Mootham, Bar-at-law.
" " " Raghubar Dayal. I.C.S.
" " " Harish Chandra. I.C.S., Bar-at-law. (Retired from 16th Septem-1954).
" " " Prakash Narain Sapru, M. A., Bar-at-law. (Retired from 12th February 1954).
" " " Mubashir Husain Kidwai, Bar-at-law. (at Lucknow)
" " " Chandra Bhan Agarwala, M A., B.L.
" " " Manulal Chunilal Desai, I. C. S.
" " " Vashista Bhargava, I. C. S.,
" " " Brij Mohan Lal, B.A., LL.B.
" " " Ram Narain Gurtu, B.A, (Hons.) (Oxon.), Bar-at-law.

PUISNE JUDGES *(contd.)*

The Hon'ble Mr. Justice Mirza Nasirullah Beg, M.A. (Cantab.), Bar-at-law.
" " " Basudeva Mukerji, M.A., LL.B,
" " " Misri Lal Chaturvedi, B.A., LL.B.
" " " Hari Shankar Chaturvedi, B.A., LL.B. (at Lucknow)
" " " Randhir Singh, B Sc., LL B. (at Lucknow)
" " " Harnath Prasad Asthana, M.A., LL.B., Bar-at-law.
" " " Dwijendra Nath Roy, M.A. LL.B.
" " " Gopalji Mehrotra, B.A., LL.B. (Took seat on 6th May 1954).
" " " Basil Reginald James, I. C. S. (Took seat on 23rd August 1954).
" " " Anand Narain Mulla, M.A., LL.B. (at Lucknow) (Took seat on 23rd August 1954).
" " " Radha Krishna Chowdhry, M A., LL.B. (Took seat on 11th November 1954).
" " " Sri Narain Sahai, B.A., LL.B. (Took seat on 11th Nov. 1954).

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THE
ALL INDIA REPORTER
1954
Allahabad High Court

A. I. R. 1954 ALL. 1 (Vol. 41, C. N. 1)

MALIK C. J. AND V. BHARGAVA J.

Pandey Parshotam Prasad, Appellant v. Balram Prasad Misra, Respondent.

Second Appeal from Order No. 3 of 1943, D/- 17-7-1953, against order of Addl. Dist. Judge, Basti, D/- 21-4-1942.

Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 9 (3) (as amended in 1939) — Retrospective effect.

The amendment must be deemed to have been intended to apply to all claims by creditors whether they had already been put in before the date of the amendment or thereafter. The legislature had intended that the Amendment would apply to all debts whether within time or not.

Held that it could not be said that the order passed by the appellate Court affirmed the order passed by the trial Court and had deprived the trial Court of jurisdiction to review its order dismissing the application under S. 9 which was clearly wrong in the light of the amendment of the section. AIR 1940 All 344; AIR 1939 All 542 and AIR 1949 All 225 (FB), Referred

(Paras 5, 6, 9)

Shambhu Prasad, for Appellant; S. G. Asthana, for Respondent.

CASES REFERRED TO:

(A) ('40) AIR 1940 All 344: ILR (1940) All 391
(B) ('39) AIR 1939 All 542: 1939 All LJ 447
(C) ('49) AIR 1949 All 225: ILR (1949) All 703 (FB)
(D) ('49) AIR 1949 Pat 137: 27 Pat 695

MALIK C. J.: This appeal has been filed on behalf of a creditor whose claim under S. 9, U. P. Encumbered Estates Act (No. 35 of 1934) was rejected on the ground that it was time-barred. The landlord-applicants filed an application under S. 4, U. P. Encumbered Estates Act, before the Collector which, in due course, was sent to the learned Special Judge, second grade, Basti. The landlord applicants then filed an application under S. 8, U. P. Encumbered Estates Act, before the learned Special Judge and on 12-6-1937, notices were published in the U. P. Gazette in accordance with the provisions of the Act and the creditors were required to put in their claims within three months from the date of the notification. According to S. 9. before its amendment in 1939, the Special Judge could on sufficient cause being shown grant only two months extension and no more. The last date for the creditors putting in their claims could not thus be extended beyond 12-11-1937.

The claim was, however, filed on 18-1-1938, after the period of limitation had expired and the reason given for the delay in filing the claim was that the creditor's father had been murdered on 20-11-1936, and he was involved in the prosecution of the culprits following the murder who were convicted on 22-9-1937, and the creditor did not know of the Encumbered Estates proceedings and was not able to put in his claim before 18-1-1938. The law, as it stood then, did not give any option in the matter if the period fixed under S. 9 had expired and this application was rejected on the 17-11-1938. Against the order dismissing the application under S. 9 an appeal was filed in the court of the District Judge on 20-12-1938.

This appeal was admitted and numbered as Encumbered Estates Appeal No. 50 of 1938 and notices were issued to the respondents. While the notices were being served on the respondents, the Chief Inspector of Stamps made a report on 11-9-1939, that the memorandum of appeal was not sufficiently stamped. This report was brought to the notice of the learned counsel for the appellant and on 25-9-1939, he filed an objection to the report and contested it. The learned Judge on 25-1-1940, directed that a copy of this objection may be sent to the revenue authorities concerned and they may be asked to file a reply by 24-2-1940.

(2) It may be mentioned that by reason of the great hardship that had been caused by the restriction put on the power of the Special Judge to extend the period only for a maximum limit of two months and no more and no option being given to the court to extend that period even for good cause, the legislature amended S. 9 by the Amendment Act No. 11 of 1939, which came into force on 30-9-1939. After the amendment the creditor made an application on 28-11-1939, that his claim be reconsidered. On 24-2-1940, on the date fixed when the appeal was put up again before the learned District Judge, the learned counsel for the appellant stated that he did not wish to proceed with the appeal and the learned Judge noted that the deficiency in the court-fee had not been paid and the appellant did not wish to proceed with the appeal and "the appeal be struck off."

The application filed on 28-11-1939, was to the effect that by reason of the amendment to S. 9, U. P. Encumbered Estates Act the claim filed on 18-1-1938, may be considered as within time and it may be admitted and the case decided on the merits. This application was dismissed on the 22nd of January, 1942, and the learned Special Judge relied on a decision of a learned single Judge of this Court in — 'Mt. Kishni v. Murli Singh', AIR 1940 All 344 (A). There was an appeal filed against that order and that appeal was dismissed by the learned District Judge on 21-4-1942. This second appeal is against that order.

(3) Learned counsel for the appellant has urged that the amendment must be deemed to apply to all debts due from landlord-applicants, whether they had already become time-barred or not, and after the amendment he was entitled to have his application dated 18-1-1938, reconsidered.

(4) Section 9(3) of the Encumbered Estates Act before its amendment read as follows:

> "The written statement must be presented within the period specified in the notice, unless the claimant satisfies the Special Judge that he had sufficient cause for not presenting it within such period, in which case the Special Judge may receive the statement if presented within a further period of two months."

The original section, therefore, made it clear that beyond a period of two months the Special Judge had no jurisdiction to extend the period of limitation for filing a claim by a creditor. This worked great hardship on the creditors as in a large number of cases the creditors never came to know of the fact that the debtor landlord had applied under the Encumbered Estates Act and that notification had been issued fixing a period within which the creditors were to put in their claims.

To take away the rigour of this provision, this Court held in — 'Chunni Lal v. Chandan Gopal', AIR 1939 All 542 (B) that, if the landlord applicant had not mentioned in the list of creditors given by him the name of a particular creditor, the creditor could claim the benefit of S. 18, Limitation Act, and put in his claim even beyond the period of two months given under S. 9, U. P. Encumbered Estates Act. That decision also could apply only to cases where the landlord applicant had not included in the list of debts the debt due and the creditor had not put in his claim within time. It could not help a creditor whose name was given in the list even if he could make out sufficient cause for his not having been able to file his claim within the period fixed.

The legislature, therefore, stepped in and by the U. P. Encumbered Estates Act (No. 11 of 1939) amended S. 9 by deleting the words "receive the statement if presented within a further period of two months" and substituting therefor the words

> "subject to such orders as to cost as he may deem fit, receive such statement if presented at any time before the date on which he sends the decrees to the Collector under the provisions of S. 19 or before 30-11-1939, whichever is later."

(5) There is no section in the Amending Act making this provision retrospective and the question, therefore that arises is whether this amendment can be deemed to apply even to claims which had become time-barred. In considering this question, we must bear in mind that the U. P. Encumbered Estates Act provided that all applications under S. 4 of the Act had to be filed within one year after the date when Chapter 3 of the Act came into force. This chapter came into force on 30-4-1935. All applications by landlords who were indebted had, therefore, to be filed by 30-4-1936, which was the last date for such applications. The landlord-applicants who wanted to apply under S. 4 had, therefore, all filed their applications by 30-4-1936. Section 6 of the Act required the Collector to forward these applications.

The Collectors forwarded these applications without delay and in most cases on the same date on which they were received. After the application was received by the Special Judge the landlord applicant had to file his written statement under S. 8 and notice of the application along with list of properties and debts mentioned by the landlord applicant was published in the gazette giving the creditors 3 months' time to file their claims under S. 9. In the large majority of cases, therefore, the period for putting in claims by the creditors under S. 9 of the Encumbered Estates Act had elapsed before the Amending Act was passed. So far as we know, there were hardly any cases in which on 30-9-1939, when the Amendment Act came into force, the period for putting in claims by the creditors under S. 9 of the Encumbered Estates Act had not already expired.

If, therefore, the Amendment Act is to be made applicable only to claims that were still within time the amendment would become unnecessary and practically useless, as it would not be of any help to the large number of creditors whose claims had become time-barred and for whose benefit alone this statement was made. In such circumstances, we think that it may be understood by necessary implication that the legislature had intended that the Amendment would apply to all debts whether within time or not.

(6) Learned counsel has relied on the decision in —'Dila Ram v. Atma Ram', AIR 1949 All 225 (FB) (C) to which one of us was a party. It was held in that case that unless the statute so provides, either expressly or by necessary implication, the section will not be deemed to have retrospective effect. Here, there can be no doubt that the amendment was intended to apply to all debts and not only to debts which were within time as otherwise the amendment would be useless and it will be of no help to the creditors for whose benefit it was intended. The same view was taken by a bench of the Patna High Court in — 'Sm. Sant Kuer v. Ganesh Choudhary', AIR 1949 Pat 137 (D). The learned Judges held that no statute should be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. In our view, this amendment must be deemed to have been intended to apply to all claims by creditors whether they had already been put in before the date of the amendment or thereafter.

(7) It is urged by learned counsel for the respondent that the last date for putting in the claim being 12-11-1937 and the claim not having

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been put in on that date the debt was discharged under S. 13, U. P. Encumbered Estates Act, and, on the date when the section was amended, there was no claim outstanding. Section 13 of the Act reads as follows:

"Every claim decreed or undecreed against the landlord in respect of a private debt, other than a debt due to a co-operative society registered under the Co-operative Societies Act, 1912, by its members shall, unless made within the time and in the manner required by this Act, be deemed for all purposes and on all occasions to have been duly discharged."

If, however, the amendment is interpreted to apply not only to claims which were still within time but also to claims that had become time-barred S. 13 will present no difficulty inasmuch as it would have to be held that the claim was presented within time and in the manner required by S. 9.

(8) The next question that has been raised is the effect of the previous proceedings pending at the time when the amendment was made. The claim was rejected on 17-11-1938, by the learned Special Judge, second grade. An appeal was filed against that order in the court of the District Judge which was numbered and registered as Encumbered Estates Appeal No. 50 of 1938. While that appeal was still pending the amendment came into force and, if the decision given by the learned single Judge in — 'Mt. Kishni's case (A)', cited above, is followed, the amendment would apply and the claim would have to be considered in accordance with the amendment. On 28-11-1939, while the appeal was pending, the creditor filed an application that his application dated 18-1-1938, be reconsidered and admitted as having been filed within time. In view of that application, the appeal was not pressed and on 24-2-1940, the learned District Judge passed an order striking it off.

(9) The point urged by learned counsel for the respondent is that appeal having been dismissed the order of Special Judge dated 17-11-1938, was merged in the order of the learned District Judge dated 24-2-1940, and the matter could not be reconsidered by the Special Judge. When an appeal filed in a court against an order passed by the lower court is dismissed so that the decree of the trial court is merged in the decree of the court of appeal the trial court has no jurisdiction to review its previous order and to reconsider the matter. In this case, however, there is one important circumstance that the Chief Inspector of Stamps had reported that the court-fee on the memorandum of appeal was insufficient. The matter was still pending, and it had not been decided either one way or the other.

On 24-2-1940, when that report was put up before the learned Additional District Judge and learned counsel stated that he did not wish to proceed with the appeal, presumably as he had already applied to the Special Judge for a reconsideration of the matter, the learned Judge passed the following order.

"The Vakil for the appellant has stated that he does not want to prosecute the appeal and has not paid the deficiency. The appeal is struck off."

The learned Judge must have used the words "struck off" as he did not wish his order to be considered as an order dismissing a regular appeal and intended that it should be taken as a mere rejection of the memorandum of appeal. The learned Judge has in his order said "has not paid the deficiency". He must have, therefore, held that the report of the Chief Inspector of Stamps that the memorandum of appeal was insufficiently stamped was correct, though learned counsel could not trace out any order to that effect.

In such circumstances, it cannot be said that the learned Judge intended to pass a decree affirming the decree passed by the trial court and thus deprive the trial court of jurisdiction to review its previous order in the light of the amendment. The fact that the appellant had made an application for review of the previous order and re-consideration of his claim filed on 18-1-1938, must have been brought to the notice of the learned Judge and it may be that it was for that reason that he passed the order that the appeal be "struck off". We cannot therefore, say that, the order passed by the learned District Judge affirmed the order passed by the trial court and had deprived the trial court of jurisdiction to review the order which was clearly wrong in the light of the amendment of the section.

(10) The result, therefore, is that this appeal must be allowed and the order of the lower court be set aside. The Special Judge is directed to proceed with the claim filed on 18-1-1938, and pass orders in accordance with law on the basis that it was filed within time. As the case has now become very old the lower court will act expeditiously. In view of the special circumstances of this case we do not propose to pass any order as to costs.

B/D.H.Z. Appeal allowed.

A. I. R. 1954 ALL. 3 (Vol. 41, C. N. 2)

ASTHANA J.

Rafiq Khan and another, Applicants v. State of Uttar Pradesh and another, Opposite Parties.

Criminal Misc. Writ No. 74 of 1953, D/- 8-7-53.

U. P. Panchayat Raj Act (26 of 1947), S. 85 — Scope — (Constitution of India, Art. 226).

Under S. 85 a Sub-Divisional Magistrate has no jurisdiction to modify the order of conviction and sentence passed by a Panchayati Adalat. He can either quash the entire order or cancel the jurisdiction of the Panchayati Adalat.

Where the Sub-divisional Magistrate maintains the conviction of the accused in respect of one offence only and quashes their convictions in respect of other offences the order is against the provisions of S. 85 and will be quashed by a writ of certiorari.

(Paras 2, 4)

S. C. Khare, for Applicants; Aqiq Hasan, for the State.

CASE REFERRED TO:

(A) ('52) AIR 1952 All 668 : 1952 Cri LJ 1185

ORDER: The applicants, Rafiq and Shafiq along with one Abdul Hafiz Khan, were tried by the Panchayati Adalat of Raghunathpur under Ss. 352, 447 and 426, I. P. C. They all were convicted under each of these sections and were sentenced to fine. Against this order a revision was filed before the Sub-Divisional Magistrate

of Puranpur under Section 85, Panchayat Raj Act. The learned Sub-Divisional Magistrate quashed the conviction of one of them, namely, Abdul Hafiz Khan and in respect of the other two accused, namely, Rafiq Khan and Shafiq Khan he maintained their conviction under S. 447, I. P. C. but quashed their conviction and sentence under the other two sections. The present application has been made by Rafiq and Shafiq for a writ of certiorari quashing the order of the Sub-Divisional Magistrate on the ground that it was against the provisions of S. 85, Panchayat Raj Act. This section provides that a Sub-Divisional Magistrate may for reasons to be recorded in writing either cancel the jurisdiction of the Panchayati Adalat with regard to any suit, case or proceeding, or quash any decree or order passed by the Panchayati Adalat at any stage.

(2) It has been argued on behalf of the applicants that the learned Sub-Divisional Magistrate had no jurisdiction to modify the order passed by the Panchayati Adalat. He could either quash the entire order or he could cancel the jurisdiction of the Panchayati Adalat. In support of his contention he has relied on — 'Raghunandan Singh v. The State', A I R 1952 All 668 (A). It was held in this case that the order passed by a Panchayati Adalat could not be interfered with in any other manner except as provided in S. 85.

(3) In this case the Panchayati Adalat had convicted the applicants and two other persons for offences under S. 24, Cattle Trespass Act and S. 323, Penal Code and had fined each of them Rs. 20/- for both the offences. A revision was filed before the Sub-Divisional Magistrate, and he acquitted two of the convicted persons and reduced the fine of the other three who had made the application. The order passed by the Sub-Divisional Magistrate modifying the decision of the Panchayati Adalat was held to be in contravention of S. 85 and was quashed in the aforesaid decision.

(4) I am, therefore, of the opinion that the order of the learned Sub-Divisional Magistrate dated 20-12-1952 should be quashed, as it is against the provisions of S. 85, Panchayat Raj Act. It is accordingly quashed and the learned Magistrate is directed to decide the case according to law.

A/K.S.B. Case remanded.

A. I. R. 1954 ALL. 4 (Vol. 41, C. N. 3)
(LUCKNOW BENCH)
KIDWAI AND CHATURVEDI JJ.

Mohammad Abdul Rahman Khan, Applicant v. The Govt. of the State of Uttar Pradesh and another, Opposite Party.

C. M. Appln. (O. J.) No. 852 of 1951, D/- 3-8-1953.

Constitution of India (1950), Art. 226 — Certiorari — (U. P. Land Revenue Act (3 of 1901), S. 145).

Remission of land revenue allowed by mistake over a number of years — Government is entitled to recover the same in one lump sum — Failure to obtain certificate under S. 145, U. P. Land Revenue Act, though a defect in procedure which affected jurisdiction of the Government to recover the same, High Court refused to issue a writ of certiorari because the defect did not affect the equities and justice of the claim of the Government and did not interfere with the fundamental rights of the petitioner — The hardship which might result to petitioner as a result of recovering amount in a lump sum held was not a matter which the High Court could consider in the writ petition. (Paras 4, 5, 6)

Anno: Civil P. C., App. III; Constitution of India, Art. 226 N. 13.

Shafiqur Rahman, for Applicant; B. K. Dhaon, for State.

KIDWAI, J.: This is an application under Article 226 of the Constitution, though the nature of the writ claimed is not mentioned. The petitioner, who was a considerable landholder and a man of influence before the abolition of zamindari, claimed that in reward for loyal services, he had been allowed two remissions of revenue, one for Rs. 150/- & the other for Rs. 75/- granted to him in 1922 and 1923 and these remissions be allowed up to 1950, when the Government stopped them. He further claimed that he was entitled to continue to enjoy these remissions and any demand by the Government for refund of either of them was illegal and infringed the petitioner's fundamental rights. He, therefore, prayed for a direction or a writ to the Government prohibiting them from "interfering in any manner in the enjoyment of the two life grants in the nature of remissions of Rs. 150/- and Rs. 75/- in the land revenue of the petitioner" and from realising a sum of Rs. 4,200/- which was the amount allowed as remission at the rate of Rs. 150/- per year for 28 years. The Government had also stopped the remission of Rs. 75/- per annum, which was valid remission, till the arrears amounting to Rs. 4,200/- had been realised. It was prayed that the Government be directed not to suspend this grant.

(2) This application was supported by an affidavit, but the verification of this affidavit shows that Saiyid Ishaq Ali, the deponent, does not state which of the facts mentioned in it were within his personal knowledge and to which facts he deposed on the basis of the information received. According to the affidavit, his age was only 50 in 1951 and there is nothing to indicate that he was in the service of the petitioner at the relevant time, viz., 1922 to 1924. His knowledge as to what happened in those years can, therefore, not be his personal knowledge but can only be based on information.

(3) Subsequently an affidavit was filed by one Nasiruddin, who swore that he had been the general agent of the petitioner at the relevant dates and he also swore that, to the best of his memory, two sanads were granted. The correspondence which has been filed in this case clearly negatives the issue of the two sanads. This affidavit too, therefore, cannot be relied upon to support the case of the petitioner.

(4) A counter affidavit has been filed by one Balak Ram, Chief Revenue Accountant, Deputy Commissioner's office, Kheri, in rebuttal of the allegations contained in the application of the petitioner. From a perusal of this affidavit, it appears that originally a sum of Rs. 40,000/- per annum was to be given as remission of land revenue or as an assignment of land revenue to certain individuals who had supported the Government loyally during the Civil Disobedience Movement of 1920-21: that subsequently this list had to be revised at the instance of the Finance Committee and the total amount allowed was reduced to Rs. 15,000/- for the whole province;

that in view of this reduction that remission granted to the petitioner was reduced from Rs. 150/- to Rs. 75/- per annum but by mistake the entries made in the revenue papers had not been corrected till 1950 and the sum of Rs. 150/- per annum as well as Rs. 75/- per annum were shown as two separate and distinct remissions of the land revenue, which was not in accordance with the Government orders. It is pleaded on behalf of the Government that the petitioner had taken advantage of this wrong entry in the revenue papers and that it was only the revenue which had not been paid year by year which was being realised now by the Government.

The affidavit filed by Balak Ram is supported by the documents which have been produced by the learned Additional Senior Standing Counsel, particularly by opposite party's Ex. 4. There can thus be no doubt that between 1922 and 1950 the petitioner received an unsanctioned remission of Rs. 150/- per annum & since there is no limitation to the recovery of the arrears, the Government is entitled to recover the same.

(5) It has been contended on behalf of the petitioner that the procedure which has been followed is not in accordance with the Land Revenue Act. On a reference to the Land Revenue Act we find that, as a matter of fact, there should have been a certificate issued by the Tahsildar under S. 145 of the Act giving a statement of the account and certifying that there is an arrear. In the present case, this certificate is missing; since the mistake was discovered by the Chief Revenue Accountant of the Deputy Commissioner's office. Thereafter, all proceedings took place in accordance with the law. There can be no doubt however that there has been a procedural defect which affects the question of jurisdiction. The proper course which should have been adopted was for the Deputy Commissioner to proceed first of all to obtain a certificate from the Tahsildar in respect of the arrears and then to proceed as the Land Revenue Act directs.

We do not, however, feel that this is a case in which we should exercise our powers of 'certiorari' because, in fact the Government is entitled to recover the sum of Rs. 4200/- and under the Land Revenue Act it can recover it in a lump sum. Therefore, although a defective procedure has been adopted, that defect does not affect the equities & the justice of the claim,nor does it interfere in any way with the fundamental rights of the petitioner.

(6) We may, however, point out that the sum which was remitted to the petitioner was spread over a period of 28 years and it was not entirely the petitioner's fault that this realisation was not made at the time when the rest of the revenue was collected. The remission was contained in the revenue paper & the revenue authorities did not correct those papers and did not realise the money from him. It is undoubtedly a matter of hardship for him to be called upon to make good the deficiency in a lump sum, but this is not a matter in which we can go in the course of a writ petition, such as the present. It is a matter for the consideration of the Government should the petitioner approach the Government on this point.

(7) Accordingly we reject this application but in view of the fact that there has been a serious defect in the procedure, we do not allow the Government costs.

A/M.K.S. Application rejected.

A. I. R. 1954 ALL. 5 (Vol. 41, C. N. 4)

MALIK C. J. AND V. BHARGAVA J.

M. R. Bakshi, Applicant v. K. N. Saksena, P. C. S., Regional Food Controller, Lucknow and others, Opposite Party.

Misc. (Writ) Petn. of 1953, D/- 4-8-1953.

Constitution of India, Art. 226 — No invasion of legal right — No action under Art. 226 — (Master and Servant).

Under Art. 226 an applicant can move a writ petition only if a legal right of his has been invaded for which he has no other adequate remedy. But, if the applicant was appointed as a temporary servant, the contract of service providing that the service was terminable on one month's notice and that contract of service has been terminated in accordance with its terms, the action of the authority being in accordance with the terms of the contract, it cannot be said that the authority had done anything illegal or that the rights of the applicant under the contract of service had, in any way, been affected. (Para 4)

S. B. Johari, for Applicant.

MALIK C. J.: This is an application on behalf of M. R. Bakshi who was a Supply Inspector in Budaun. His services were temporary as were those of most other persons in the Supply Department—the services being terminable after one month's notice. On 18-5-1953, the Regional Food Controller, Lucknow, served a notice on the applicant in these terms:

"The services of Sri M. R. Bakshi, Foodgrains Inspector, Kashipur, are no longer required. He is hereby served with one month's notice of termination of services with immediate effect."

(2) Learned counsel has urged that though the notice purported to be a notice terminating the applicant's services on the ground that the services were no longer required, the real reason for the termination of the service was that there were certain complaints of misconduct against the applicant. Our attention was drawn to appendix 4 of the affidavit and it was said that the termination of service by notice was a device adopted to avoid the necessity of proving misconduct to entitle the opposite party to dismiss the applicant and the termination of service by notice, therefore, really amounted to an order of dismissal.

(3) There are two objections to the acceptance of this argument. Firstly, the appendices relied on are not parts of the affidavit. Learned counsel has stated that he could not include them in the affidavit as he was not sure about the correctness of the contents in those appendices. The other objection is that even if there was some suspicion against the applicant that his conduct had not been above-board, it was open to the Regional Food Controller, Lucknow, to overlook it and the mere fact that the applicant's conduct was suspected did not mean that the Regional Food Controller, Lucknow, was bound to have the charges established and then dismiss him and could not terminate his services which were no longer required.

(4) Under Art. 226 of the Constitution the applicant can move a writ petition only if a legal right of his has been invaded for which he has no other adequate remedy. If the applicant was appointed as a temporary servant, the

contract of service providing that the service was terminable on one month's notice and that contract of service has been terminated in accordance with its terms, the action of the opposite party being in accordance with the terms of the contract, it cannot be said that the opposite party had done anything illegal or that the rights of the applicant under the contract of service had, in any way, been affected.

(5) In the circumstances, we do not think that there is any force in this application and it is, therefore, dismissed.

A/V.S.B. Application dismissed.

A. I. R. 1954 ALL. 6 (Vol. 41, C. N. 5)

MOOTHAM AND GURTU JJ.

Chandra Bhan, Applicant v. The Rent Control and Eviction Officer, Agra and others, Opposite Parties.

Writ Petn. No. 7809 of 1951, D/- 23-7-1953.

(a) Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 7 — Order granting permission to let vacant premises, form of.

The order contemplated by S. 7 (1) (a) of the Act must be an order addressed to the landlord requiring him to let or not to let vacant accommodation. This view is supported by the terms of Rule 4 of the rules made under the Act which makes the absence of notice to the landlord the prerequisite to the operation of the rule.

(Para 14)

Where on an application by the landlord for allotment of the vacant premises to C, the Rent Controller made the following endorsement 'Allotted to C, issue allotment Order', it was held that the order was not one as contemplated by S. 7 (1) (a) as it was not an order addressed to the landlord at all but was in the nature of an administrative order directed to a subordinate official in the Magistrate's office instructing him to prepare an allotment order directing the landlord to let accommodation.

(Para 14)

(b) Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 7 — Order of allotment, validity.

An order of allotment cannot be made until after the accommodation has fallen vacant and if is made prior to it it is invalid. AIR 1952 All 832, Rel. on.

(Para 15)

(c) Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 7 — Order of allotment, validity — (U. P. Temporary Control of Rent and Eviction Rules, R. 4) — (Constitution of India, Art. 226).

When the Rent Control and Eviction Officer decides a question of fact the result of which determines the right of a person to the benefit of R. 4, he acts in a quasi-judicial capacity. Although the act of issuing an allotment order may be administrative act, the consideration which must precede the doing of that act in a case in which the rights of one party depend upon the existence of a particular state of facts is of the nature of a quasi-judicial consideration. He cannot make that decision in his discretion but must reach his conclusion after hearing the persons whose rights are likely to be affected and after giving them a full opportunity of placing their case before him. If this has not been done the order cannot be sustained. (Para 17)

V. D. Bhargava and R. S. Pathak, for Applicant; G. Mehrotra, for S. C.; S. B. L. Gaur, for Opposite Parties.

CASE REFERRED TO:

(A) ('52) AIR 1952 All 832: 1952 All LJ 213

MOOTHAM J.: This is a petition under Art. 226 of the Constitution.

(2) The essential facts in an involved chain of circumstances are the following:

One Suraj Bhan Jain, who is the father of the petitioner, was the owner of certain premises in Agra. On 23-2-1950, he informed the Rent Control and Eviction Officer, Agra, that the portion of the premises which was occupied by Sri Genda Lal Jain was about to be vacated, and he asked that that portion of the house be allotted to the petitioner.

(3) On 15th April Suraj Bhan Jain moved an application before the same Officer in which he stated that as more than thirty days had passed from the date upon which he had informed that officer of the existence of the vacancy, and as no allotment had been made, he nominated the petitioner as his tenant in respect of the vacant portion of the premises. No action having been taken on either of these applications, Suraj Bhan Jain made a further application on 2nd May, and on 3rd June the Rent Control and Eviction Officer made the following endorsement on the application:

"Allotted to Chandra Bhan Jain. Issue allotment order".

No allotment order was in fact issued.

(4) On 6th June, the Rent Control and Eviction Officer cancelled his order of the 3rd June and issued an allotment order in respect of the same accommodation in favour of respondent No. 4, B. L. Kapoor.

(5) On 19th September the Additional Commissioner Agra, quashed the allotment order of 6th June and directed the District Magistrate to make a further enquiry.

(6) On 14-12-1950, the District Magistrate directed that the accommodation be allotted to the petitioner, and on the 22nd December an allotment order was issued.

(7) On 22nd January 1951, the Additional Commissioner cancelled the District Magistrate's order of 14th December and the allotment order of 22nd December and again referred the case back to the District Magistrate.

(8) On 5th April the District Magistrate decided that the accommodation should be allotted to the petitioner, but no allotment order was made.

(9) Finally on 21st May the Additional Commissioner set aside the District Magistrate's order of 5th April.

(10) In these circumstances the petitioner has come to this Court, and he asks for the following reliefs: first, for the issue of a writ in the nature of certiorari to quash the order made by the Additional Commissioner on 21-5-1951; and, secondly, for the issue of a writ in the nature of mandamus to compel the Rent Control and Eviction Officer, Agra, and the Commissioner of the Agra Division, to put into effect "the allotment made in favour of the applicant".

(11) It was argued on behalf of the petitioner that there was a valid allotment of the accommodation made in his favour on 3-6-1950; that that allotment, once made, could not subsequently be revoked; and the allotment order of 6th June in favour of Kapoor was consequently invalid; that alternatively the allotment order of 22-12-1950, is a good and subsisting order; and, in the further alternative, that on the basis of the order of the District Magistrate of 5-4-1951, he is entitled to have an allotment order prepared in his favour.

(12) In our opinion the authorities concerned failed to observe the provisions of the Rent Control and Eviction Act and have misdirected themselves as to their powers thereunder, with the result that these long drawn out proceedings, which must have been the cause of much anxiety and hardship to the parties concerned, are vitiated throughout.

(13) The first and principal question is whether the endorsement made on 3-6-1950, on the application of the petitioner's father on the preceding 2nd May is an order such as is contemplated by S. 7 of the Control of Rent and Eviction Act.

(14) The relevant part of S. 7 (as then in force) was as follows:

"1(a). The District Magistrate may, by general or special order, require a landlord to give information that any accommodation of which he is the landlord is or has fallen vacant and to let or not to let such accommodation to any person."

We are of opinion that, the order for which provision is made in this sub-section must be an order addressed to the landlord requiring him to let or not to let vacant accommodation. This view is supported by the terms of Rule 4 of the rules made under the Act which makes the absence of notice to the landlord the prerequisite to the operation of the rule. We do not think that the order made by the Rent Control and Eviction Officer on the 3rd June was such an order.

The terms of the order, namely "Allotted to Chandra Bhan Jain. Issue allotment order", make it clear, we think, that it was not an order addressed to the landlord at all but was in the nature of an administrative order directed to a Subordinate official in the Magistrate's office instructing him to prepare an allotment order directing the landlord to let accommodation. The petitioner says that he was informed of the order at the time it was made, but we are unable to see that this makes any difference. We think it to be important for the due administration of the Control of vacant accommodation that the provisions of this sub-section should be strictly complied with, otherwise much confusion and uncertainty may arise.

(15) In the view we take as to the nature of the order made on the 3rd June, it was not necessary to consider the date upon which the accommodation was vacated by the previous tenant or tenants; but this question is one which becomes vital when we turn to a consideration of the validity of the order made on 6th June. There are two statutory requirements which must be borne in mind, first, under S. 7(1) of the Act an order of allotment cannot be made until after the accommodation has fallen vacant — 'Badri Prasad Tripathi v. District Magistrate', AIR 1952 All 832 (A), secondly, Rule 4 provides that if the District Magistrate does not allot the accommodation within thirty days of the receipt by him of an intimation given by the landlord under S. 7(1) that the accommodation is vacant, the landlord himself may nominate a tenant and the District Magistrate must allot the accommodation to that nominee unless, for reasons to be recorded in writing, he forthwith allots the accommodation to some other person.

Now, unfortunately, there is the widest conflict of evidence as to the date upon which the accommodation in this case became vacant. The petitioner swears that the premises were vacated by the previous tenant by the end of February, 1950, and in this, he is supported by his father Suraj Bhan, and by Suraj Mal and Panna Lal who are occupants of other portions of the premises in which is situated the accommodation in dispute. Kapoor on the other hand swears that the accommodation was not vacated until 7th June. If this is true, it is of course manifest that the allotment order made on the previous day in his favour is invalid. If on the other hand the accommodation was vacated by the end of February then under Rule 4 the petitioner was prima facie entitled to have the accommodation allotted to him.

(16) The order made by the Rent Control and Eviction Officer on 6-6-1950, was as follows:

"Appeared and heard. The house has not been vacated till today. The landlord had no business to inform that the house has fallen vacant. He should be asked to report why he should not be prosecuted by giving false information. In supersession of all previous orders the house is allotted to Sri B. L. Kapoor."

This order it appears was made 'ex parte' (paragraph 11 of the petitioner's affidavit and paragraph 10 of the counter-affidavit sworn on the 22nd October, 1951) and in making it the Rent Control and Eviction Officer appears wholly to have overlooked the importance, in view of the petitioner's father's applications of 15th April and 2nd May, 1950, of determining with some care the date upon which in fact the accommodation fell vacant.

(17) We think that when the Rent Control and Eviction Officer decides a question of fact the result of which determines the right of a person to the benefit of Rule 4, he acts in a quasi-judicial capacity. Although the act of issuing an allotment order may be administrative act, the consideration which must precede the doing of that act in a case (such as the present) in which the rights of one party depend upon the existence of a particular state of facts is of the nature of a quasi-judicial consideration. He cannot make that decision in his discretion but must reach his conclusion after hearing the persons whose rights are likely to be affected and after giving them a full opportunity of placing their case before him. This has not been done in the present instance and the order of the 6th June cannot therefore, in our opinion, be sustained.

(18) We turn now to the allotment order made in favour of petitioner on 22-12-1950. That order also, in our opinion, cannot stand, for it is we think clear that it was passed only upon a consideration of the claims of the petitioner and not upon a determination of the merits of the respective claims of the petitioner and Kapoor. We have already said that by an order of the 19-9-1950, the Additional Commissioner, Agra, purported to quash the allotment order of 6th June and remanded the case to the District Magistrate for further consideration.

In his order the Additional Commissioner expressed the view that Kapoor had been unjustly installed in the premises; this expression of opinion was understood by the District Magistrate to

imply that his inquiry was to be limited to a consideration of the question whether or not the petitioner was a fit person to whom the accommodation should be allotted. This is clear, we think, from the following extract from the order of the District Magistrate made on the 14th December which was the foundation of the allotment order issued on 22nd December:

"It (that is, the order of the Additional Commissioner of the 19th September) further says that 'the allottee Sri B. L. Kapoor has been unjustly installed there by the Rent Control and Eviction Officer with police help'. It seems to me quite clear, in view of this, that Sri B. L. Kapoor cannot be allowed to retain that house. The only question is whether Sri Chandra Bhan was a suitable person to be allotted this house, or whether the house should be reallotted to a third party."

(19) Finally, there remains to be considered the effect of the District Magistrate's subsequent order of 5-4-1951, in which he again decided that the accommodation should be allotted to the petitioner. The District Magistrate concluded his fairly long order with the following words:

"I hold that the house should be allotted to Sri Chandra Bhan. He should be given possession after two weeks from date and Sri B. L. Kapoor should be notified at once."

That order was not followed by the issue of any allotment order to the landlord nor indeed does any action appear to have been taken to implement it, for Kapoor took the order in revision to the Additional Commissioner who, as we have said, purported to set it aside by his order of the 21st May, 1951.

(20) We are therefore of opinion that no valid allotment of the accommodation has been made either to the petitioner or to Kapoor, and it is consequently unnecessary for us to express an opinion on the question whether a valid allotment order can be revoked either by the officer who makes it or by a higher executive authority. In our opinion, the matter must go back to the Rent Control and Eviction Officer who must, upon a consideration of all the circumstances, make a fresh order of allotment, bearing in mind the provisions of the Act and the rules made thereunder.

(21) As we have held that the order of the District Magistrate made on 5-4-1951, which the Additional Commissioner purported to quash by his order of the 21st May following does not constitute an order of allotment within the meaning of S. 7 of the Act, it is not necessary to direct the issue of a writ quashing the latter; and as we have held that there is no subsisting order of allotment in favour of the petitioner no writ of mandamus can issue. The petition is therefore dismissed but there will be no order as to costs.

B/K.S.B. Petition dismissed.

A. I. R. 1954 ALL. 8 (Vol. 41, C. N. 6)
(LUCKNOW BENCH)
R. SINGH J.

Brij Narain, Accused-Applicant v. Ram Dayal, Opposite Party.

Criminal Revn. No. 294 of 1952, D/- 30-7-53, against order of Sub-Divisional Magistrate, Unao, D/- 1-8-1952.

Constitution of India, Art. 227 — Interference with illegal conviction by Panchayati Adalat — (U. P. Panchayat Raj Act (26 of 1947), S. 52 (1) (a).)

Panchayati Adalat has no jurisdiction to entertain a complaint and try a case where the allegations in the complaint clearly make out an offence under Penal Code which is not mentioned in S. 52 (1) (a) of the U. P. Panchayat Raj Act. Where in such a case it entertains the complaint and convicts the accused for a different offence under the Penal Code which is mentioned under S. 52 (1) (a) of the Act, the conviction is illegal and requires to be set aside when an application is made by the accused under Art. 227 of the Constitution.

(Para 3)

Anno: Civil P. C., App. III; Constitution of India, Art. 227 N. 1.

S. Kalbe Mustafa, for Applicant; M. L. Trivedi, for Opposite Party.

ORDER: This is an application under Art. 227 of the Constitution of India invoking the powers of this Court for quashing the conviction of the applicant by an Adalati Panchayat.

(2) A complaint was made by Ram Dayal to the Panchayati Adalat of village Raukarna alleging that one day Ram Dayal had gone to the market to sell his wares when Dulli alias Brij Narain applicant met him. Ram Dayal told him that he was not getting sufficient sugar for sale and Dulli told him that he could get a permit for sugar if he paid him Rs. 50/- for engaging a lawyer to apply for the permit. Ram Dayal paid the money but Dulli did not do anything to get him the permit. He definitely alleged in the application that Dulli was in the habit of cheating people in this manner and that the applicant was also cheated by him. Thereupon the matter was taken up by the Panchayati Adalat and the accused was summoned. The accused denied having taken any money from Ram Dayal. The Panchayati Adalat, however, came to the conclusion that the complaint made by Ram Dayal was well founded and convicted the applicant under Section 403 of the Indian Penal Code and sentenced him to a fine of Rs. 5/-. The applicant then went in revision. The Sub-Divisional Magistrate rejected the revision. He has now made an application under Article 227 of the Constitution.

(3) The allegations made in the complaint, which should primarily decide the forum, clearly show that it was a case of cheating. The applicant is said to have wrongly represented to Ram Dayal that he could obtain a permit for sugar for him when in fact he had no such intention. It would thus be a clear case of cheating. The allegations made in the complaint would not bring the offence under S. 403 or under Section 405 of the Indian Penal Code as alleged on behalf of the applicant. If this had been only a case of a wrong application of a section to the offence no interference was perhaps necessary, but if the offence made out takes the case out of the jurisdiction of the Adalati Panchayat the conviction of the applicant would be bad.

Section 52 of the Panchayat Raj Act enumerates the various sections of the Indian Penal Code, offences under which are, cognizable by the Panchayati Adalat. The list given in S. 52 (a) of such offences does not include an offence under Section 420 or under Section 405 of Indian Penal Code. If, therefore, the offence made out by the complainant Ram Dayal in this case was not covered by any of the sections mentioned in S. 52 (1) (a) the Panchayat Raj Act's jurisdiction could not be attracted in this case and any proceedings taken by the Pan-

chayati Adalat would be bad. It is a matter of common knowledge that sometimes allegations are twisted in order to make a certain complaint cognizable by a Panchayati Adalat when in fact it is not so, and this also appears to be one of those cases. The Panchayati Adalat had no jurisdiction to entertain a complaint under Section 420 of the Indian Penal Code but had jurisdiction to entertain a complaint under S. 403 of the Indian Penal Code. Although the facts in this case clearly made out an offence under S. 420, the Panchayati Adalat treated the offence as one under S. 403 and dealt with. It would thus appear that the Panchayati Adalat had no jurisdiction to try this case.

(4) It has been argued on behalf of the opposite party that the applicant had a remedy open to him inasmuch as he could go up in revision under S. 85 of the Panchayat Raj Act to the Sub-Divisional Magistrate and he should not be heard in this Court if he fails to take up the point now pressed before this Court in the Court below. The appln. made in revision to the Sub-Divisional Magistrate is on the record. Although the point that the Panchayati Adalat had no jurisdiction to entertain the complaint was not specifically taken up by the applicant in the Court of the Sub-Divisional Magistrate it had been pleaded that the order of the Panchayati Adalat was illegal. It could not therefore, be said that the point was not taken up in the Court of the Sub-Divisional Magistrate. No other point arises for determination in this case.

(5) As a result the conviction of the applicant and the sentence passed upon him by the Panchayati Adalat are set aside. It will be open to the complainant Ram Dayal to file a fresh complaint in the proper court against the applicant if he so desires. The fine, if paid, shall be refunded.

A/M.K.S. Conviction set aside.

A. I. R. 1954 ALL. 9 (Vol. 41, C. N. 7)

B. D. MUKERJI J.

Debi Das, Applicant v. State.

Criminal Revn. No. 39 of 1953, D/- 28-7-1953, against order of Addl. S. J., Aligarh, D/- 23-12-1952.

U. P. First Offenders Probation Act (6 of 1938), S. 4(1) — Offender convicted of offence punishable with fine only — Applicability of Act.

The U. P. First Offenders Probation Act does not apply to those cases where the offence with which the offender is charged and punished is punishable with fine alone. Further, a convicted person cannot get relief in respect of a sentence of fine also even though he may have been sentenced to a term of imprisonment as well. AIR 1945 All 206, Rel. on. (Paras 2, 3)

B. S. Darbari and Satish Chander, for Applicant; T. N. Madan, for the State.

CASE REFERRED TO:

(A) ('45) AIR 1945 All 206: 1945 All LJ 82: 46 Cri LJ 743

ORDER: This revision has had a chequered career in this Court inasmuch as it came up for hearing on several dates. On 12-5-1953, it came up before me and on that date I heard counsel on both sides and came to the conclusion that on the facts and circumstances of the case I could not, sitting in revision disturb the decision of the Court below. Sri Darbari appearing on behalf of the applicant prayed that instead of sentencing the applicant to any punishment I should exercise my powers under the U. P. First Offenders Probation Act. On behalf of the State it was argued that before I could exercise my powers under that Act it was the duty of the applicant to satisfy me in regard to certain matters provided for by S. 4 (1) of that Act. Sri Darbari thereupon took time to file an affidavit disclosing the circumstances which would entitle the applicant to have the benefit of the First Offenders Probation Act. Such an affidavit was filed on 5-6-1953, and thereafter the case was again listed before me for disposal. It was then contended on behalf of the State that relief under the First Offenders Probation Act could not be given to a convicted person in respect of a sentence of fine alone. Sri Darbari again took time to meet this objection on behalf of the State. The case was adjourned again since learned counsel for the State had no objection to Sri Darbari having an opportunity of meeting the objection raised on behalf of the State.

(2) I have heard arguments on the question, whether under S. 4 (1) of the First Offenders Probation Act this Court can commute a sentence of fine and release the offender on probation of good conduct? The contention on behalf of the State is that the scheme of the Act clearly indicates that sentences of imprisonment alone fall within the purview of the Act and not sentences of fine. Emphasis was laid on the word 'release' used in S. 4 (1) of the Act. It was contended that a person can only be released, strictly speaking, from prison or from undergoing a sentence of imprisonment. On behalf of the applicant, however, it was contended that the word 'release' may equally apply to a sentence of fine because we do speak of releasing a man from the obligation of paying a fine.

It is undoubtedly true that the word 'release' can be used and often is used in that sense. Certain authorities were cited on behalf of the applicant, but in my opinion none of the cases cited actually applied to the question that I have to determine. There is however authority for the proposition and indeed it is also clear on the language used that the First Offenders Probation Act does not apply to those cases where the offence with which the offender is charged and punished is punishable with fine alone. Bennet J. in — 'Jawahir v. Emperor', AIR 1945 All 206 (A), held thus:

"As I understand S. 3 the words 'any offence punishable with not more than two years' imprisonment' mean any 'offence punishable with imprisonment of not more than two years', and if this construction is adopted, there can be no doubt that it was intended to exclude offences punishable by fine only. It is, I think, difficult to say that an offence punishable with fine only is 'punishable with not more than two years' imprisonment'. The Legislature clearly seems to have been contemplating only cases where imprisonment is provided as a punishment and not cases where fine only is provided as punishment. Had it been the intention to include offences punishable with fine only it would have been easy to add the words 'or with fine only' after the words 'punishable with not more than two years' imprisonment'."

(3) In my judgment if the First Offenders Probation Act cannot be invoked in aid by a convicted person who is sentenced to a fine only

for relief then it follows that a convicted person cannot get relief in respect of a sentence of fine also even though he may have been sentenced to a term of imprisonment as well. I am also of the opinion that the scheme of the Act clearly indicates that the Legislature contemplated action being taken by Courts in the case of first offenders only when they were being sent to jail. The object of the legislation clearly was to provide Courts with the power of keeping away first offenders of a certain standard of life or of a certain status from being contaminated by the atmosphere prevailing in jails. The sentence of fine passed on an offender has no such dangers about it. If the intention of the First Offenders Probation Act were that by taking action under it the stigma of conviction was also to be wiped out then possibly it could have been contended that Courts were given powers to take action under the Act in a case where the offender was sentenced only or in addition to a sentence of fine; but that is not the scope or the object of the Act. I am, therefore, of the view that action under the First Offenders Probation Act cannot be taken to relieve an offender in respect of a sentence of fine.

(4) I wish further to say that even if I had the power under the First Offenders Probation Act to relieve the applicant of the sentence of fine which has been imposed on him, I would not have given him such relief. In my view all offences which are anti-social in their effect must be punished with severity. It is no doubt true that in this case the applicant has not been found to have been guilty of a flagrant breach of a Control Order, but that, in my judgment, makes no difference to the penalty that he incurred under the Foodgrains Control Order. It may further be noted that the applicant never pleaded that the excess stocks found in his possession were there because he had been misled by an incorrect publication (not authoritative however) of the prescribed limits. That being so, so far as the applicant was concerned, there was no extenuating circumstance which can persuade me to interfere with the sentence of fine that has been imposed. I, however, am of the opinion that in this particular case the sentence of imprisonment, namely, the sentence of six months' rigorous imprisonment, which has been awarded by the lower appellate Court to the applicant may be reduced to the period already undergone by the applicant.

(5) **In the result I uphold** the conviction of the applicant and maintain his sentence of fine, but reduce the sentence of imprisonment passed on him to the sentence already undergone by him. The sentence of imprisonment in lieu of fine is also reduced from six months to three months' rigorous imprisonment. In other respects this revision fails.

(6) Mr. Darbari prays that this case be certified as a fit one for appeal to the Supreme Court. I do not consider that it is such a case in which a certificate of fitness for appeal to the Supreme Court can be granted. I, therefore, reject the prayer made by Mr. Darbari.

B/V.S.B. Ordered accordingly.

A. I. R. 1954 ALL. 10 (Vol. 41, C. N. 8)

BRIJ MOHAN LALL J.

Tula Ram, Appellant v. Mangaloo and others, Respondents.

F. A. No. 38 of 1953, D/- 23-7-1953, from order of Dist. Judge, Meerut, D/- 25-10-1952.

Civil P. C. (1908), O. 22, Rr. 4, 11; O. 41, R. 20 — Failure to apply for substitution deliberately or negligently.

The right of impleading any person as a party to the suit has been conferred by R. 20, O. 41 on the Judge alone. This rule does not give a right to a party to claim that a certain person should be impleaded. Ordinarily this power should not be exercised at the instance, or in favour, of a party who has deliberately or negligently failed to make an application for substitution of names under O. 22, R. 4 read with R. 11. (Para 4)

Anno: C. P. C., O. 22, R. 4 N. 2, 20; R. 11 N. 1; O. 41, R. 20 N. 4.

S. N. Misra, for Appellant.

JUDGMENT : This is a first appeal from an order passed by the learned District Judge of Meerut. It appears that a civil appeal was pending before the learned District Judge. Rupa, one of the respondents in the said appeal, died during the pendency of the appeal. The appellant did not make an application to bring Rupa's legal representative on the record within the time allowed by law. After the expiry of the said period he made an application praying that Rupa's son, Yadu, might be brought on the record under O. 41, R. 20 C. P. C. At the same time he contended before the learned District Judge that the appeal had not abated as a result of his failure to bring Rupa's legal representative on the record.

(2) The learned District Judge remarked in his order under appeal that the counsel for the appellant should make up his mind as to whether he would make an application under O. 22, R. 9, C. P. C., to bring the legal representative of Rupa on the record or he would contend that it was unnecessary to implead Rupa's legal representative. He also added that "the question of impleading Rupa's legal representatives under O. 41 R. 20 C. P. C., does not arise".

(3) Learned counsel for the appellant contends that the learned Judge has not yet disposed of his application containing a prayer to implead Rupa's legal representative under O. 41, R. 20. I am unable to agree with this contention. It is true that the language used by the learned Judge is not explicit but after reading his order as a whole there is no doubt left in one's mind that he meant to reject the petition for impleading Rupa's legal representative under O. 41, R. 20, C. P. C. I, therefore, take it that the learned Judge has rejected the petition presented before him.

(4) I have next to see whether that decision is incorrect. In this connection it may be pointed out that the right of impleading any person as a party to the suit has been conferred by R. 20 of O. 41 on the Judge alone. If the Judge feels that a certain party should be impleaded, he may take action under the rule. This rule does not give a right to a party to claim that a certain person should be impleaded. If the Judge does not consider it necessary to implead any person as a party, there is an end of the matter. Ordinarily this power should not be exercised at the instance, or in favour of a party who has deliberately or negligently failed to make an

application for substitution of names under O. 22, R. 4 read with R. 11.

(5) In the present case, an automatic abatement has taken place and the real object of the appellant was to circumvent the provisions of O. 22 R. 4(3) read with R. 11. The learned Judge was, therefore, perfectly right in not acceding to the appellant's request.

(6) In the circumstances, I find no force in this appeal. It is dismissed under O. 41, R. 11 C. P. C.

B/D.H.Z. Appeal dismissed.

A. I. R. 1954 ALL. 11 (Vol. 41, C. N. 9)

MALIK C. J. AND V. BHARGAVA J.

Rampur Tannery and Mfg. Co. Ltd., Applicant v. Umar Uddin, Plaintiff-Opposite Party.

Civil Revn. No. 97 of 1953, D/- 23-7-1953, against order of Dist. Judge, Rampur, D/- 30-4-1952.

(a) Civil P. C. (1908), O. 30, R. 1 — Suit in name of firm through all partners.

The provisions of O. 30 of the Code are enabling provisions and they enable any two or more persons to sue or be sued in the name of a firm. The provisions of O. 30, R. 1 do not make a suit filed in the name of a firm through all the partners of the firm a defective suit. (Para 1)

Anno: Civil P. C., O. 30, R. 1 N. 1.

(b) Civil P. C. (1908), O. 30, R. 1 — Suit filed on behalf of firm by one partner — Other partners can apply under R. 1. (Para 4)

Anno: Civil P. C., O. 30, R. 1 N. 12.

(c) Civil P. C. (1908), S. 151; O. 1, R. 10 and O. 30, R. 1 — Suit filed on behalf of firm by one partner — Addition of other partners.

A Court has inherent jurisdiction to entertain an application of a stranger to be made a party and to implead any person as a party to a suit where it considers the addition to be in the interest of justice. (Para 8)

Thus, where a suit is filed on behalf of a partnership by a partner and the other partners apply that their names be also brought on record and they might be allowed to continue the suit on behalf of the partnership, the Court can entertain the application under S. 151 even if O. 1, R. 10 or O. 30, R. 1 is not applicable. (Para 7)

Anno: Civil P. C., S. 151 N. 2 Pt. 33; O. 1, R. 10 N. 15; O. 30, R. 1 N. 12.

Bageshwari Sahai, for Applicant.

CASES REFERRED TO:

(A) (1905) 74 LJKB 14: (1905) 1 KB 46

(B) ('41) AIR 1941 FC 16: 1940 FCR 110 (FC)

(C) ('41) AIR 1941 Lah 402: ILR (1942) 23 Lah 603

(D) ('13) 18 Ind Cas 207: 40 Cal 955

MALIK C. J.: This is a revision under Section 115, Civil P. C. The point raised by learned counsel is that there is no provision of law under which when a suit was filed on behalf of a partnership by a partner the other partners could apply that their names be also brought on the record and they might be allowed to continue the suit on behalf of the partnership. Learned counsel has relied on the provisions of Order 30, Civil P. C. (Act 5 of 1908) and has urged that the order relates only to an application by a party to the suit applying for disclosure of names of partners of a firm, in the name of which or against which a suit has been filed, and the other partners, who were not parties to the suit, had no right to apply that their names be disclosed and they be allowed to continue the suit in the name of the partnership.

The provisions of Order 30, Civil P. C. are, however, enabling provisions and they enable any two or more persons to sue or be sued in the name of a firm. If the provision was not there it may make it necessary, where there is no agreement that one partner is entitled to represent the firm and to sue or be sued in the name of the firm, for all partners to join as parties when a suit has to be filed in the name of a partnership firm or against it. The provisions of Order 30, Rule 1 do not make a suit filed in the name of a firm through all the partners of the firm a defective suit.

(2) The facts of this case are that a suit was originally filed by one Umaruddin in his own name. The plaint was, however, subsequently amended by an order dated 22-4-1950, and it became a suit on behalf of the firm Messrs. Umaruddin and Sons, through Umaruddin partner. From the registered deed of partnership and other documents on the record it appeared that the partners of the firm were Umaruddin, Abdul Karim, Mardan Khan and Saheb Khan. Umaruddin, according to the defendant, had migrated to Pakistan. The plaintiffs probably do not admit this fact. Be that as it may, the other partners applied that their names be also disclosed in the plaint so that they may be able to continue the suit on behalf of Messrs. Umaruddin and Sons. This application was granted by the learned District Judge on 30-4-1952, and this revision has been filed against that order.

(3) The argument advanced by learned counsel is that the learned Judge had no right to pass the order either under Order 30, Rule 1 or Rule 2, or under Order 1, Rule 10, Civil P. C. Order 30, Rr. 1 and 2 in short provide that two or more persons claiming or being liable as partners may sue or be sued in the name of the firm of which they are partners, and any party to a suit may in such a case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm. Sub-rule (2) of Rule 1 allows the pleading etc., to be verified or signed by one partner on behalf of the partnership. Rule 2 of Order 30 provides that the plaintiffs will be bound to disclose the names of the partners on an application being made to that effect by the defendant.

(4) The submission made by learned counsel is that Rule 2 only applies to a disclosure by the plaintiff on an application by the defendant and Rule 1 applies to a disclosure of the names and addresses of all the partners on an application by any party to a suit. The question, therefore, is whether in a case where a suit has been filed on behalf of a firm by a partner the other partners can apply under Order 30, Rule 1. The suit being in the name of and on behalf of the partnership, all the partners should be deemed to be parties in their capacity as partners and there appears to be no reason why they should not be able to apply under Order 30, R. 1.

(5) In — 'Abrahams and Co. v. Dunlop Pneumatic Tyre Co.', (1905) 1 KB 46 (A) a decision by the Court of Appeal in England — an application was filed by a person supported by an affidavit that though her name had not been disclosed by the plaintiff she was a partner of the firm and her name should be disclosed. The learned Judges held that such a disclosure could be made under

the provisions of Order 48, Rule 1, which are very similar to the provisions of our Order 30, Rule 1, Civil P. C.

(6) Learned counsel has pointed out that the disclosure could only be of the names of persons who were partners on the date when the cause of action accrued. The partnership deed is of the year 1946. The suit is on behalf of the partnership for realisation of dues which, it is claimed, are due to the partnership. The point mentioned by learned counsel after all other points urged by him had failed appears to be an after-thought The point was not raised in the lower Court and it raises a question of fact. In any case, if the amounts claimed are not due to the partnership the suit will fail on that ground. We need not, therefore, go into that question at this stage.

(7) Learned counsel's further contention is that O. 1, Rule 10, Civil P. C. does not apply as that rule applies only to a case where a suit has been instituted in the name of a wrong person or where it is doubtful whether it has been instituted in the name of the right plaintiff. It may be that on a strict view Rule 10 of Order 1 may not apply to this application but even if Order 30, Rule 1 or O. 1, Rule 10, is not applicable, the Court had ample jurisdiction under Section 151 of the Code to pass the order. The suit being on behalf of the firm, the partners of the firm were interested in the result, and as we have already said, all of them could have from the very beginning joined in the suit and the suit could have been filed through all of them.

If for some reason the other partners thought that their interest was not safe in the hands of Umaruddin and he might not be able to look after the interest of the firm properly and they applied that their names be also disclosed and the learned Judge passed an order to that effect, it cannot be said that he did anything improper or that the disclosure of the names of the other partners in any way adversely affected the rights of the defendant.

(8) The law is well settled that under the inherent powers of the Court the Court can implead any person where it considers that the addition of that party is in the interest of justice and even where a party may not be a necessary party but merely a proper party his name can be added. The Federal Court in — 'United Provinces v. Mt. Atiqa Begum', A. I. R. 1941 FC 16 (B) held that the language of Order 41, Rule 20, Civil P. C., does not show that it is exclusive or exhaustive so as to deprive a Court of any inherent power which it may possess and can exercise in special circumstances, and which has been saved by Section 151.

After the decision of the Federal Court it is not necessary to quote other cases but we may mention only two which have been cited at the Bar. — 'Shanti Lal v. Hira Lal Sheo Narain', AIR 1941 Lah 402 (C); and — 'Nanda Kishore Singh v. Ram Golam Sahu', 40 Cal 955 (D). Dealing with the question of the existence of inherent power and the extent to which it should be exercised, after having discussed the law on the subject the learned Judge (Mookerjee J.) held that amongst obvious cases may be mentioned—

> "enquiry as to whether all the proper parties are before the Court, entertaining an application of a stranger to be made a party, the addition of a party".

It is not necessary for us to examine all the instances mentioned by the learned Judge but we have no doubt that the Court has inherent jurisdiction to entertain an application of a stranger to be made a party and to implead any person as a party to a suit where it considers the addition to be in the interest of justice. It cannot, therefore, be said that the order passed by the lower Court was beyond its jurisdiction.

(9) The revision has no force and is dismissed.

B/V.R.B. Revision dismissed.

A. I. R. 1954 ALL. 12 (Vol. 41, C. N. 10)
(LUCKNOW BENCH)

RANDHIR SINGH J.

Abdul Waqar, Appellant v. State.

Criminal Reference No. 27 of 1953, D/- 30-7-1953, reference made by S. J., Lucknow, D/- 20-2-1953.

(a) Railways Act (1890), Ss. 112, 113 — Applicability and scope.

No doubt a person is bound to produce a railway ticket or pass when demanded and would be liable to pay the fare and penalty if he is unable to produce the ticket when demanded. It would, however, be difficult to say that in all cases the omission to produce the ticket or pass could be referable to an intention to defraud the railway. It is possible that a person may lose his ticket or may even be unable to purchase one on account of rush at the booking office or want of sufficient time. In all such cases S. 112, Railways Act would be inapplicable and the person in default could be held liable under S. 113 of the Act. (Para 3)

Anno: Railways Act, S. 112 N. 1; S. 113 N. 1.

(b) Railways Act (1890), S. 134 — Opportunity to produce evidence — (Criminal P. C., Ss. 184, 263) — (Criminal trial — Procedure).

No doubt cases have to be tried by the Special Magistrate while he is on the line, but this would be no justification for refusing a proper trial if the accused wants to produce evidence to show that it was not his intention to defraud the railway. (Para 4)

Anno: Railways Act, S. 134 N. 1; Criminal P. C., S. 263 N. 1.

Uma Shankar Srivastava, for Addl. Govt. Advocate, for the State.

ORDER : This is a reference by the Sessions Judge of Lucknow recommending that the conviction of Abdul Waqar under S. 112, Indian Railways Act and the sentence of fine of Rs. 50/- imposed on him be set aside.

(2) It appears that Abdul Waqar was found travelling in a railway special train meant to convey railway servants holding passes or token, without a proper pass or ticket. He was detected by the special squad and was then produced before a Magistrate. A charge under S. 112, Railways Act was framed against Abdul Waqar and he was convicted as he pleaded guilty to the charge. Abdul Waqar went in revision to the Sessions Judge. In his application for revision he stated that he was a railway servant and had left his token at his house and could not therefore produce it to the railway squad when he was asked to produce a pass or a ticket. He further stated that he had mentioned all these facts to the learned Special Magistrate who did not record his statement. He denies having pleaded guilty to the charge.

(3) The explanation submitted by the railway Magistrate is that Abdul Waqar must have pleaded guilty to the charge or else there was no reason why he should have recorded a plea of guilty in the proceedings. The Magistrate further states that when a raid is made by the special squad, quite a large number of persons travelling without ticket are detected and proceedings have to be taken quickly and summarily and it was for this reason that the Magistrate had in his possession printed forms on which the words "pleads guilty and prays for mercy" are cyclostyled so that they may be used in case where the accused pleads guilty. Ordinarily there is no reason to believe that the Magistrate recorded a plea of guilty when none was made by the accused. The main point, however, for consideration in this case is whether it was a case in which the accused should have been charge-sheeted under S. 112 or under S. 113 Railways Act.

If in fact Abdul Waqar held a token which he was unable to produce when demanded by the railway servant and as a railway servant, there was no reason why he should have pleaded guilty to the charge under S. 112. No doubt a person is bound to produce a railway ticket or pass when demanded and would be liable to pay the fare and penalty if he is unable to produce the ticket when demanded. It would, however, be difficult to say that in all cases the omission to produce the ticket or pass could be referable to an intention to defraud the railway. It is possible that a person may lose his ticket or may even be unable to purchase one on account of rush at the booking office or want of sufficient time. In all such cases S. 112 Railways Act would be inapplicable and the person in default could be held liable under S. 113 of the Act.

(4) There is nothing on the record of this case in support of the allegations made by Abdul Waqar that he was a railway servant and that he held a token which he left at his home. No doubt cases have to be tried by the Special Magistrate while he is on the line, but this would be no justification for refusing a proper trial if the accused wants to produce evidence to show that it was not his intention to defraud the railway. The proper course, therefore, would be to set aside the conviction of Abdul Waqar under S. 112, Railways Act and order a retrial. I accordingly accept the reference made by the Sessions Judge and set aside the conviction and sentence in this case. The case shall be sent back to the Railway Magistrate who will give an opportunity to the accused to put up his defence and then decide the case according to law.

C/H.G.P. Reference accepted.

A. I. R. 1954 ALL. 13 (Vol. 41, C. N. 11)

(LUCKNOW BENCH)

RANDHIR SINGH J.

Bhaggo Singh, Appellant v. Sanoman Singh and others, Respondents.

Criminal Reference No. 83 of 1952, D/- 13-7-1953, reference made by Addl. Dist. Magistrate, Bahraich, D/- 22-10-1952.

Criminal P. C. (1898), S. 145 (5) — Termination of proceedings.

A Magistrate has a right to terminate proceedings under S. 145 if he is satisfied that there was no further likelihood of a breach of the peace or that there was initially no apprehension of a breach of the peace. The mere fact that the opposite party was absent or did not come forward to show cause would be no justification for the Magistrate to dismiss the proceedings or to come to the conclusion that there was no apprehension of a breach of the peace. (Para 3)

Anno: Criminal P. C., S. 145 N. 48 Pt. 4.

S. S. Chaudhari and R. N. Misra, for Applicant; S. D. Misra, for Opposite Parties (Nos. 1 to 14).

CASES REFERRED TO:

(A) ('03) 6 Cal WN 417: 30 Cal 112

(B) ('25) AIR 1925 Mad 1252: 49 Mad 232: 27 Cri LJ 95

ORDER: This is a reference by the Additional District Magistrate of Bahraich recommending that the order passed by the Sub-Divisional Magistrate, Bahraich releasing property which had been attached in proceedings under S. 145, Cr. P. C. in favour of the opposite-party be set aside and it be ordered that the property may continue in attachment.

(2) It appears that there was some dispute relating to some cultivatory land and Bhaggoo Singh made an application asking the Court to take proceedings under S. 145, Cr. P. C., against the opposite-party Sanoman Singh and others. On receipt of this application the Magistrate called for a report from the police and this report was submitted by the police on 6-9-1951. The police reported that the Opposite-party were influential people and that in the year 1939 there had been rioting for the possession of this property in which two persons had been killed. The culprits were prosecuted and were sentenced to imprisonment. The police also reported that the property should be attached as there was an apprehension of a breach of the peace if the property was not attached. On receipt of this report of the police the Magistrate ordered attachment of the property and issued notice to the opposite party to file a written statement in respect of actual possession of the subject matter of the dispute. The case dragged on, it appears, and finally came up for hearing on 20-5-1952, when the opposite party did not appear. They were also not represented by any Counsel and the Magistrate passed the following order :

"Case called out. Bhaggu Singh is present but the Opposite-Party is neither present nor represented despite due notice for appearance today.

There does not appear any genuine need of proceeding with the case under S. 145, Cr. P. C. now. Let the attached property be released in favour of the party from whose possession it was attached by the police."

Direction was sent to the police to execute the order passed by the Magistrate and the police reported on the 12th June, that there was no record in the office as to who was in possession and that both parties claimed possession. It also reported that there was an apprehension of a breach of the peace. On 18-6-1952, Khannan Tewari, one of the opposite-parties, made an application asking for deli-

very of possession of the property in his favour as he had been in possession of the property before the same was attached by the Court. On the presentation of this application the Magistrate asked for a fresh report from the police and a report was submitted by the police on the 19-6-1952.

In this report it was mentioned that the police found Sanoman Singh and others harvesting paddy and they had been asked to keep their hands off pending orders of the Court. The police also reported that the land belonged to Saraswati Singh and Khannan Tewari and others were sub-tenants. The Magistrate then passed an order releasing the property in favour of the opposite party and suggesting to the Station Officer that he might move for proceedings under S. 145, Cr. P. C. afresh if there was an apprehension of a breach of the peace. This order was passed on 9-7-1952. Bhaggoo Singh then went in revision to the Additional District Magistrate who after considering the proceedings taken in this case has recommended that the order passed by the Magistrate may be set aside as it was illegal and the attachment of the property may be ordered to continue.

(3) A number of rulings have been cited in support of the contention that the recommendation of the Additional District Magistrate asking for a cancellation of the order of release was not a proper recommendation inasmuch as such an order could not be passed. It may not be necessary to refer to all these authorities in the view that I propose to take in this case. It appears to me that the order passed by the Magistrate on 20-5-1952, was not a proper order. The mere fact that the opposite party was absent or did not come forward to show cause would be no justification for the Magistrate to dismiss the proceedings or to come to the conclusion that there was no apprehension of a breach of the peace. Two rulings have been cited on behalf of the opposite-party in support of the contention that it is always open to a Magistrate who has ordered attachment of property under S. 145, Cr. P. C. to withdraw the attachment or cancel the order of attachment if he is satisfied that there was no longer any apprehension of a breach of the peace, Vide — 'Manindra Chandra v. Barada Kanta', 30 Cal 112 (A) and — 'Narasayya v. Venkiah', AIR 1925 Mad 1252 (B).

A perusal of these rulings shows that a Magistrate has a right to terminate proceedings under S. 145 if he is satisfied that there was no further likelihood of a breach of the peace or that there was initially no apprehension of a breach of the peace. It should however appear from the record that the Magistrate had satisfied himself on this point. In the present case the order of the Magistrate does not show that he had received any information from any source or had otherwise satisfied himself that there was initially no apprehension of a breach of the peace or that subsequently the apprehension of a breach of the peace had ceased to exist. The only ground which seems to have commended itself to the Magistrate was that the opposite party was absent. There was sufficient material on the record to show that there was an apprehension of a breach of the peace. The report made by the police on the 6th September, 1951, itself shows that sometime before there had been rioting in respect of this land which had resulted in two persons being killed and the police was also of the view that there was an apprehension of a breach of peace.

There is nothing on the record to show that after this report of the police had been received the learned Magistrate had received any information or had satisfied himself that this report of the police was wrong or that the apprehension of a breach of the peace had come to an end. It was the duty of the Magistrate to have satisfied himself either by recording evidence or otherwise if he wanted to terminate the proceedings under S. 145, but he does not seem to have done either and seems to have dealt with the case more or less as a civil matter where one of the parties was absent and case was not proceeded with. This order could have been passed only if the Magistrate had done something to satisfy himself that there was no further apprehension of a breach of the peace. The order passed by the Magistrate was therefore not a proper or valid order and should therefore be set aside.

(4) The subsequent proceedings taken in furtherance of this order would automatically fall through and need not therefore be considered in detail.

(5) As a result the recommendation made by the learned Additional Magistrate is accepted to this extent that the original order of the Magistrate dated 20-5-1952, terminating the proceedings under section 145 of the Code of Criminal Procedure is set aside. The file will go back to the learned Magistrate who will proceed from the stage before which the proceedings were terminated according to law.

B/V.R.B. Reference accepted.

A. I. R. 1954 ALL. 14 (Vol. 41, C. N. 12)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Chandrapal and others, Applicants v. State through Mahabir and another, Opposite Party.

Criminal Revn. No. 193 of 1952, D/- 28-7-1953, against order of S. J., Lucknow, D/- 18-7-1952.

Criminal P. C. (1898), Ss. 138, 133, 135 — Time to appoint a jury.

Under S. 138 a Magistrate would appoint a jury after the party, against whom a notice under S. 133, Cr. P. C., had been issued, appears and asks for a jury. There is no provision that the Magistrate would appoint a jury even after he has come to the conclusion that there was no reliable evidence in support of the contention that there was no public way, after an inquiry. AIR 1933 Cal 318, Not followed. (Para 7)

Anno: Criminal P. C., S. 138 N. 3; S. 133 N. 24; S. 135 N. 3.

G.H. Naqvi, for Applicants; S. B. Bajpai, for Opposite Party.

CASE REFERRED TO:

(A) ('33) AIR 1933 Cal 318: 34 Cri LJ 532

ORDER: This is an application in revision against an order of the Sessions Judge refusing to interfere with an order passed by a Magistrate, first class, under S. 133, Cr. P. C., requiring the ap-

plicant to remove an obstruction from a public way.

(2) Mahabir and Babadin made an application to the Sub Divisional Magistrate under S. 133, Cr. P. C., against Chandrapal and two others praying that the applicants should be ordered to remove the obstruction which they had placed on a public way inasmuch as the applicants had parked their bullockcart, had set up some troughs and were tying cattle in the way. On receipt of this application the Magistrate asked for a report from the police and the Tahsildar and on being satisfied that there was obstruction, issued a preliminary notice to the applicants to show cause why they should not be ordered to remove the obstruction.

(3) The applicants appeared before the Magistrate and filed a written statement in which they denied the existence of a public way and further alleged that they had been in possession of the piece of land on which they had been parking bullockcart and tying their cattle for quite a long time. They also in their statement alleged that if necessary a jury may be appointed.

(4) The parties were then asked to produce evidence and a number of witnesses were examined on behalf of Mahabir and Babadin. The qanungo and the patwari were also produced and a certified copy of the village Khasra was also filed in which the land in dispute was entered as 'rasta'. The applicants produced oral evidence which did not appear to be reliable to the learned Magistrate and he made his earlier order absolute and ordered the applicants to remove the obstruction. Before passing the final order the Magistrate enquired of Chandrapal, who was present, if he wanted a jury and he made a statement to the effect that he did not want a jury. Thereafter the final order was passed.

(5) Against the order of the learned Magistrate the applicants went in revision to the Sessions Judge, who dismissed the application for revision. The applicants have now come up in revision to this Court.

(6) Section 135, Cr. P. C., lays down:

"The person against whom such order is made shall—

(a) perform, within the time (and in the manner) specified in the order, the act directed thereby or

(b) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper."

The provisions of this section, therefore, clearly show that it is open to a person to whom a notice had been issued under S. 133, Cr. P. C., either to submit to the order or to have recourse to one of the two other alternatives, viz., to appear and show cause or to apply for the appointment of a jury. In the present case, it appears that the applicants wanted that an inquiry be made by the Magistrate and it was only towards the end of their written statement that they mentioned that a jury may be appointed, if necessary. They did not, therefore, ask for a jury straightway. The parties adduced evidence and after the evidence had been recorded the Magistrate was cautious enough to enquire of the applicant, Chanderpal who was present, if he wanted a jury and he made a clear statement that he did not want a jury. The other two applicants Prahlad and Shanker were not present and it appears from the order sheet that they did not put in appearance after the written statement had been filed. They were not present at any of the subsequent hearings and this conduct of theirs shows that they had entrusted the conduct of the defence to Chandrapal. After Chandrapal had given his statement that he did not demand a jury, the Magistrate made the order absolute.

(7) It is not contended on behalf of the applicants in this Court that it was the duty of the Magistrate to have asked all the three applicants if they wanted a jury. In support of this contention a ruling of the Calcutta High Court — 'Shamji Tricumdas v. Ram Moye', AIR 1933 Cal 318 (A), has been cited. It was held in this ruling that it is open to the persons to whom notices have been issued under S. 133, Cr. P. C., to ask for a jury, even after the Magistrate has come to the conclusion after enquiry that there was no reliable evidence in support of the contention that there was no public way in existence. With great respect I am unable to agree with the view taken by the learned Judges in this case. A plain reading of S. 138, Cr. P. C., also leads to the same inference. The relevant provision in S. 138 is:

"On receiving an application under S. 135 to appoint jury, the Magistrate shall —

(a) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;

(b) summon such foreman and members to attend such place and time as the Magistrate thinks fit; and

(c) fix a time within which they are to return their verdict."

It would thus appear that a Magistrate would appoint a jury after the party, against whom a notice under S. 133, Cr. P. C., had been issued, appears and asks for a jury. There is no provision that the Magistrate would appoint a jury even after he has come to the conclusion that there was no reliable evidence in support of the contention that there was no public way, after an inquiry.

(8) It is, however, not necessary to discuss the merits of the ruling cited on behalf of the applicants in this case as on the facts also there is no ground for interference with the order passed by the learned Magistrate. The only party present out of the applicants was Chandrapal and he was asked if he wanted a jury and he gave a statement that he did not want a jury. No application or even a request was made on behalf of the other two applicants, who did not even care to turn up after the first hearing. There was no obligation cast upon the learned Magistrate to make an inquiry at that stage if the applicants wanted a jury. It was open to them to make a request to the Magistrate and if he had refused to appoint a jury, they could have had a legitimate grouse on this score. There was thus nothing improper or irregular in the proceedings taken by the learned Magistrate. After he had come to the conclusion that there was no reliable evidence in support of the contention of the applicants before him, the only order which he could pass was to order the applicants in the present case to remove the obstruction.

(9) There is thus no force in this application. The application for revision is, therefore, dismissed. The stay order is discharged.

C/H.G.P. Revision dismissed.

A. I. R. 1954 ALL. 16 (Vol. 41, C. N. 13)

MALIK C. J. AND V. BHARGAVA J.

Hardei, Plaintiff-Appellant v. Wahid Khan and another, Defendants-Respondents.

F. A. F. O. No. 22 of 1950, D/- 4-8-1953, against order of Judge, S. C. Court, Allahabad, D/- 30-11-1949.

T. P. Act (1882), Ss. 76(a) and 111(c) — Effect of redemption on lease by mortgagee in possession.

A mortgagee in possession of a shop has a right under S. 76(a) to let out the shop and the room appertaining thereto on a monthly tenancy and on the redemption of the mortgage the tenant continues to be a tenant and does not become trespasser. Section 111(c) does not mean that, if in the exercise of his powers of due management as a person of ordinary prudence the mortgagee has entered into an agreement of tenancy, on the mere redemption of the mortgage without the mortgagor exercising his option of putting an end to the tenancy the tenancy automatically and 'ipso facto' lapses on the date of the redemption. AIR 1952 SC 205, Rel. on.

(Paras 6, 8)

Anno: T. P. Act, S. 76 N. 6 Pts. 10 to 14; S. 111 N. 5 Pt. 2.

G. Kumar, for Appellant; Sy. A. Kazmi, for Respondents.

CASES REFERRED TO:

(A) ('11) 11 Ind Cas 817: 8 All LJ 802
(B) ('06) 1906 All WN 241: 3 All LJ 517
(C) ('70) 2 NWP (HCR) 199
(D) ('21) AIR 1921 Mad 393: 69 Ind Cas 651
(E) ('29) AIR 1929 Pat 630: 119 Ind Cas 551
(F) ('31) AIR 1931 All 743(1): 1931 All LJ 887
(G) ('37) AIR 1937 Cal 763: ILR (1937) 2 Cal 181
(H) ('16) AIR 1916 Mad 911: 31 Ind Cas 630
(I) ('27) AIR 1927 Bom 145: 100 Ind Cas 1033
(J) ('52) AIR 1952 SC 205: 1952 SCR 775 (SC)

MALIK, C. J.: This case raises a very short point, that when a mortgage is redeemed, does the tenant, to whom the house had beeen let out by the mortgagee, become a trespasser from the date of redemption and can he be ejected as a trespasser, or must the mortgagor after redeeming the property take steps to eject him as a tenant? There is conflict of opinion on the point. It has been urged that the cases dealing with agricultural tenancies are distinguishable and do not apply to houses which have been let out to tenants. Piggott, J. however, in — 'Collector of Basti v. Sarnam Charak', 8 All LJ 802 at p. 805 (A), held that there was no difference between an ordinary tenancy and an agricultural tenancy. In view of the conflict of decisions on the point it is desirable that this case may be decided by a larger Bench. I, therefore, refer it to a Bench for decision.

The cases which have been quoted and which appear to be relevant and in favour of the appellant are: — 'Ram Chand v. Raj Hans', 3 All LJ 517 (B); — 'Adjoodhya Singh v. Girdharee', 2 N. W. P. (H. C. R.) 199 (C); — ';Alagiriswami Mudali v. Akkulu Naidu', AIR 1921 Mad 393 (D); and — 'Jhagru Mian v. Raghunath Singh', AIR 1929 Pat 630 (E).

The cases in which the other view seems to have been taken, besides the case decided by Piggott J. which I have already mentioned are: — 'Bhup Singh v. Sheo Shanker', AIR 1931 All 743 (1) (F); — 'Pramatha Nath v. Sashi Bhusan', AIR 1937 Cal 763 (G); — 'Chinnappa Thevan v. Pazhaniappa Pillai', AIR 1916 Mad 911 (H) and — 'Barjorji Shapurji v. Shripatprasadji', AIR 1927 Bom 145 (I).

MALIK, C. J.: This case has been referred to a Division Bench by reason of some difference of opinion, but on an examination of the cases cited at the Bar, we do not think that the exact point raised in this case in fact arose for decision in the cases cited. The plaintiff, Srimati Hardei, had mortgaged a house and a shop appertaining thereto to one Nandlal; the mortgage was with possession. During the continuance of the mortgage the mortgagee let out the shop and the room appertaining thereto to Wahid Khan, defendant 1, as a month to month tenant. Defendant 2 is his son. The mortgage was redeemed in 1946. There is some dispute as to the date on which the mortgagor took possession of the property but the exact date of her having taken possession of the mortgaged property is not of much importance for the purpose of decision of this appeal. The mortgagor, treating defendant 1 as a trespasser, gave him a notice to quit on 13-3-1948. As the defendant did not comply with the notice she brought the suit No. 422 of 1948 in the Court of the Munsif, West Allahabad, out of which this appeal has arisen, for his ejectment from "the western shop and the room appertaining thereto in house No. 46 situate in Thathera Bazar, Allahabad," and impleaded his son Shaukat as defendant 2, so that there may be no complication after she had obtained the decree. The plaintiff also claimed damages for use and occupation at the rate of Rs. 25/- per month from 27-11-1946, the date when she claimed to have got back possession of the property.

(2) The defendants in their written statements raised various pleas which gave rise to ten issues which were framed by the learned Munsiff. The first issue was

"Whether the tenancy of defendant 1 has terminated as alleged?"

The importance of this issue, according to learned counsel, lies in the fact that, if defendant 1 became a trespasser on the redemption of the mortgage by the plaintiff, the Rent Control and Eviction Act will not apply to him. That if, on the other hand, his position was not that of a trespasser but of a tenant on the date of the redemption of the mortgage, he was entitled to the benefit of the Rent Control and Eviction Act (U. P. Act 3 of 1947).

(3) The learned Munsif held that the defendant was a tenant and that he did not become a trespasser on the date of the redemption of the mortgage and, on that finding, he dismissed the suit without recording any finding on the other issues raised in the case.

(4) The lower appellate court agreed with the learned Munsif on the decision of the first issue but remanded the case under O. 41, R. 23 Civil P. C., for decision of the other issues raised. It is against that order that this appeal has been filed under O. 43, Civil P. C.

(5) The short point in the case is whether the mortgagee in possession had a right to let out the shop and the room appertaining thereto on a monthly tenancy and whether on the redemption of the mortgage the tenant ceased to have any tenancy rights and from the date of the redemption became a trespasser.

(6) Under S. 76, T. P. Act, (4 of 1882)

"when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property (a) he must manage the property

as a person of ordinary prudence would manage it if it were his own....."

If the property mortgaged is a shop which is let out to tenants, the mortgagee is not bound either to keep the shop vacant or to occupy it himself. He is authorised under the provisions quoted above to let it out to a tenant and in the case of a house or a shop a month to month tenancy. in the absence of a contract to the contrary, would be the usual tenure under S. 106, T. P. Act. If the mortgagee lets out the premises on a month to month tenancy it cannot be said therefore that he was doing anything beyond the powers conferred on him by S. 76(a) quoted above.

(7) Reliance is placed on S. 111(C), T. P. Act, which provides that

"A lease of immoveable property determines — (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happenings of any event — by the happening of such event;

and it is urged that as the mortgagee's right to grant the lease extended only up to the period when the mortgage was in existence the tenant became a trespasser on the date the mortgage was redeemed.

(8) No doubt, on the redemption of the mortgage, the mortgagor is not bound by the transfers made by the mortgagee or by contracts entered into by him unless his action can be supported on the ground that it was authorised by law or that he was empowered to act under some power or authority, express or implied, conferred on him by the mortgagor. The mortgagor in such a case may be entitled to claim back possession of the property free from any liability created by the mortgagee after the redemption of the mortgage, but this does not mean that, if in the exercise of his powers of due management as a person of ordinary prudence he has entered into an agreement of tenancy, on the mere redemption of the mortgage without the mortgagor exercising his option of putting an end to the tenancy the tenancy automatically and 'ipso facto' lapses on the date of the redemption.

(9) Learned counsel have cited some cases relating to agricultural land and have urged that, though in cases of agricultural land by reason of the Tenancy Act those decisions may have been justified, the principle laid down in those cases does not apply. A number of rulings has also been cited for the proposition that a mortgagee has no right to create a title beyond the continuance of a mortgage and on the redemption of the mortgage the title of the transferee from the mortgagee ceases. In view of the recent decision of the Supreme Court in — 'Mahabir Gope v. Harbans Narain Singh', AIR 1952 S. C. 205 (J), it is no longer necessary for us to discuss the cases relied on by learned counsel. Dealing with the question of a mortgagee creating a lease for a definite period and the lessee claiming that the mortgagor even after the redemption of the mortgage was bound and could not claim back possession of the property before the expiry of the period for which the mortgagee had granted the lease, their Lordships held that

"A mortgagee cannot during the subsistence of the mortgage act in a manner detrimental to the mortgagor's interests such as by giving a lease which may enable the tenant to acquire permanent or occupancy rights in the land, thereby defeating the mortgagor's right to khas possession; it would be an act which would fall within the provisions of S. 76, sub-cl. (e)."

Their Lordships, however, pointed out that

"A permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights in the tenant conferred or created by statute based on the nature of the land and possession for the requisite period is a different matter altogether. It is an exception to the general rule."

(10) In the case before us, the mortgagee had created merely a tenancy from month to month in accordance with the provisions of Ss. 76(a) and 106, T. P. Act. It could not be said that he had done anything contrary to law or usage in letting out the shop, which he could not occupy himself and that he had not acted as a "person of ordinary prudence". On the redemption of the mortgage, the mortgagor no doubt has the right ordinarily to terminate the tenancy by giving 15 days' notice in accordance with the provisions of S. 106, T. P. Act. The Control of Rent and Eviction Act, 1947, it is urged, however, restricts the rights of a landlord to eject a tenant and a suit for ejectment can, therefore, be filed only in accordance with the provisions of S. 3 of the Act. The decision of the lower Courts, that the defendant did not automatically become a trespasser on the date of the redemption of the mortgage is correct. Whether in the circumstances the lower appellate Court should have remanded the case to the trial Court for decision of the other issues and whether in the circumstances the provisions of the Control of Rent and Eviction Act apply are not points that have been argued before us. All that we, therefore, need say is that, while dismissing the appeal, we make it clear that the trial Court will only decide such issues as may call for decision after the finding that defendant 1 did not automatically become a trespasser on the date of redemption of the mortgage.

(11) The appeal has no force and is dismissed with costs.

B/V.S.B. Appeal dismissed.

A.I.R. 1954 ALL. 17 (Vol. 41, C. N. 14)
(LUCKNOW BENCH)

R. SINGH J.

Jhallar, Accused Applicant v. State.

Criminal Revn. No. 133 of 1952, D/-15-7-1953, against order of S. J., Rae Bareli, D/-16-6-1952.

Penal Code (1860), Ss. 441 and 456 — House trespass.

Where the accused entered the house of the complainant at night on the invitation of a married woman with intent to commit an offence under S. 497, it was held that he was guilty under S. 456, Penal Code: AIR 1938 Lah 514 (FB), Rel. on. (Para 3)

Anno: Penal Code, S. 441 N. 2; S. 456 N. 1.

H. K. Ghose, for Applicant; Addl. Govt. Advocate, for the State.

CASE REFERRED TO :

(A) ('38) AIR 1938 Lah 514: 39 Cri LJ 734 (FB)

ORDER : This is an application in revision by one Jhallar who was convicted under S. 456, Penal Code and was sentenced to three months' rigorous imprisonment and a fine of Rs. 50/- by a Magistrate and whose appeal against his conviction and sentence was dismissed by the Sessions Judge of Rae Bareli.

(2) It appears that Jhallar had entered the house of one Ram Nath on the night between

17th and 18th January, 1952 when an alarm was raised & Jhallar was apprehended. He was then taken to the police station and a report was lodged. The defence of Jhallar was that he had gone to the house on the invitation of one Srimati Jaggi with whom he had illegitimate intimacy and that Ram Nath, who seems to have been lying in wait, caught hold of him while he had come out of the house. The story that the applicant had presumably some intimacy with Srimati Jaggi has been accepted by the lower Courts but the applicant was convicted on the ground that he had entered the house of Ram Nath with a view to commit an offence.

(3) It has been argued on behalf of the applicant that the applicant could not be said to have entered the house of Ram Nath with the intent of causing annoyance to him inasmuch as he had gone to the house either on the invitation of Srimati Jaggi or only to meet her of his own accord. In either case it could not be the intention of the applicant to annoy the owner or the possessor of the house. Section 441 which defines a criminal trespass indicates that a person is said to commit criminal trespass if he enters into or upon property in the possession of another with the intent (1) to commit an offence, or (2) to intimidate, insult or annoy any person in possession of such property. Evidently the applicant had not entered the house of Ram Nath with any deliberate intention of annoying anybody. Srimati Jaggi was, however, a married woman and it is in evidence that she had her husband living. Consequently intercourse with such a lady would evidently be an offence under S. 497, Penal Code and on the own showing of the applicant he had entered the house of Ram Nath. It has been held in a Full Bench ruling of the Lahore High Court reported in — 'Mohammad Yar v. Emperor', AIR 1938 Lah 514 (A) that in the circumstance mentioned above a person who entered the house would be held to be guilty of criminal trespass. I agree with the view expressed above. The applicant was, therefore, rightly found guilty under S. 456, Penal Code by the Courts below.

(4) The application for revision is dismissed.

B/K.S.B. Revision dismissed.

A.I.R. 1954 ALL. 18 (Vol. 41, C. N. 15)
(LUCKNOW BENCH)
KAUL J.

Inayat Ali and another, Creditor-Applicants v. Natthu Khan, Debtor-Opposite Party.

Appln. No. 133 of 1951, D/- 24-9-1952, to revise order of S. D. O., Shahabad of Hardoi, D/- 10-5-1951.

Civil P. C. (1908), O. 23, R. 1 (2) (b), S. 115 — 'Other sufficient grounds' must be analogous to preceding grounds — Character of defects not determined — Order is without jurisdiction. AIR 1951 All 845 (FB), Rel. on. (Para 3)

Anno: Civil P. C., O. 23, R. 1 N. 26 Pt. 10; S. 115 N. 10.

K. N. Tandon, for Applicants; R. N. Shukla, for Opposite Party.

CASE REFERRED TO:
(A) ('51) AIR 1951 All 845: 1951 All LJ 607 (FB)

ORDER: This is an application for revision of an order passed under Order 23, Rule 1, Civil P. C. by the Sub-Divisional Officer, Shahabad (Hardoi district) in a case under Section 12, Agriculturists' Relief Act. The material facts are as follows:

(2) On 29-11-1950, an application was made by one Natthu Khan for redemption of a mortgage alleged to have been executed by his father Yusuf Khan in 1920 in favour of the opposite parties, Inayat Ali and Basharat Ali. A number of defences were taken to the claim for redemption. One of these was a total denial of the alleged mortgage. Natthu Khan contended in reply to this defence that the mortgagees had instituted a suit in the Court of the Munsif Shahabad for possession of the mortgaged property on the basis of that deed of mortgage and obtained a decree in that suit in 1931. He applied for summoning the record of the case on which that decree was passed. His contention was that the original mortgage deed could be found in that record. It appears, however, that he was remiss in summoning of his evidence. Accordingly, on 27-4-1951, Natthu Khan made an application for permission to summon and adduce some further evidence in support of his averment. This application was not disposed of till 10-5-1951, when evidence that was ready and available was recorded. The application for permission to summon and adduce further evidence was dismissed on that date and the case was closed. Thereupon Natthu Khan put in an application under Order 23 Rule 1, Civil P. C. praying for permission to withdraw the suit with liberty to bring a fresh suit. It was vaguely mentioned in his application that there were certain formal defects ('naqais canuni') on account of which the suit was bound to fail. The learned Sub-Divisional Officer without considering what these defects were, or if they were of a character on the basis of which permission to withdraw the suit with liberty to bring a fresh suit could be given under Order 23 Rule 1, Civil P. C., allowed the application and granted permission to withdraw the suit with liberty to bring a fresh suit. Dissatisfied with this order, the mortgagees have come up in revision.

(3) It was held in — 'Abdul Ghafoor v. Abdul Raham', A. I. R. 1951 All 845 (FB) (A), following a number of cases of the Oudh Chief Court, that the words "other sufficient grounds" in Order 23 Rule 1 (2) (b), Civil P. C. cover grounds analogous to those mentioned in Rule 1 (2) (a). It was further held that if the Court purports to exercise discretion under clause (b) but the grounds are not analogous to the defects referred to in clause (a), the discretion, even though judicial, can be interfered with under Section 115, Civil P. C. It has been held in a number of cases that if a court disposes of an application under Order 23 Rule 1 Civil P. C. without applying its mind to the determination of the question whether the defects referred to as the basis for the prayer to withdraw the suit are of the character mentioned in Order 23 Rule 1, Civil P. C., its order is without jurisdiction. In the present case the learned Sub-Divisional Officer did not apply his mind to this aspect of the matter. No specific reference was made in the application of 10-5-1951, to any defect on account of which the suit was bound to fail, nor do we find any reference to such defects in the order passed by the learned Sub-Divisional Officer. In these circumstances, the order granting permission to withdraw the suit with liberty to bring a fresh suit is set aside.

(4) I am of opinion, however, that in the circumstances of the case permission should be granted to Natthu Khan to substantiate the averments made by him in his application of 27-4-1951. It is true that the order dismissing that application

has not been challenged by an application for revision. All the same, as I am interfering with the order passed upon the application for permission to withdraw the suit with liberty to bring a fresh suit, which was passed very shortly after the order for dismissal of the application of 27-4-1951, it will not be proper to allow the order disposing of the application of 27-4-1951, to stand. I do so because I am of opinion that the two applications appear to have been disposed of practically simultaneously and the learned Sub-Divisional Officer was influenced in passing each of these orders by what he intended to do with regard to the other application. I am satisfied that the order dismissing the application of 27-4-1951, was passed by the learned Sub-Divisional Officer not wholly uninfluenced by the view which he entertained of the authority conferred upon him by Order 23 Rule 1, Civil P. C. I am of opinion that in the view of the learned Sub-Divisional Officer it was not a matter of any consequence what the defects were upon which permission to withdraw the suit with liberty to bring a fresh suit was asked for. Had he taken the correct view of the provisions of Order 23 R. 1, Civil P. C., in all probability, he would not have dismissed the application of 27-4-1951.

(5) For the reasons given above I allow this application, set aside the order granting permission to withdraw the suit with liberty to bring a fresh suit and direct that the case go back to the Sub-Divisional Officer, Shahabad, with the direction that he should dispose of it in accordance with the law. The applicant Natthu Khan will be given an opportunity to summon and adduce evidence in support of the averments made by him in his application of 27-4-1951, and such other evidence, if any, which the Sub-Divisional Officer may consider proper. Of course, if any evidence is adduced by Natthu Khan, the present petitioner shall be allowed an opportunity to rebut the same. The applicant shall get his costs from the opposite party. The order dated 13-12-1951, is vacated.

(6) The result of the order passed by me today is that when the present case goes back to the lower Court there will be pending in the Court of the Sub-Divisional Officer two applications by Natthu Khan made under Section 12 of the Agriculturists' Relief Act for redemption of the same mortgage. It will be open to Natthu Khan not to proceed with the second of these applications if he is so advised.

C/D. R. R. Order accordingly.

A.I.R. 1954 ALL. 19 (Vol. 41, C. N. 16)
(LUCKNOW BENCH)

KAUL J.

Brij Lal, Judgment-debtor-Applicant v. Mahadeo, Decree-holder-Opposite Party.

Appln. No. 2 of 1948, D/- 9-10-1952, to revise order of Munsif, North of Lucknow, D/- 16-10-1947.

(a) Civil P. C. (1908), S. 47 — Appeal — Decree in suit under S. 9, Specific Relief Act — Execution — Order in — Appeal is incompetent — (Specific Relief Act (1877), S. 9). (Para 10)

Anno: C. P. C., S. 47 N. 84 Pt. 7; Specific Relief Act, S. 9 N. 16.

(b) Limitation Act (1908), Art. 182 — Revival of application — A obtaining decree for possession against B — Execution application filed — B obtaining declaratory decree against M — Execution application consigned to records — No reference in B's decree directly affecting A's decree — A's decree does not become inoperative — Subsequent application filed more than 3 years after previous application is barred — AIR 1947 All 256, Distinguished. (Paras 12 and 13)

Anno: Limitation Act, Art. 182 N. 143.

Jamuna Prasad Srivastava, for Applicant; S. B. Bajpai, for Opposite Party.

CASES REFERRED TO :

(A) ('44) AIR 1944 All 88: ILR (1944) All 197
(B) ('47) AIR 1947 All 256: 1947 All WR (HC) 214
(C) ('47) AIR 1947 Nag 53: ILR (1946) Nag 640
(D) ('32) AIR 1932 Lah 416: 13 Lah 798
(E) ('18) AIR 1918 Cal 925: 45 Cal 519

ORDER: As these cases relate to the same order, it will be convenient to dispose of them together and by one common judgment.

(2) Mr. S. B. Bajpai who appeared for the respondent in the appeal and the opposite-party in the revision application stated that he had no instructions. Accordingly the two cases have been heard ex parte.

(3) It is desirable that the facts which have given rise to this appeal and the revision application should be stated at some length.

(4) On 3-10-1936, Gur Prasad sold a house in Mohalla Dugawan in the city of Lucknow to Brij Lal. Brij Lal could not obtain possession. Accordingly Brij Lal brought a suit for possession. His claim was decreed and possession was actually delivered to him in the year 1937. Objections were preferred against delivery of possession of the house to Brij Lal by one Mahadeo who claimed to be a sharer in the house purchased by Brij Lal from Gur Prasad. His objections were allowed and possession was given back to Mahadeo in 1938. In 1939 Brij Lal again managed to get into possession. Thereupon Mahadeo instituted a suit under Section 9, Specific Relief Act. His claim was decreed on 15-5-1940.

(5) He applied for execution of his decree on 31-5-1940. Before this application for execution could be given effect to, Brij Lal instituted a suit for a declaration that he was the owner of the house and succeeded in obtaining a temporary injunction directing the stay of execution proceedings. The order staying the execution proceedings was communicated to the Munsif in whose Court the execution of decree application was pending on 21-8-1940.

(6) The claim brought by Brij Lal which was for a declaration that he was the owner of the house and in the alternative for possession was decreed as follows:

"The plaintiff's suit for declaration be decreed against all the defendants. The plaintiff is declared to be the exclusive owner of the house in dispute and defendant 1 has no title or interest in it. Costs payable by defendant 1 alone....
....."

With the determination of the suit brought by Brij Lal, the stay order obtained by him was vacated. By a 'rubkar' dated 12-9-1941, which was communicated to the Munsif North Lucknow on 16-9 1941, the latter was informed that the stay order dated 14-8-1940 had been withdrawn.

(7) The execution application of Mahadeo which was pending in the Court of Munsif North, Lucknow, was however dismissed at the request of Mahadeo's counsel. Mahadeo filed an appeal against the decree passed in favour of Brij Lal in his declaratory suit. He was unsuccessful in the Court of first appeal. He pursued the matter fur-

ther and filed a second appeal in the Avadh Chief Court. In this second appeal, which was successful, it was held that though Mahadeo was not a brother of Gur Prasad and as such had no right, title or interest in the house sold by Gur Prasad to Brij Lal, yet inasmuch as Brij Lal did not institute a declaratory suit as contemplated by Order 21, Rule 103, C. P. C., within one year of the objections preferred by Mahadeo under Order 21, Rule 100, C. P. C., the order allowing his objections had become final.

The additional Civil Judge communicated the result of the second appeal to the Munsif North, Lucknow, on 30-1-1947. It was further suggested by the Additional Civil Judge that in view of dismissal of Brij Lal's suit, possession might be delivered to Mahadeo. The learned Munsif North called for an office report and when he found that the application for execution of decree filed by Mahadeo had been dismissed at the request of his own counsel on 16-9-1941 and no application for execution of decree was pending in his court, he did not take any steps to deliver possession of the house to Mahadeo.

(8) On 31-1-1947, an application for delivery of possession of the house was made by Mahadeo under Section 151, C. P. C. This request appears to have been refused. On 11-2-1947 Mahadeo who was a minor put in another application through his next friend that the possession of the house be delivered to him. He pressed that the application be treated as an application for revival of the original application for execution of 31-5-1940 or that it might be treated as a fresh application and the decree executed by excluding in computing the period of limitation the time spent in contesting the declaratory suit under Section 15, Limitation Act. On 20-3-1947 Mahadeo personally made an application stating that he had come of age and be permitted to act without the intervention of next friend or guardian. On 26-7-1947, he put in a fresh application for execution. The application made on 11-2-1947 by Mahadeo through his next friend was consigned to records on 30-8-1947.

(9) Brij Lal filed objections under Section 47, C. P. C., against the application made by Mahadeo for execution of decree on 26-7-1947. The learned Munsif before whom the application came up for consideration held that it could not be treated as an application for revival of the original application for execution dated 31-5-1940. He was further of opinion that Section 15, Limitation Act, did not in terms apply to the case before him. He was, however, of opinion that "the decree-holder could invoke to his aid the general principles of suspension of limitation". Relying on the decision in — 'Chanda Devi v. Nathu Singh', AIR 1944 All 33 (A), he took the view that the law of limitation would apply only if an operative decree were in existence and where such a decree did not exist, the Limitation Act could have no application.

He was further of opinion that if by an order of a competent Court a decree passed in favour of a party has been rendered nugatory the period during which that order was in force must be excluded, otherwise the period of three years' limitation allowed to a decree-holder for making an application for execution of his decree would be reduced to less than three years. He found further support for the view taken by him in — 'Murlidhar v. Ram Saran Das', AIR 1947 All 256 (B). Having taken that view of the law he allowed Mahadeo's application for execution of the decree obtained by him in the suit under S. 9, Specific Relief Act, on 15-9-1940.

(10) Dissatisfied with this order Brij Lal preferred an appeal which came up for consideration before the Civil and Sessions Judge, Lucknow. The learned Judge was of opinion that in view of the prohibition contained in S. 9, Specific Relief Act, that no appeal shall lie from an order or decree passed in a suit instituted under that section, the appeal preferred before him was incompetent. The appeal was accordingly dismissed. Brij Lal has thereupon preferred a second appeal (Ex. D. A. No. 8 of 48) against the order of the learned Civil and Sessions Judge and also a revision under S. 115, C. P. C. (Sec. 115 Appln. No. 2 of 1948) against the order of the Munsif. I am clear that the view taken by the learned Civil and Sessions Judge as to the competency of the appeal filed before him is correct.

This view was taken in — 'Zakar Ali v. Israr Hussain', AIR 1947 Nag 53 (C), — 'Tota Ram v. Shibban Lal', AIR 1932 Lah 416 (D), and — 'Kanai Lal Ghose v. Jatindra Nath Chandra', AIR 1918 Cal 925 (E). Apart from the above authorities, the language of the section appears to be clear and the matter does not admit of any doubt. This second appeal like the first appeal disposed of by the learned Civil and Sessions Judge must be held to be incompetent. It is dismissed accordingly.

(11) The question raised, however, can be considered in the revision application. It will be seen from what has been stated above that the learned Munsif was of opinion that the application for execution of decree made on 26-7-1947 by Mahadeo could not be treated as an application for revival of the original application for execution of decree made on 31-5-1940. He further took the view that the period of limitation could not be excluded under S. 15, Limitation Act, as that section did not in terms apply to the facts of the case before him. He, however, allowed the execution to proceed on what he called "general principles of suspension of limitation". He observed:

> "Their Lordships of the Allahabad High Court in another case reported in — 'AIR 1947 All 256 (B). after discussing a number of rulings have held that law courts do recognise "general principles of suspension of limitation or right of action" in cases where a party is prevented under certain circumstances from taking action in pursuance of his rights.
>
> In the present case, when Brij Lal, J. Dr. obtained a declaratory decree on 20-11-1940 to the effect that he was owner of the house in question, the decree of Mahadeo, D. Hr. dated 15-5-1940 for possession of the same house, became incapable of execution as the two contradictory decrees could not be executed simultaneously. Brij Lal's decree of 20-11-1940 no doubt does not expressly declare Mahadeo's decree of 15-5-1940 null and void, but it had the effect that Mahadeo D. Hr. could not execute his decree for when Brij Lal was declared to be the owner of the house in question Mahadeo could not be put in possession of the same house in pursuance of his decree obtained under S. 9, Specific Relief Act.
>
> Further, when Brij Lal's decree was confirmed in appeal on 23-7-1941, it became quite apparent to Mahadeo, present D. Hr., that he could not execute his decree. In the circumstances the explanation of D. Hr.'s counsel that he prayed for consignment of his execution application to records on 16-9-1941, as he thought that he could not execute the decree, is quite reasonable. Had the D. Holder continued with his execution application or had he applied again for execution after the passing of Brij Lal's declaratory decree, it would

have been rejected forthwith on the ground that the D. Hr. had no executable decree in his favour.

In my opinion it would be very unreasonable to hold that the D. Hr's present execution application is time barred, because his decree was rendered incapable of execution by the subsequent decree of competent court (i.e., decree in favour of Brij Lal, J. Dr.). It was only when Mahadeo present D. Hr., succeeded in his second appeal in Hon'ble Chief Court of Avadh and Brij Lal's declaratory suit was dismissed and decree in his favour set aside on 20-11-1946 that Mahadeo's decree dated 15-5-1940 again became capable of execution".

(12) I have considered the matter carefully and am of opinion that the view taken by the learned Munsif is erroneous. In the case before him Mahadeo had obtained a decree for possession in a suit under S. 9, Specific Relief Act, on 15-5-1940. He applied for execution of that decree on 31-5-1940. His judgment-debtor, that is, Brij Lal instituted a suit for a declaration that he was the owner of the house and that defendant 1 (Mahadeo) had no right of interest in the same on 16-7-1940. He obtained an order for stay of execution proceedings initiated by Mahadeo's application of 31-5-1940 on 14-8-1940. The stay order was communicated to the Munsif before whom the execution proceedings were pending on 21-8-1940. This order was vacated automatically when Brij Lal's declaratory suit was decreed. I have given above the relevant portion of this decree. It was

"that the plaintiff's suit for declaration be decreed against all the defendants. The plaintiff is declared to be the exclusive owner of the house in dispute and defendant 1 has no title or interest in it. Costs payable by defendant 1 alone....."

It will be seen that the property for possession contained in Brij Lal's plaint was refused nor is there any reference in the relevant portion of the decree passed in favour of Brij Lal which directly affected Mahadeo's decree for possession obtained in the suit under S. 9, Specific Relief Act. It cannot, therefore, be said that the result of the decree passed in the suit brought by Brij Lal was to render the decree passed in the suit under S. 9, Specific Relief Act ineffective or inoperative. It is true that a declaration had been given in favour of Brij Lal that he was the owner of the house and that defendant 1 had no interest or title in it. This did not, however, affect his right to obtain possession of the house under the decree passed in his favour in his suit under S. 9, Specific Relief Act. It is, therefore, incorrect to say that

"the decree of Mahadeo decree-holder dated 15-5-1940 for possession of the house became incapable of execution as two contradictory decrees could not be executed simultaneously".

There is no warrant for holding as the learned Munsif did that the decree given in Brij Lal's favour "had the effect that Mahadeo decree-holder could not execute his decree". All that was decided by that decree was that Brij Lal was the owner of the house. It was further decided that Mahadeo did not have any title or interest in that house. No decision was, however, given with regard to his right to possession of the house which was the subject-matter of the suit brought under S. 9, Specific Relief Act. I am clear that the decree obtained by Mahadeo under S. 9, Specific Relief Act, did not become inoperative as a result of the decree passed in favour of Brij Lal in his declaratory suit.

(13) In this view of the matter the cases on which the learned Munsif relied did not apply to the facts of the present case. The result, therefore, is that the revision application is allowed. The order of the Munsif, North Lucknow, dismissing the objections filed by Brij Lal is set aside. Mahadeo's application for execution of his decree having been filed more than 3 years after the last application for execution was consigned to records must be held to be barred by law of limitation. The application for execution of decree made by Mahadeo on 26-7-1947 shall stand dismissed as time barred. The applicant shall get his costs of this revision application and such costs as may have been incurred by him in the objections preferred in the court of Munsif, North Lucknow, under S. 47, C. P. C., from Mahadeo.

B/V.R.B. Order accordingly.

A.I.R. 1954 ALL. 21 (Vol. 41, C. N. 17)
(LUCKNOW BENCH)

R. SINGH J.

Sm. Sheopiari, Applicant v. Devi Prasad, Opposite Party.

Criminal Ref. No. 13 of 1953, D/-23-7-1953, reference made by S. J., Lucknow, D/-27-1-1953.

Criminal P. C. (1898), S. 488 — Living separately by mutual consent.

The mere institution of a suit for restitution of conjugal rights should not be enough to throw out the application of the wife. The Magistrate ought to record a finding on evidence if the wife had been living apart by mutual consent and the remedy under S. 488 was barred to her under S. 488 (4). (Para 5)

Anno: Criminal P. C., S. 488 N. 23.

Dwarka Nath Jha, for Applicant; M. L. Trivedi, for Opposite Party.

ORDER: This is a reference by the Sessions Judge of Lucknow recommending that the order of Sri V. N. Vidyant, Magistrate first class, refusing to entertain an application under S. 488, Cr. P. C. on behalf of Shrimati Sheopiari be set aside and the proceedings be transferred to some other competent Court.

(2) It appears that Shrimati Sheopiari made an application against Devi Prasad for maintenance under S. 488, Cr. P. C. before the Additional City Magistrate, Lucknow. In the mean time one Rameshwar Dayal had sued Shrimati Sheopiari for restitution of conjugal rights in the Civil Court. An ex parte decree was passed in his favour and the Additional City Magistrate dismissed her application for maintenance on the ground that there stood a decree for restitution of conjugal rights in favour of one Rameshwar Dayal against the lady and as such she could not maintain an application for an order of maintenance under S. 488, Cr. P. C.

(3) The ex parte decree passed in favour of Rameshwar Dayal was subsequently set aside and after the decree had been set aside Shrimati Sheopiari made a second application for maintenance under S. 488, Cr. P. C., which came up for hearing before Sri V. N. Vidyant, Magistrate first class. The Magistrate refused to entertain this application for maintenance on the ground that a similar application made before the Additional City Magistrate had already been dismissed. Srimati Sheopiari went in revision

to the Sessions Judge. The Sessions Judge is of opinion that the mere fact that a suit for restitution of conjugal rights had been instituted by one Rameshwar Dayal should be no ground for throwing out the application for maintenance made by Shrimati Sheopiari.

(4) It is not disputed on behalf of the opposite party in this Court that Shrimati Sheopiari was originally the wedded wife of Devi Prasad. His case was that some three years ago Shrimati Sheopiari left the protection of her husband Devi Prasad and began to live with Rameshwar Dayal as his wife and she was, therefore, not entitled to claim maintenance from him.

(5) The view taken by the learned Sessions Judge appears to me to be correct. The mere institution of a suit for restitution of conjugal rights should not be enough to throw out the application of Shrimati Sheopiari. The learned Magistrate ought to have recorded a finding on evidence if Shrimati Sheopiari had been living apart by mutual consent and the remedy under S. 488, Cr. P. C. was barred to her under S. 488 (4), Cr. P. C. No such inquiry was, however, made by the learned Magistrate and he took the short cut of throwing out the application.

(6) The reference is, therefore, accepted and the order passed by Sri V. N. Vidyant is set aside. The proceedings will be reopened at the stage at which they were dismissed and shall be transferred to some other competent Magistrate for disposal according to law.

B/D.H.Z. Reference accepted.

A.I.R. 1954 ALL. 22 (Vol. 41, C. N. 18)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Ganga Bux Singh and another, Applicants v. The State.

Criminal Revn. No. 132 of 1952. D/- 13-7-53, against order of Addl. S. J., Sitapur, D/- 25-4-1952.

Criminal P. C. (1898), S. 253 (2) — Discharge of accused — Duty of Magistrate.

A Magistrate is entitled to discharge an accused at any stage of an inquiry or trial if it appears to the Magistrate that the charge brought against the accused was groundless. The Magistrate, however, has to give reasons for the order of discharge. This provision, however, does not clothe the Magistrate with an arbitrary power of discharge. There must be grounds and material on the record to come to a definite conclusion that the charge was baseless. (Para 3)

Opportunity should be given to the complainant to admit or rebut the facts alleged by the accused in his application for discharge.

Held that the Magistrate acted with haste in passing the order of discharge without making proper inquiry or without waiting for the full facts of the case being brought on the record. (Para 3)

Anno: Cr. P. C., S. 253 N. 2, 6, 7.

S. S. Chaudhri, for Applicants.

ORDER : This is an application in revision against the order of the Sessions Judge setting aside the order of discharge passed by a Magistrate.

(2) It appears that one Thakurain Kailash Kuar widow of Thakur Narendra Bikramjit Singh, taluqdar of Parsandi, died on 22-6-1949, leaving movable and immovable property. There was dispute in the mutation Court regarding immovable property and about a year and a half after the death of the lady a complaint was filed by Ram Nath Bakhsh Singh, brother of Thakurain Kailash Kuar's husband, against Ganga Bakhsh Singh and others, alleging that the accused had misappropriated property belonging to the widow. Process was issued against the accused and the case came up for hearing on 15-10-1951. An application was made by Ganga Bakhsh Singh accused asking the Court that he should be discharged as there was no case against him. Another application was made by the Deputy Commissioner, acting as President of a trust created by Narendra Bikramjit Singh, to the Court in which it was mentioned that no property belonging to Thakurain Kailash Kuar had been misappropriated by Ganga Bakhsh Singh or the other accused and that the complaint filed by Ram Nath Bakhsh Singh was false and baseless. The learned Magistrate then discharged Ganga Bakhsh Singh and the complainant went in revision to the Sessions Judge who set aside the order of discharge. Ganga Bakhsh Singh has now come up in revision to this Court.

(3) A perusal of the order passed by the learned Sessions Judge shows that the Magistrate discharged the accused after perusing the applications made by him and by the Deputy Commissioner as also some registered documents produced by the accused Ganga Bakhsh Singh. No opportunity, it appears, had been given to the complainant to have his say about the matters mentioned in the applications or about the contents or the execution of the deed relied upon by the accused Ganga Bakhsh Singh.

It has been argued on behalf of the applicants in this court that the Magistrate was perfectly within his rights to pass an order of discharge in respect of any of the accused at any stage of the trial and that it was not incumbent upon him to record the entire evidence to be produced by the complainant before the order of discharge could be passed. He relied on S. 253 (2) Criminal P. C. There can be no doubt that a Magistrate is entitled to discharge an accused at any stage of an inquiry or trial if it appears to the Magistrate that the charge brought against the accused was groundless. The Magistrate, however, has to give reasons for the order of discharge. This provision, however, does not clothe the Magistrate with an arbitrary power of discharge. The magistrate is entitled to take advantage of the provisions of S. 253(2) if there are grounds and material on the record to come to a definite conclusion that the charge was baseless.

In the present case the trust deed executed by Narendra Bikramjit Singh would not be of much avail inasmuch as Narendra Bikramjit Singh died in the year 1931 and was succeeded by his widow Thakurain Kailash Kuar who died in 1949. The widow was entitled to appropriate the profits of the estate during her life time and it is possible that she might have acquired some moveable property

out of the profits or the income of the property and this property would go to the heirs of Kailash Kuar and would not be governed by the trust deed which was only in respect of the property belonging to Narendra Bikramjit Singh. It would have been difficult, therefore, for the Magistrate to come to the conclusion that the charge was baseless without making an inquiry as to whether the property in respect of which the charge of criminal misappropriation or breach of trust had been brought against the accused did or did not belong to Thakurain Kailash Kuar and was or was not misappropriated or taken away by the accused. The Magistrate, therefore, acted with undue haste in passing the order of discharge without making proper inquiry or without waiting for the full facts of the case being brought on the record.

In view of these circumstances it is difficult to say that the order passed by the Sessions Judge setting aside the order of discharge was not a proper order. The application made by the Deputy Commissioner as President of the Trust Committee was to say the least, ill-advised. The matter was before a Magistrate, and if anybody, howsoever high or disinterested he may be, brings to the notice of the Court that the matter pending before the Court was false it would be a most indiscreet act and may even amount to a contempt of Court. The learned Magistrate should not therefore have taken into consideration any facts with regard to the merits of the complaint mentioned in the application. The facts mentioned by the accused in his application could have been taken into consideration if substantiated or if admitted by the complainant. No opportunity was, however, given to the complainant to admit or rebut the facts mentioned in the application. Taking into consideration all these circumstances I do not see any good reason for setting aside the order passed by the Sessions Judge. The application in revision is, therefore, dismissed.

It may, however, be noted that it would be open to the Magistrate to proceed under S. 253 (2) if the Magistrate finds, after all the material has come up before him, to lead to the conclusion that the charge against any of the accused was groundless.

C/R.G.D. Revision dismissed.

A.I.R. 1954 ALL. 23 (Vol. 41, C. N. 19)

AGARWALA J.

Mahadeo Singh and others, Defendants-Appellants v. Jagdeo Singh and others, Plaintiffs-Respondents.

Second Appeal No. 1627 of 1945, D/- 21-2-51, against decrees of Addl. Civil Judge, Gorakhpur, D/- 6-7-1945.

U. P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951), Ss. 9 and 4 — Settlement under S. 9 without notification under S. 4.

Section 9 assumes that the estate in which wells, trees in abadi, and buildings are situate has already vested in the State Government, for it is only after such vesting that it could be said that these things have been settled by the State Government with the owners or occupiers thereof. Before the estate has become vested, it cannot be said that the State Government has any 'locus standi' to settle them with the owners or occupiers. It is true that it has not been expressly stated in the section that the settlement shall take effect after the vesting of the estates. But it is clear that this is the intention of the Legislature. The section cannot come into effect unless the notification mentioned in Section 4 has been made and the estates or other areas have vested in the State. (Para 4)

Z. H. Lari and K. C. Saxena, for Appellants; K. L. Misra and N. D. Pant, for Respondents.

JUDGMENT: This is a defendant's appeal arising out of a suit for possession of a portion of plot No. 335. The plaintiff-respondent's case was that the portion in dispute had been given to him in exchange by the Revenue Court under S. 53, U. P. Tenancy Act, and that later on the defendant dishonestly had made constructions over the same and dispossessed the plaintiff. The defence was that the order of the Revenue Court was without jurisdiction, as the land was not land as defined in the U. P. Tenancy Act and further that the constructions were more than twelve years old. The trial court decreed the suit in its entirety. There was an appeal and the case was remanded to the trial Court, which decreed the suit again with the exception of land covered by the 'ghari' (cattle-shed) and the well. Both sides appealed to the lower Appellate Court. The lower Appellate Court dismissed both the appeals but made one amendment in the decree of the trial Court. It ordered that "the 'ghari' referred to in the decree (of the Munsif) will be taken to be the 'ghari' with the exception of the portion marked 'EFGH'."

(2) In this second appeal by the defendant two points have been urged before me. It has been urged that the learned Judge was in error in excepting the portion marked "EFGH" from the site covered by the 'ghari'. It is pointed out that the 'ghari' and the portion 'EFGH' are one and the same and that if you except 'EFGH' the whole 'ghari' is excepted. I have looked into the Commissioner's map and his report and I find that EFGH is indeed the whole of the 'ghari'. The Commissioner had reported that the northern verandah of this 'ghari' EFGH was two or three years old and the rest of the 'ghari' was over twelve years old. The lower Appellate Court intended to exempt from the area of the 'ghari' the portion covered by the northern verandah and not the entire area EFGH.

(3) The other point urged before me is of some importance. It is urged that under S. 9 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950. (Act 1 of 1951), the land in dispute must remain with the defendant as it will be deemed to have been settled with him by the State Government. Section 9 runs as follows:

"S. 9: Private wells, trees in abadi and buildings to be settled with the existing owners or occupiers thereof: All private wells in holdings, grove or 'abadi', trees in 'abadi' and all buildings situate within the limits of an estate, belonging to or held by an intermediary or tenant or other person, whether residing in the village or not, shall continue to belong to or be held by such

intermediary, tenant or person, as the case may be, and the site of the wells or the buildings with the area appurtenant thereto shall be deemed to be settled with by the State Government on such terms and conditions as may be prescribed."

(4) It is pointed out that the land in dispute is situate within the limits of an estate, that it is covered with buildings, that the defendant falls under the category of "other person" and that, therefore, the case is fully covered by this section. At first sight the argument is plausible but on closer consideration I find it without force. Section 9 appears in Chapter II which deals with the acquisition of the interests of intermediaries and its consequences. Section 4 (1) lays down the conditions under which estates situate in Uttar Pradesh shall vest in the State. It says:

"As soon as may be after the commencement of this Act, the Provincial Government may, by notification, declare that, as from a date to be specified, all estates situate in Uttar Pradesh shall vest in the State, and, as from the beginning of the date so specified (thereinafter called the vesting) all such estates shall stand transferred to and vest, except as hereinafter provided, in the State free from all encumbrances."

Sub-section 2 of this section empowers the State Government to issue the notification referred to in sub-section 1 in respect of only a portion of an estate or other area as may be specified. It is obvious, therefore, that unless a notification has been issued by the State Government as provided in S. 4, no estate situate in Uttar Pradesh can vest in the State, with the result that the present owners of the estates or, as the Act calls them, "intermediaries" remain the owners thereof till such notification is issued. Section 6 refers to the consequences of the vesting of an estate in the State. Section 7 saves certain rights in respect of the vesting of the estate in the State. We are not concerned with these rights and, therefore, they need not be detailed. Section 8 declares that contracts entered into after August 8, 1946 (the date on which the resolution for the abolition of zamindari in the legislature seems to have been passed) shall become void from the date of vesting. And then comes S. 9 which deals with private wells, trees in 'abadi', buildings with building sites and lands appurtenant thereto. The effect of S. 9 is to declare that all these things shall be deemed to be settled with the existing owners or occupiers thereof by the State Government on certain terms which have to be prescribed. Now the section assumes that the estate in which wells, trees in 'abadi', and buildings are situate has already vested in the State Government, for it is only after such vesting that it could be said that these things have been settled by the State Government with the owners or occupiers thereof. Before the estate has become vested it cannot be said that the State Government has any 'locus standi' to settle them with the owners or occupiers. It is true that it has not been expressly stated in S. 9 that the settlement which is to be deemed to have been made with the owners and occupiers by the State Government shall take effect after the vesting of the estates. But it is clear that this is the intention of the Legislature. The drafting of this section is not what one would desire, but the meaning of S. 9, to my mind, is perfectly clear. The section cannot come into effect unless the notification mentioned in S. 4 has been made and the estates or other areas have vested in the State. It is agreed that no such notification has been issued by the State Government as yet. Section 9, therefore, cannot apply to the plots or land in dispute.

(5) I, therefore, allow this appeal only to this extent that instead of the words and letters "with the exception of the portion marked "EFGH" in the last sentence of the judgment of the lower court the following words shall be substituted: "with the exception of the northern verandah thereof." In other respects the appeal is dismissed. As the appellant has substantially failed, he will pay the costs of this appeal to the respondent. Leave to appeal under the Letters Patent is allowed.

B/G.M.J. Appeal partly allowed.

A.I.R. 1954 ALL. 24 (Vol. 41, C. N. 20)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Parmatma and others, Appellants v. State and another, Complainant-Respondents.

Criminal Reference No. 11 of 1953, D/- 22-7-1953, reference made by S. J., Gonda, D/- 11-2-1953.

(a) Criminal P. C. (1898), S. 145(1) — Omission to pass preliminary order — Effect.

Where the Magistrate acting under S. 145 omits to pass a preliminary order to the effect that he is satisfied that there is an apprehension of a breach of the peace, but if it appears from the record that there was material on which the Magistrate could be satisfied, the mere omission to pass an order under S. 145(1) in explicit words does not vitiate the subsequent proceedings or take away the jurisdiction of the Magistrate: AIR 1933 All 264 (FB); AIR 1951 All 826. Foll.; AIR 1947 Oudh 159; AIR 1948 Oudh 184, Disting.

(Paras 5, 6)

Anno: Cr. P. C., S. 145 N. 15.

(b) Criminal P. C. (1898), S. 145(3) — Omission to serve order.

Non-service of notice of the proceeding started under S. 145 on two out of the four brothers, who are presumably joint and belonging to the opposite party, though irregular will not vitiate the proceeding as they have been effectively represented by the two brothers before the Magistrate and there does not appear any failure of justice on account of the irregularity.

(Para 7)

Anno: Cr. P. C., S. 145 N. 28.

K. S. Varma, for Applicants Nos. 1 to 4; S. N. Srivastava, for Opposite Party.

CASES REFERRED TO:

(A) ('47) AIR 1947 Oudh 159: 230 Ind Cas 229
(B) ('48) AIR 1948 Oudh 184: 49 Cri LJ 291
(C) ('33) AIR 1933 All 264: 55 All 301: 34 Cri LJ 414 (FB)
(D) ('51) AIR 1951 All 826: 1951 All LJ 714: 52 Cri LJ 1501

ORDER: This is a reference by the Sessions Judge of Gonda recommending that an order

passed under S. 145, Criminal P. C., by a Magistrate, first class, Gonda, ordering delivery of possession to Debi Prasad and Mata Prasad who were applicants in a case under S. 145, Criminal P. C. be set aside.

(2) It appears that an application under S. 145 Criminal P. C., was made by Debi Prasad and Mata Prasad on 24-9-1952, on the allegations that the jondhri crop in three acres of plot No. 1238/5 had been raised by them and that the opposite party were threatening to dispossess them and also that there was a likelihood of a breach of the peace. On receipt of this application the Sub-Divisional Magistrate, Tarabganj, made an order asking the station officer to make a report. 6-10-1952 was fixed for the receipt of this report of the station officer. Meanwhile on 29-9-1950, the Sub-Divisional Officer, Tarabganj, happened to go to Colonelganj police station and there seems to have been apprised of the facts of the case. He asked the station Officer to make a report and the report was made by the station officer on that date. He then passed an order as follows:

"Attach the crop in dispute and call both parties to produce their evidence before me tomorrow at 3 p.m. and call the patwari."

The order was served on the complainant as also on Jwala Prasad of the second party. Jwala Prasad and Parmatmadin, opposite parties Nos. 1 and 2, turned up before the Sub-Divisional Magistrate. They did not file any written statement. The Magistrate recorded the evidence produced by the complainants. No evidence was produced by the opposite party and final order was passed by the Magistrate ordering delivery of possession of the crop to the complainants. The opposite party being dissatisfied with the order passed by the Magistrate went up in revision to the Sessions Judge who has made the recommendation which is before me.

(3) The learned Sessions Judge has in his order of reference mentioned that the learned Magistrate had no jurisdiction to proceed with the case inasmuch as he failed to make an order in accordance with the provisions of S. 145, Criminal P. C. The provisions relating to a preliminary order made under S. 145 (1), Criminal P. C. are as follows:

"Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute."

It is evident that a Magistrate should, if he is satisfied that there is an apprehension of a breach of the peace, express his satisfaction on this point in writing and he should also make an order asking the opposite party to file a written statement and produce evidence. In the present case the Magistrate on receipt of the report of the station officer did not make any order expressing that he was satisfied that there was an apprehension of a breach of the peace but simply passed an order for attachment of the property. It is now contended that this procedure adopted by the learned Magistrate was not in accordance with law and the omission to observe the provisions of S. 145(1), Criminal P. C., vitiated the subsequent proceedings in the Court of the Magistrate inasmuch as he had no jurisdiction to proceed with the case in the absence of an order in terms enjoined by S. 145 (1). In support of this contention, two rulings have been cited on behalf of the applicants who went in revision before the Sessions Judge — 'Lakhpat v. Mt. Maharana', AIR 1947 Oudh 159 (A) and — 'Abdul Aziz Khan v. Badri', AIR 1948 Oudh 184 (B).

(4) In these two cases, it was held that it was obligatory on the Magistrate to pass a preliminary order under S. 145(1) expressing his satisfaction that there was an apprehension of a breach of the peace before he could acquire jurisdiction to proceed with the case. In both these cases, however, it was mentioned that there was no material also before the Magistrate from which it could be inferred that the Magistrate was satisfied that there was an apprehension of a breach of the peace. In the earlier case, — 'Lakhpat v. Mt. Maharana', (A), a report had been called for from the Sadar Qanungo and his report showed that there was no apprehension of a breach of the peace and still the Magistrate ordered attachment to issue. Under these circumstances evidently there was no material before the Magistrate from which it could be inferred that he was satisfied that there was a likelihood of a breach of the peace. In the other case — 'Abdul Aziz Khan v. Badri' (B), also there was no material on the record to show that the Magistrate was satisfied of an apprehension of a breach of the peace, and it was obseved by Kidwai J.:

"When the Court fails to pass such an order at any stage of the proceedings and there is not sufficient material on the record on the basis of which such an order could be passed, it cannot be held that the criminal Court had jurisdiction to take proceedings under section 145, Criminal Procedure Code."

(5) There is a case of our own High Court in which the matter came up for consideration before a Full Bench — 'Kapoor Chand v. Suraj Prasad', AIR 1933 All 264 (C). In this reported case also the Magistrate omitted to pass a preliminary order to the effect that he was satisfied that there was an apprehension of a breach of the peace, and it was held that if it appears from the record that there was material on which the Magistrate could be satisfied; the mere omission to pass an order in explicit words would not vitiate the subsequent proceedings or take away the jurisdiction of the Magistrate: it would be a mere irregularity curable under S. 537, Criminal P. C., if it has not occasioned any failure of justice. This Full Bench case was subsequently relied upon and followed in another case of this Court in 1951 vide — 'Narain Singh v. Mst. Suraj Kishore Devi', AIR 1951 All 826 (D). I am bound to follow the Full Bench ruling of this Court with which, if I may say so with respect, I am also in full accord.

(6) In the present case the Magistrate had gone to the police station and had asked for a report from the Station Officer. The Station Officer reported that the parties were 'sarkash wa giroband' and that peace could be established only if the attachment of the property in dispute was made. On this report of the station officer, the Magistrate made an order of attachment and also ordered that the parties may be informed and may be asked to be present on the following day. The Magistrate would not have passed this order if he had not in fact been satisfied that there was an apprehension of a breach of the peace.

No doubt he should have passed an order in explicit words that he was satisfied that there was an apprehension of a breach of the peace but this omission on the part of the Magistrate would not nullify the subsequent proceedings taken by him in view of the opinion expressed in the Full Bench case referred to above.

(7) Another point taken up in revision and supported by the learned Sessions Judge is that two of the four persons who represented the opposite party in the proceedings under S. 145, Criminal P. C. had not been served. It appears that all the four persons shown as opposite parties were sons of the same father and claimed possession over the plot jointly. Service was made by the Sub-Inspector on Jwala Prasad, one of the members of the opposite party and two of them actually turned up before the Magistrate on the following day. No doubt all of them should have been served, but it appears that two of them had not actually been residing there but were residing either at Badaun or Lucknow. They were all brothers and were presumably joint. The Magistrate seems to have been satisfied that they had been effectively represented by the two brothers before him. Both of them who were present before the Sessions Judge had the same interest in the property as the other two brothers who were not present and it appears to me that there was no question of prejudice to them if the whole of the case was represented by the two brothers who were present. It would not, therefore, be necessary to disturb the order of the Magistrate only on this ground as it appears to me that there was no failure of justice on account of this irregularity also.

(8) Lastly it has been argued that the evidence on the record did not justify the conclusion that the applicants under S. 145 of the Code of Criminal Procedure were actually in possession of the crop in respect of which proceedings had been taken under S. 145. The learned Sessions Judge seems to have got confused in the names of some of the parties. Debi Prasad and Mata Prasad were the two applicants before the Magistrate while Parmatmadin, Jwala Prasad, Debi Prasad and Bachau were the opposite party. The witnesses who were examined on behalf of the applicants stated that Debi Prasad and Mata Prasad were in possession. There was no Mata Prasad in the array of the opposite parties and the witnesses could not therefore have referred to any Mata Prasad of the opposite party in their statements made before the Magistrate. Moreover, it is difficult to believe that the witnesses for the applicants should have tried to establish the possession of the opposite party. There is, therefore, no substance in the contention that the evidence produced by the applicants in the case before the Magistrate had not proved their possession. It would not be open to me to go into a question of fact on which the trial Court has come to a definite finding. There is thus no good ground for interference in the order passed by the Magistrate and I am unable to entertain the reference made by the Sessions Judge. The reference is, therefore, rejected and the order passed by the Magistrate is maintained.

B/V.S.B. Reference rejected.

A.I.R. 1954 ALL. 26 (Vol. 41, C. N. 21)

MALIK C. J. AND V. BHARGAVA J.

Haji Ghulam Hussain, Applicant v. Commr. of Income-tax, United Provinces, Lucknow, Respondent.

Misc. Case No. 92 of 1949, D/- 18-11-52.

Income-tax Act (1922), Ss. 28 and 30 — Jurisdiction and powers of Appellate Assistant Commissioner.

Where in the appeal under S. 30, filed against the order of the Income-tax Officer imposing a penalty under S. 28 (1) (c), the Appellate Assistant Commissioner took the view that the assessee had failed to furnish a return of his total income in the manner required by the notice under S. 22 (2) and the penalty under S. 28 (1) (c) could not be imposed but while disposing of the appeal, by the same order, the Appellate Assistant Commissioner issued a fresh notice to the assessee and imposed a penalty under S. 28 (1) (a) of the same amount:

Held that the Appellate Assistant Commissioner was entitled to pass the order under S. 28 (1) (a). AIR 1936 Lah 585, Distinguished. (Para 4)

B. L. Gupta, for Applicant; S. C. Das, for Respondent.

CASE REFERRED TO:

(A) ('36) AIR 1936 Lah 585: 1936-4 ITR 217

MALIK C. J.: The question referred to this Court under S. 66 (1), Income-tax Act is as follows:

"Whether in the circumstances of the case, the Appellate Assistant Commissioner had jurisdiction to issue a notice under S. 28 (3) and impose a penalty under S. 28 (1) (a), Income-tax Act?"

(2) The assessee in reply to a notice under S. 22 (2), Income-tax Act had filed his return, but he had not mentioned the status in which the return was being filed, nor had he given the date on which he had filed his return. The form prescribed in the Indian Income-tax Act requires these facts to be also mentioned in the return that is to be filed by an assessee. The Income-tax Officer, however, overlooked the defects and proceeded to complete the assessment. In the course of the assessment proceedings he discovered certain deliberate omissions made in the account books and he, therefore, issued a notice to the assessee to show cause why penalty under S. 28 (1) be not imposed on him. The assessee furnished such explanations as he thought proper, but the Income-tax Officer was satisfied that the assessee had deliberately furnished inaccurate particulars of his income and he imposed a penalty of Rs. 3,000/- under S. 28 (1) (c), Indian Income-tax Act. Against the order passed by the Income-tax Officer an appeal was filed under S. 30. It was urged by the assessee that the Income-tax Officer could not impose a penalty under S. 28 (1) (c) as his return, being defective in the two particulars mentioned above, was not a return furnished in accordance with the provisions of the Act. The Appellate Assistant Commissioner accepted this contention, but issued a notice to the assessee to show cause why a penalty should not be imposed under S. 28 (1) (a). Ultimately, on 14-4-1947, the Appellate Assistant Commissioner passed final orders in the appeal and he came to the conclusion that the question of imposing a penalty under S. 28 (1) (c) did not arise as no valid return had been filed, and imposed the same penalty of Rs. 3,000/- under S. 28 (1) (a) on the ground that the assessee had without reasonable cause failed to furnish the return of his total income

which he was required to furnish by notice under S. 22. There was a further appeal to the Appellate Tribunal, which, however, dismissed the appeal and, on an application made by the assessee, has sent to us the question mentioned above for our decision.

(3) Learned counsel has urged that the Appellate Asst. Commissioner was only seized of the appeal filed under S. 30 against the order passed under S. 28 (1) (c) and he could deal with the appeal in one of the manners mentioned in S. 31; and he could not, therefore, issue a fresh notice under S. 28 and impose a fresh penalty under S. 28 (1) (a). Learned counsel has relied on the provisions of S. 31 (3) (f) of the Income-tax Act which provides that:

> "In disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order" under S. 28..... "confirm or cancel such order or vary it so as either to enhance or reduce the penalty....."

In short, the argument is that the Appellate Assistant Commissioner could either confirm the order of the Income-tax Officer, or cancel the order, or vary it as regards the amount, but he could not, according to learned counsel, set aside the order imposing a penalty under S. 28 (1) (c) and impose a fresh penalty under S. 28 (1) (a), though it may be in like amount. Reliance is placed on a decision of the Lahore High Court in — 'Banarsi Das v. Commr. of Income-tax, Punjab & N. W. F. P.', AIR 1936 Lah 585 at p. 587 (A). In that case, there was an assessment made by the Income-tax Officer under S. 23 (4) against which order no appeal had then been provided. The assessee, however, in spite of the fact that he had no right of appeal, had filed an appeal which was not admitted by the Appellate Assistant Commissioner. Though the Appellate Assistant Commissioner did not admit that appeal and was of the opinion that he had no jurisdiction to entertain it, the assessment order being under S. 23 (4), he proceeded to impose a penalty under S. 28, and the Lahore High Court held, if we may say so with respect rightly, that there being no proceedings in the eye of law before the Appellate Assistant Commissioner, the Appellate Assistant Commissioner could not exercise any of the powers mentioned in S. 28. In the case before us it cannot be doubted that an appeal did lie to the Appellate Assistant Commissioner against the order of the Income-tax Officer passed under S. 28 (1) (c). Section 30 expressly provides for appeals 'inter alia' against the orders passed under S. 28. There was, therefore, a competent proceeding pending before the Appellate Assistant Commissioner. Section 28 (1), Indian Income-tax Act provides that if the Appellate Assistant Commissioner has before him any proceedings under the Act, then if he is satisfied that it is necessary to pass any orders under the various clauses mentioned in that section, he has authority to do so. As we have already said, there can be no doubt, and it is not disputed by learned counsel, that there were valid proceedings pending before the Appellate Assistant Commissioner and thus he had jurisdiction to pass an order under Section 28 (1) (a) if he thought that such an order should be passed on the facts and circumstances of the case.

(4) It is not necessary for us to consider the question whether the Appellate Assistant Commissioner was right in his view that the return, being defective in the two particulars mentioned above, was not a return at all, nor is it necessary to consider whether it was open to the assessee to plead that by reason of the fact that he had made a mistake in not furnishing the date and in not furnishing the status in which he wanted to be assessed he could claim that his return was invalid or that he must be deemed not to have filed it. On the view taken by the Appellate Assistant Commissioner, the assessee had failed to furnish a return of his total income in the manner required by the notice under sub-s. (2) of S. 22. The Appellate Assistant Commissioner was, therefore, entitled, while dealing with the appeal pending before him, to pass an order under S. 28 (1) (a) imposing a penalty.

(5) Learned counsel has urged that, after the appeal had been disposed of, the Appellate Assistant Commissioner had no jurisdiction to start a fresh proceeding by issuing a fresh notice. This argument is, however, based on a misapprehension. We have seen the order of the Appellate Assistant Commissioner and we find that by the same order dated 14-4-1947, he finally disposed of the appeal and, though he changed the clause under which penalty was imposed and instead of imposing the penalty under S. 28 (1) (c) he held that the penalty should have been imposed under S. 28 (1) (a), yet he did not vary the amount and dismissed the appeal.

(6) Our answer to the question, therefore, is in the affirmative.

(7) The Department is entitled to its costs which we assess at Rs. 300/-.

B/H.G.P. Reference answered.

A.I.R. 1954 ALL. 27 (Vol. 41, C. N. 22)
(LUCKNOW BENCH)

R. SINGH J.

Madanlal Haweliwala and another, Appellants v. State.

Criminal Ref. No. 10 of 1953, D/-22-7-1953, reference made by Addl. S. J., Bahraich, D/-10-2-1953.

Factories Act (1948), Ss. 106, 92 — Cognizance after three months — (Factories Rules, 1950 R. 130(b)).

Breach of R. 130(b) committed within jurisdiction of sub-divisional Magistrate at M — Chief Inspector of Factories sending complaint to city Magistrate at B — Latter sending file to sub-divisional Magistrate at M and sub-divisional Magistrate taking cognizance of case after more than three months from the date of offence — Conviction passed by sub-divisional Magistrate held bad and set aside. (Para 2)

B. N. Khanna, G. K. Khanna and Umashankar Srivastava, for Applicants; Addl. Govt. Advocate, for the State.

ORDER: This is a reference by the Additional Sessions Judge of Bahraich recommending that the order of the Sub-Divisional Magistrate, Nanpara, convicting and sentencing Madan Lal Haweliwala & another to pay a fine of Rs. 50/- under S. 92 of the Factories Act of 1948 be set aside.

(2) The facts of this case are simple. Sri Madan Lal Haweliwala is the proprietor and occupier of Janki Rice Mills Rupaidiha and Sarju Prasad is his son and manager of the mill. An inspector of Factories inspected the mill on 10-7-1950 & found that a certain register

required to be maintained under the Factories Rules could not be produced. This involved a breach of rule 130(b) of the Factories Rules of 1935. The Chief Inspector of Factories sent a complaint bearing date 7-10-1950 against the owner and manager of the factory to the City Magistrate of Bahraich. This complaint seems to have reached the City Magistrate on 10-10-1950, and the City Magistrate passed an order for the first time on 12-10-1950. The file was sent on 8-12-1950, to the Sub-Divisional Magistrate, Nanpara, for disposal as the place where the offence is said to have been committed lay within the jurisdiction of the Sub-Divisional Magistrate, Nanpara, and not of the City Magistrate. The case was ultimately tried, it appears, by the Sub-Divisional Magistrate, Nanpara, who convicted Madan Lal Haweliwala and the other accused as mentioned above. An application for revision was then filed by Madan Lal Haweliwala to the Sessions Judge who has made the recommendation which is before me.

(3) It is not disputed that the place where the offence is said to have been committed lay within the jurisdiction of the Sub-Divisional Magistrate, Nanpara. It was he, therefore, who was empowered to take cognizance of the offence. A complaint could also have been filed to the District Magistrate. In the present case, however, no complaint was made either to the Sub-Divisional Magistrate, Nanpara, or to the District Magistrate, but one was sent to the city Magistrate who had evidently no jurisdiction to entertain the complaint in respect of the offence committed within the jurisdiction of the Sub-Divisional Magistrate Nanpara. The Sub-Divisional Magistrate, Nanpara, took cognizance of the case after 11-12-1950, that is more than three months after the offence had been committed. It is provided in S. 106 of the Factories Act that cognizance of an offence committed in connection with the Factories Act or Rules could be taken only within three months of the date of the offence. In the present case no complaint was in fact made to the proper person within three months of the date of the offence and no cognizance of the offence was taken by the Sub-Divisional Magistrate, Nanpara, within three months. The conviction of Madan Lal Haweliwala and Sarju Prasad by the Sub-Divisional Magistrate, Nanpara, was therefore bad and should be set aside.

(4) The reference made by the Sessions Judge is therefore accepted. The order of conviction and sentence of fine passed upon Madan Lal Haweliwala and Sarju Prasad under S. 92 of the Factories Act, 1948, are therefore set aside. They are acquitted. The fine, if paid, shall be refunded to them.

C/H.G.P. Reference accepted.

A.I.R. 1954 ALL. 28 (Vol. 41, C. N. 23)

B. D. MUKERJI J.

Basheshwar Nath, Applicant v. State.

Criminal Misc. Case No. 1042 of 1953, D/- 21-7-1953.

†U. P. High Courts (Amalgamation) Order (1948), Cl. 14, Proviso 1 — Transfer application — Case pending within jurisdiction of Lucknow Bench — Allahabad Bench cannot entertain application — (Criminal P. C. (1898), S. 526).

Where the case out of which an application for transfer arises is pending within the area over which the Lucknow Bench exercises jurisdiction, the application cannot be entertained by the Allahabad Bench and the fact that a prayer has been made for the transfer of the case to Allahabad makes no difference. (Para 4)

Anno: Cr. P. C., S. 526 N. 2.

Gyanchandra Kumar, for Applicant; Brij Lal Gupta, for the State.

ORDER : This is an application for the transfer of a case pending in the Court of Sri A. N. Singh, Judicial Magistrate Ist class, Hardoi, to some Magistrate at Allahabad, competent to try it.

(2) On behalf of the State a preliminary objection is taken to the hearing of this application by this Court on the ground that this Court has no jurisdiction under the provisions of the U. P. High Courts (Amalgamation) Order, 1948, inasmuch as the case in respect of which relief is claimed from this Court is pending within the jurisdiction of the Lucknow Bench or is one in respect of which the Lucknow Bench alone can exercise jurisdiction.

(3) The relevant clause in the Amalgamation Order is cl. 14. Clause 14 is in these words :

"The new High Court, and the Judges & Division Courts thereof, shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appoint :

Provided that unless the Governor of the United Provinces, with the concurrence of the Chief Justice, otherwise directs, such judges of the new High Court, not less than two in number, as the Chief Justice may, from time to time nominate, shall sit at Lucknow in order to exercise in respect of cases arising in such areas in Oudh, as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court :

Provided further that the Chief Justice may in his discretion order that any case or class of cases arising in the said areas shall be heard at Allahabad."

(4) From the above it will be apparent that the first proviso to cl. 14 is really the material provision which determines the venue of this application for transfer. There can be no doubt that the case out of which this application has arisen is pending within the area over which the Lucknow Bench exercises jurisdiction. While dealing with an application for the transfer of a case a Court must be deemed to be exercising jurisdiction in respect of a case which has arisen within a certain territorial area or jurisdiction. In my judgment the position of an application for the transfer of a case is not any different from that of an application in revision or an appeal so far as the question of the higher Court's territorial jurisdictional powers qua that case is concerned.

The High Court, when it is called upon to determine, in respect of a case pending in Hardoi, which falls within the jurisdiction of the Lucknow Bench, whether that case should or should not be transferred, it is called upon, without doubt, to exercise its powers in res-

pect of a case which has arisen within such jurisdiction. The fact that a prayer has been made for the transfer of the case to Allahabad, which place is within the jurisdiction of the Allahabad Bench, should make no difference for the reason that the case in respect of which the High Court is exercising its powers of transfer is not in respect of a case arising within the jurisdiction of the Allahabad Bench: it is the jurisdiction of the original matter that determines the jurisdiction of the Bench — Lucknow or Allahabad — under the U. P. High Courts (Amalgamation) Order.

(5) From what I have stated above it appears to me that the preliminary objection must prevail. I accordingly dismiss this application as being unentertainable by me.

B/V.R.B. Application dismissed.

A.I.R. 1954 ALL. 29 (Vol. 41, C. N. 24)

(LUCKNOW BENCH)

RANDHIR SINGH J.

Bhup Narain and others, Applicants v. State.

Criminal Revn. No. 280 of 1952, D/- 23-7-1953, against order of 2nd Addl. S. J. Hardoi, D/- 16-7-1952.

(a) Criminal P. C. (1898), S. 117 — Effect of consent to give security.

If it appears to the Court that the accused are willing to furnish security as they admit that there was a likelihood of a breach of the peace, a Magistrate may not proceed to record evidence and may accept the offer of the accused and order them to furnish security. AIR 1920 All 29; AIR 1924 All 269; AIR 1928 All 270, Rel. on. (Paras 3, 4)

Anno: Cr. P. C., S. 117 N. 3.

(b) Criminal P. C. (1898), S. 117 — Effect of consent to give security.

Where the accused-applicants never admitted that there was a likelihood of a breach of the peace and had clearly mentioned in their application that they were willing to offer security provided all the persons of the opposite party were also asked to furnish security this would not be tantamount to a plea of guilty, and the Magistrate is, therefore, not justified in taking this offer as a plea of guilty. Further evidence in support of the report made by the police would be necessary. (Paras 3, 5)

Anno: Cr. P. C., S. 117 N. 3.

K. N. Tandon, for Applicants; Uma Shankar Srivastava, for Addl. Govt. Advocate, for the State.

CASES REFERRED TO:

(A) ('20) AIR 1920 All 29: 21 Cri LJ 176
(B) ('24) AIR 1924 All 269: 46 All 109: 25 Cri LJ 750
(C) ('28) AIR 1928 All 270: 30 Cri LJ 6

ORDER: This is an application in revision against an order of the Sessions Judge dismissing an appeal against the order of a Magistrate requiring the applicants to furnish personal bonds in the sum of Rs. 500/-, to keep the peace under S. 107, Criminal P. C.

(2) It appears that there was presumably some likelihood of a breach of the peace and the police made a report to the Sub-Divisional Magistrate, Hardoi, asking proceedings to be taken under S. 107, Criminal P. C. against two sets of persons of village Bawan. There were two factions in the village, one headed by Bhup Narain and Lakshmi Narain and the other headed by Kamarul Hasan, Ram Shanker, Ram Saran and one other. On receipt of this report the Magistrate made an order under S. 112, Criminal P. C. and sent notices to the applicants, as also to some others, to show cause why action should not be taken against them as reported by the police. The substance of the information received was set forth in the notice issued to the applicants, and 4-3-1952 was fixed for hearing.

On 4-3-1952, the applicants were examined and five of the applicants, viz., Bhup Narain, Lakshmi Narain, Ram Narain, Manohar and Laraitey, confessed that there was a likelihood of a breach of the peace while the remaining five of the applicants denied any such apprehension. Ultimately 26-3-1952 was fixed for further inquiry into the matter. On the 26th of March, an application was made on behalf of the applicants and some others volunteering to offer security provided the other set of persons to whom notices had been issued, were also asked to furnish security for keeping the peace. The Magistrate seems to have taken this offer of the applicants as a plea of guilty and ordered them to furnish bail bonds in the sum of Rs. 500/- each. The applicants then went up in appeal and their appeal was dismissed by the Sessions Judge. They have now come up in revision.

(3) The applicants can be classed into two categories, that is, those who admitted that there was an apprehension of a breach of the peace and those who denied that there was any apprehension of a breach of the peace. It has been argued on behalf of the applicants that the learned Magistrate was not justified in ordering the applicants to furnish bail bonds without making a regular inquiry into the matter as to whether there was any likelihood of a breach of the peace. In support of this contention a ruling of this Court has been cited, vide — 'Jagdat Tewari v. Emperor', AIR 1920 All 29 (A). In this case Walsh J. observed as follows:

> "To entitle the Magistrate to act upon consent in such a case as this he must, if it is open to him to act upon consent at all, obtain, a full admission from each of the persons called upon to show cause that he is likely to commit breach of the peace, and the circumstances under which or reasons why he is likely to commit a breach of the peace, and that he fully understands that it is for that reason that he is to be bound over and that if he fails to find the sureties he may have to go to prison."

This view was subsequently modified by the same learned Judge in a later case, — 'Emperor v. Ghariba', AIR 1924 All 269 (B). Both these cases were further considered in a Division Bench ruling of this Court in — 'Emperor v. Kish Narain', AIR 1928 All 270 (C) and it was held that a Court is entitled under S. 107 to act upon a solemn and free consent amounting to a plea of guilty given before it by the person summoned. In such a case the person summoned might waive the formal production of evidence.

The view which has, therefore, crystallised is that it is open to a Magistrate to accept the plea of the persons summoned to appear before him and to refrain from making any further inquiry. If the persons so summoned admit that there is a likelihood of a breach of the peace, the Magistrate need not record any further evidence and is entitled to act on this plea and order the ac-

cused to furnish security or bail bonds. A distinction may, however, be made if the accused do not admit that there is a likelihood of a breach of the peace but they offer to furnish security. The offer to furnish security may be referable to their desire not to undergo the trouble of a further hearing in the case, or to their desire that there was a likelihood of a breach of the peace. If it appears to the Court that the accused are willing to furnish security as they admit that there was a likelihood of a breach of the peace. a Magistrate may not proceed to record evidence and may accept the offer of the accused and order them to furnish security. If, however, the offer to furnish security cannot be interpreted as an admission of a likelihood of a breach of the peace, further evidence in support of the report made by the police could be necessary.

(4) In the present case five of the applicants had clearly admitted that there was a likelihood of a breach of the peace and there was therefore evidently no necessity for the Magistrate to proceed further with the inquiry or to record evidence in the case. He was perfectly justified in asking these applicants to furnish bail bonds.

(5) With regard to the other five persons the case is slightly different. They never admitted there was a likelihood of a breach of the peace and the learned Magistrate acted upon their offer contained in the application dated 26-3-1952 wherein they volunteered to offer security. The learned Magistrate, however, did not examine the application carefully. The offer was only conditional. The applicants had clearly mentioned in their application dated 26-3-1952, that they were willing to offer security provided all the 25 persons of the opposite party were also asked to furnish security. This would not be tantamount to a plea of guilty, and the learned Magistrate, was, therefore, not justified in taking this offer as a plea of guilty. He should have either asked the accused clearly if they did not want further evidence to be recorded and were agreeable to furnish security or if they were willing so to do only if an order requiring security from the other set of persons was passed. The order made by the learned Magistrate against these five persons who did not admit in their statements that there was a likelihood of a breach of the peace cannot be held to be justified. The order was passed more than a year ago and the period for which the applicants were asked to furnish personal bonds has also expired. No useful purpose will, therefore, be served by remanding the case against the five applicants for a free inquiry.

(6) As a result, the order passed by the Magistrate against Bhola Ram, Beni Prasad, Ram Dayal, Ram Kumar and Shyam Charan is set aside and their bail bonds are cancelled. The order passed against the remaining applicants shall stand and the revision to that extent is dismissed.

B/D.H.Z. Order accordingly.

A.I.R. 1954 ALL. 30 (Vol. 41, C. N. 25)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Smt. Maiki, Applicant v. Hemraj, Opposite Party.

Criminal Reference No. 7 of 1953, D/- 20-7-1953, reference made by S. J. Lucknow, D/- 10-1-1953.

Criminal P. C. (1898), S. 488 — Husband contracting marriage with another wife.

No other ground for refusal to live with the husband need be looked into if there is the good ground of husband's contracting another marriage for the wife's refusal to live with her husband. The fact that the wife came once or twice to live with her husband even after his remarriage does not improve matters in favour of the husband. (Para 2)

Anno: Cr. P. C., S. 488 N. 21.

D. N. Mathur, for Applicant; R. K. Rai, for Opposite Party.

ORDER: This is a reference by the Sessions Judge of Lucknow recommending that the order refusing to grant maintenance to Smt. Maiki should be set aside as the view taken by the learned Magistrate was not proper in this case. It appears that Smt. Maiki was married to her husband some 8 or 9 years ago when she was hardly 5 or 6 years of age. She is said to be 16 or 17 years of age at present and her husband has admittedly taken a second wife. After the remarriage of her husband the applicant moved the Magistrate under S. 488, Cr. P. C., that he should order payment of maintenance to her. The learned Magistrate threw out the application on the ground that Smt. Maiki had been living with her husband for some time at least amicably even after the husband had taken a second wife. The Magistrate has also submitted his explanation along with the order of reference. It appears to me that the learned Magistrate was of the opinion that it was at the discretion of the Magistrate to accept or not to accept the second marriage of the husband as a ground for refusal and that it was not in all cases that the Courts were bound to accept this ground as a valid ground for refusal to live with the husband.

(2) The view taken by the learned Magistrate appears to be clearly wrong. Section 488, Cr. P. C. was amended in 1949 and the words which are added are

> "If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for the wife's refusal to live with him'.'

The effect of this amendment obviously is that the ground mentioned in this amendment which was sometimes accepted as a valid ground and sometimes, not should be accepted as a valid ground for the wife's refusal to live with her husband if he has taken a second wife or kept a mistress. In the present case, some of the witnesses for the opposite-party have admitted that even before Smt. Patia was actually married to the opposite party she had been living as a mistress of the opposite-party for 2 or 3 years. The plea taken by the opposite-party that he was obliged to take a second wife on account of some oath which he was put to by his mother-in-law does not, therefore, appear to be well founded. Smt. Maiki has come of age only recently and if she finds that the atmosphere in the house of her husband after his remarriage was not congenial to her she was justified in refusing to live with her husband. No other ground for refusal to live with the husband need be looked into if there is this good ground for the wife's refusal to live with her husband. The fact that the wife came once or twice to live with her husband even after his remarriage does not improve matters in favour of the opposite-party. It is possible that Smt. Maiki made some efforts to reconcile her fate to the altered circumstances and it was her experience after her visit to her husband's house after his remarriage that presum-

ably drove her to the necessity of living apart and to ask for maintenance. The circumstances of this case, therefore, clearly justify the request of Smt. Maiki for an order of maintenance against her husband.

(3) It remains now to be seen as to what should be the proper amount which the husband should be ordered to pay Smt. Maiki on account of her maintenance. The opposite party is in receipt of a sum of Rs. 55/- p.m. which I am told includes dearness allowance which may be stopped at any time after the living index has gained normality. The opposite-party has to maintain, besides his new wife his mother & may also have to maintain his children which may be born to the wife subsequently. All these circumstances have, therefore, to be taken into consideration in fixing the amount of maintenance. It has been suggested by the learned Counsel for the opposite-party that a sum of Rs. 10/- per mensem may perhaps be sufficient for the maintenance of Smt. Maiki. This sum appears to me to be sufficient in the circumstances. It will be open to the parties to apply to the Court of the Magistrate to alter the amount of maintenance if it appears at any future time that the maintenance is too low or too high if there is an increase in the emoluments of the opposite party or a substantial decrease in the price level of commodities.

(4) I, therefore, accept the refernece made by the Sessions Judge and set aside the order passed by the Magistrate. The opposite party is ordered to pay Rs. 10/- per mensem as maintenance to Smt. Maiki with effect from 1-7-1953.

B/D.H.Z. Reference accepted.

A.I.R. 1954 ALL. 31 (Vol. 41, C. N. 26)

MALIK C. J. AND GURTU J.

Salaried Employees Co-operative Housing Society Ltd., Petitioner v. Registrar, Co-operative Societies, Opposite Parties.

Civil Misc. Writ No. 7788 of 1951, D/- 13-2-1953.

(a) Co-operative Societies Act (1912), S. 43 (1) — Rule 115, U. P. Co-operative Societies Rules, 1936 is not ultra vires.

No doubt clause (l) of S. 43, sub-s. (2) does not deal with cases of disputes between a Society and its members or past members. But sub-s. (1) is wide enough to include a dispute between two Societies and the rules made thereunder are, therefore, perfectly valid. Thus, R. 115, U. P. Co-operative Societies Rules, 1936 is not ultra vires. (Para 3)

(b) U.P. Co-operative Societies Rules, 1936, R. 135 — Revision by Registrar beyond limitation — Revision is without jurisdiction.

Rule 135 provides that the Registrar may review his own order within six months or he may revise order of an Assistant Registrar passed in appeal within the same period. If he fails to do so, the power given to him under that rule for revising the Assistant Registrar's order comes to an end. Thus, an order passed by the Registrar under this rule revising the order made by the Assistant Registrar almost after ten months after the said order is without jurisdiction. (Paras 4, 5)

Baleshwari Prasad, for Petitioner; Standing Counsel, for Opposite Parties.

MALIK C. J.: This writ application has been filed on behalf of the Salaried Employees Co-operative Housing Society Ltd., Mainpuri against the Registrar, Co-operative Societies, Uttar Pradesh and the Mainpuri Co-operative Housing Society Ltd., Mainpuri.

(2) A piece of land was being acquired at the instance of the petitioner, the Salaried Employees Co-operative Housing Society Ltd. This land was also needed by the opposite party 2, the Mainpuri Co-operative Housing Society Ltd. and with respect to this land, therefore, there was a dispute between the two Societies. The dispute was referred to an arbitrator, Sri Tirlok Chand, in accordance with the provisions of R. 115, U. P. Co-operative Societies Rules, 1936. The arbitrator gave his decision on 17-5-1949 and by that award, he wanted to divide the land half and half between the two Societies. The petitioner filed an appeal before the Assistant Registrar in accordance with the provisions of R. 133 of the said Rules. The Assistant Registrar on 10-1-1950 allowed the appeal and held that the petitioner was entitled to the whole land. This order was revised by the Registrar under R. 135 on 6-11-1950. The Registrar set aside the order of the Assistant Registrar dated 10-1-1950 and restored the order of the arbitrator dated 17-5-1949. The opposite party 2 had filed an application for revision of the order of the Assistant Registrar on 8-4-1950 i.e., within a period of a little over three months, but the order of the Registrar, as we have already said, was passed on 6-11-1950, that is, almost after ten months of the order of the Assistant Registrar.

(3) Learned counsel for the petitioner has raised two points. His contention is that under R. 135, the Registrar could revise the Assistant Registrar's order only within six months and the six months having expired, he had no jurisdiction to revise that order. Learned counsel has also contended that R. 115 of the Rules is 'ultra vires' as it is not covered by S. 43, sub-s. (2), cl. (l), Co-operative Societies Act, 1912. We are not satisfied that the second contention has any force. Section 43, sub-s. (1) gives the State Government right to make rules to carry out the purposes of the Act for any registered society or class of such Societies. Sub-section (2) starts with the words "In particular and without prejudice to the generality of the foregoing power such rules may". No doubt cl. (L) of S. 43, sub-s. (2) does no deal with cases of disputes between two independent Societies and is confined to cases of disputes between a Society and its members or past members. But sub-s. (1) is wide enough to include a dispute between two Societies and the rules made thereunder are, therefore, perfectly valid. The reference of the dispute to arbitration and the award given by Tirlok Chand cannot, therefore, be said to be 'ultra vires' or without jurisdiction.

(4) Coming, however, to the question of limitation, it would be necessary to consider the language of the Rules. Before, however, we come to R. 135, we may point out that under R. 133, a party aggrieved by an award has been given a right of appeal to the Registrar and such a right provides an appeal within one month of the date of the communication of the award. Rule 134 then makes the award of an arbitrator which has not been appealed against or the order of the Registrar final and provides that such an order shall not be questioned in any civil or revenue Court. Rule 174 makes it clear that the word "Registrar" in Rr. 133 and 134 includes an "Assistant Registrar". After this we have Rr. 135

and 136. These two rules give the Registrar and Assistant Registrar power to review their own order or the orders of those subordinate to them. Rule 135 provides that the Registrar may review his own order within six months or he may revise the order of an Assistant Registrar passed in appeal within the same period. Rule 136 gives similar power to the Assistant Registrar. He can review his own order within six months or he can revise the award of an arbitrator within the same period. Neither of these rules seem to require an application for the purpose and, in any case, even if an application has to be filed, it is not said that the application has to be filed within six months. The language of the Rules makes it clear that the whole process must be completed and the order revised within the period mentioned above. The relevant portion of R. 135 reads as follows:

"The Registrar may review his own order or revise .....the orders passed in appeal by an Assistant Registrar against an award, within six months of such order.....".

(5) In the circumstances, the Registrar should have revised the order of the Assistant Registrar within six months of the date of that order i.e., within six months of the 10th of January, 1950 and he not having done that, the power given to him under R. 135 for revising the Assistant Registrar's order had come to an end. The order passed by the Registrar on 6-11-1950 was, therefore, without jurisdiction and under Art. 226 of the Constitution. We set aside that order. Under the circumstances, we do not think it is a fit case where we should make an order as to costs.

B/V.S.B. Order set aside.

A.I.R. 1954 ALL. 32 (Vol. 41, C. N. 27)

MALIK C. J. AND V. BHARGAVA J.

Ziaul Haq and others, Appellants v. Lala Shankar Lal and another, Respondents.

Second Appeal from Order No. 3 of 1945, D/- 14-7-1953, against the decree and Order of Dist. J., Saharanpur, D/- 11-11-1944.

Debt Laws — U. P. Encumbered Estates Act (25 of 1934), Ss. 9(5), 14, 45 — Application for apportionment of debts after passing of decree.

Section 9(5) does not cast the duty of making the application for apportionment on the creditor. There is no section in the Encumbered Estates Act which requires in so many words that after decrees are passed under S. 14 of the Act, no application for apportionment shall be entertained. Where no party having applied to the Special Judge for apportionment of the liability, the Judge had made a mistake in passing a decree for the whole amount against the estate of the landlord-applicant, the subsequent order passed by the lower Court that the decree shall be apportioned is in the interest of justice and the High Court cannot entertain an appeal under S. 45(2a) and set aside the order. (Para 2)

Ishaq Ahmad, for Appellants; B. R. Avasthi, N. S. Singhal and G. N. Kunzru, for Respondents.

CASE REFERRED TO:

(A) ('44) Ex F A No 188 of 1942, D/- 3-4-1944 (All)

MALIK, C. J.: This is an appeal against an order passed by the learned Special Judge, Second Grade, Saharanpur, entertaining an application under S. 9(5), U. P Encumbered Estates Act for apportionment of certain debts on payment of Rs. 50/- as damage within two weeks. The respondents are the creditors to whom the amount was due from the appellants and their father. An application under S. 4, U. P. Encumbered Estates Act was made on 30-3-1936, on behalf of Amanat Ali, the father, and his sons and, in that application, the amount due to the respondents was shown in the list of debts. On 12-8-1936, however, the sons made an application for permission to withdraw and thereafter the case under the Encumbered Estates Act proceeded on behalf of Amanat Ali alone. On 24-10-1939, Amanat Ali died and his four sons and two daughters were then brought on the record as his legal representatives and, in that capacity, they continued the Encumbered Estates Act proceedings.

Decrees in favour of the creditors were passed on 15-7-1941, and they were sent to the Collector for payment of the debts. It was after 15-7-1941, when the decrees had been passed, that the creditors, who had obtained those decrees against Amanat Ali and his sons, applied for execution of the decrees. The execution application was dismissed on the objection raised on behalf of the appellants that the debts had not been apportioned. The decree-holders thereafter filed an application for apportionment of the liability under S. 9(5), U. P. Encumbered Estates Act. This application for apportionment was made on 16-3-1944. An objection was taken that this application was belated and it was entertained as we have already said on payment of Rs. 50/- as costs to the other side.

Against the order passed by the learned Special Judge, Second Grade, Saharanpur, there was an appeal and the learned District Judge of Saharanpur, who dismissed the appeal on 11-11-1944, relied on a decision of this Court in — 'Molhar Singh v. B. Mahabir Prasad', Ex. First Appeal No. 188 of 1942, D/- 3-4-1944 (A). This second appeal has been filed under S. 45(2-a), U. P. Encumbered Estates Act. Sub-section (5) of S. 45 of the Act provides:

"45(5) Subject to the provisions of sub-s. (2-a) the decision on an appeal under this section shall be final and in deciding the appeal the appellate Court may modify or alter or reverse any decree or order of the Special Judge, if in the opinion of the appellate Court it be necessary to do so in the interest of justice and equity."

(2) Learned counsel has urged that the application for apportionment should have been made before the learned Special Judge passed the decrees under S. 14, U. P. Encumbered Estates Act. Learned counsel had to admit that there is no section in the Encumbered Estates Act which requires in so many words that after decrees are passed under S. 14 of the Act, no application for apportionment shall be entertained. Reliance was placed at one stage on S. 20-A, cl. (ii), U. P. Encumbered Estates Act. A reference, however, to that clause makes it clear that it has no application whatsoever to an order under S. 9(5) of the Act.

Section 9(5), U. P. Encumbered Estates Act does not cast the duty of making the application for apportionment on the creditor. It lays down that

"..... the Special Judge shall determine the amount of the joint debt which is due by the debtor or debtors who have applied and the amount due by those who have not applied ....."

It does not say who shall apply for an order under this section. In the ruling relied upon by the lower Courts, the decrees had already been passed under S. 14 of the Act and they had been sent to the Collector for liquidation of debts and thereafter the creditors applied for execution of the decrees and, against the order passed in the execution proceedings, an appeal was filed in this Court. In those proceedings, this Court had granted the landlord-applicant the right to apply for apportionment and, failing him gave the creditor a right to apply and observed that the Court had no doubt that the Special Judge will, on such application being received, determine the liability of the landlord-applicant and the other decree-holders.

There can be no doubt that no party having applied to the Special Judge for apportionment of the liability, the learned Judge had made a mistake in passing a decree for the whole amount against the estate of the landlord-applicant. The order passed by the lower Court that the decrees shall be apportioned is in the interest of justice and equity and it cannot, therefore, be said that the order passed is erroneous and that we can entertain this appeal under S. 45(2-a), U. P. Encumbered Estates Act and set aside the order.

(3) The appeal has no force and is dismissed with costs.

B/D.H.Z. Appeal dismissed.

A. I. R. 1954 ALL 33 (Vol. 41, C. N. 28)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Sm. Chameli, Applicant v. Gajraj Bahadur Gupta, Opposite Party.

Criminal Revn. No. 199 of 1952, D/- 20-7-1953, against order of S. J., Hardoi, D/- 21-7-1952.

(a) Criminal P. C. (1898), S. 488 — Living separately by mutual consent — (Husband and wife — Maintenance) — (Words and Phrases — Mutual consent).

The words "mutual consent" mentioned in S. 488(4) would apply to separate living if such separate living was the result of a desire of both parties and mere agreement to pay maintenance or to live separate would not bar an application under S. 488 of the Code. AIR 1937 All 115, Followed; Case law considered. (Para 7)

(Object of the Section stated). (Para 6)

Anno: Criminal P. C., S. 488 N. 23.

(b) Criminal P. C. (1898), S. 488 — "Sufficient means."

In fixing the maintenance under S. 488, the Court has to take into consideration not only the needs of the applicant but also the paying capacity and circumstances of the person liable to pay maintenance. (Para 8)

Anno: Criminal P. C., S. 488 N. 7.

K. N. Tondon, for Applicant; Hyder Husain and S. D. Misra, for Opposite Party.

CASES REFERRED TO :

(A) ('26) AIR 1926 Lah 469: 27 Cri LJ 779
(B) ('30) AIR 1930 Lah 524: 31 Cri LJ 1179
(C) ('33) AIR 1933 Cal 776 (2): 35 Cri LJ 501
(D) ('38) AIR 1938 Bom 499: 40 Cri LJ 91
(E) ('37) AIR 1937 All 115: 38 Cri LJ 312

ORDER : This is an application in revision against the order of the Sessions Judge of Hardoi dismissing an application in revision against an order passed by a Magistrate, first class Hardoi refusing to order payment of maintenance on an application made by one Smt. Chameli against her husband under S. 488, Criminal P. C.

(2) Smt. Chameli who claims to be the wedded wife of the opposite party made an application to a Magistrate, first class Hardoi, asking for an order against the opposite party for maintenance as the opposite party had neglected to maintain her. The applicant was married to the opposite party more than 25 years ago, but shortly after the marriage the opposite party refused to keep the applicant in his house and agreed to pay maintenance to her. An agreement dated 19-3-1928, was executed by the applicant in favour of the opposite party relinquishing her rights against the opposite party who agreed in return to pay maintenance at the rate of Rs. 150/- per annum. This amount was paid for some time. A suit was, however, brought in 1938 for arrears of maintenance on the basis of this deed of agreement for the period from 1-3-1937, to 31-8-1938. This suit ended in a compromise decree being passed on 6-2-1939. Under the terms of the decree the opposite party agreed to pay the arrears of the maintenance and future maintenance was reduced to Rs. 115/- per annum.

Once again the applicant had to bring a suit for arrears of maintenance in 1941 when she claimed maintenance for the period from October 1938 to August 1941. In this suit also a compromise decree was passed and the opposite party agreed to pay arrears of maintenance and future maintenance at the rate of Rs. 9/9 per month. The maintenance was paid to the applicant as agreed upon till July 1951. The applicant then made an application under S. 488, Criminal P. C. on 5-11-1951, on the allegations that the opposite party had neglected to maintain her and that in these hard days it was not possible for her to eke out her existence.

(3) The application made by the applicant was resisted by the opposite party. It was contended on his behalf that the parties had been living separately and that the applicant was not entitled to relief under S. 488 inasmuch as this section was inapplicable as the parties had been living separately by mutual consent. The Magistrate came to the conclusion that although the applicant needed assistance his jurisdiction to entertain the application under S. 488, Criminal P. C. was barred as the parties had been living separately by

mutual consent. The applicant then went in revision to the Sessions Judge who agreed with the view taken by the Magistrate and dismissed the application for revision. The applicant has now come up in revision to this Court.

(4) It is not disputed that the applicant is the wife of the opposite party and that they have not been living together since 1928. The execution of the agreement dated 19-3-1928 is admitted although it is alleged by the applicant that it was brought about without her consent and under indifferent circumstances. The subsequent litigation between the applicant and the opposite party was borne out by copies of decrees passed in those suits and they are Exs. B and C.

(5) The first point which arises for determination in this application for revision is whether it is open to the applicant to take advantage of the provisions of S. 488, Criminal P. C. after an agreement had been arrived at between the parties under which maintenance was granted to the applicant, and they were living separately. It has been argued on behalf of the applicant that the agreement to pay maintenance even though arrived at by consent of parties, does not bar the jurisdiction of a criminal Court to entertain an application under S. 488, Criminal P. C. and in support of this contention a number of rulings have been cited. Before all these authorities cited on behalf of the applicant are considered in detail, the objection taken by the opposite party may also be referred to. Learned counsel for the opposite party contends that after an agreement has been arrived at between the parties it is not open to any of them to go behind the agreement and to plead that the agreement was not the result of mutual consent. Section 488(4), Criminal P. C. lays down :

> "No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent."

A perusal of the relevant provisions of S. 488, Criminal P. C., therefore, shows that if the husband and wife have been living separate by mutual consent the wife shall not be entitled to receive an allowance from her husband under S. 488, Criminal P. C. The main point for consideration, therefore, in this application for revision is whether the parties in this case have been living separately by mutual consent. Two rulings of the Lahore High Court have been cited on behalf of the opposite party in support of the contention that the jurisdiction of the criminal Court under S. 488, Criminal P. C. is barred after an agreement for payment of maintenance has been arrived at either by agreement or by an order of the Court : vide — 'Budhu Ram v. Khem Devi', AIR 1926 Lah 469 (A) and — 'Sham Singh v. Mt. Hakam Devi'. AIR 1930 Lah 524 (B). In — 'Budhu Ram v. Khem Devi (A)', Dalip Singh J. held that once a compromise was entered into for payment of maintenance there was no refusal to maintain on the part of the husband and therefore S. 488, Criminal P. C. had no longer any application and that the proper remedy was by way of a civil suit to enforce the compromise.

A more or less similar view was taken by another single Judge in — 'Sham Singh v. Hakam Devi', (B). The view taken by the Lahore High Court was accepted by the Calcutta High Court in — 'S. W. Colbert v. Mrs. H. Colbert', AIR 1933 Cal. 776 (2) (C). The learned Counsel for the applicant has cited — 'Taralakshmi Manu Prasad In re', AIR 1938 Bom 499 (D), in which the view taken by the Calcutta High Court was also discussed. The Division Bench of the Bombay High Court in the reported case, however, came to the conclusion that the mere existence of a decree of a civil Court directing a certain sum to be paid for maintenance did not oust the jurisdiction of a Magistrate in a proper case to make an order under S. 488, Criminal P. C. This view was in substance at variance with the view taken by the Lahore High Court which held that an order embodying an agreement to pay maintenance passed by a civil or criminal Court would subsequently bar the jurisdiction of a Magistrate to entertain an application under S. 488. The interpretation of the words "mutual consent" has been the subject of a decision in a ruling of this Court in — 'Ram Saran Das v. Mt. Ram Piari', AIR 1937 All. 115 (E). In this reported case an application had been made by one Mst. Ram Piari that her husband should be directed to pay her maintenance. During the pendency of the application, the husband and wife made a joint application to the Court in which they said that they were agreed that Ram Saran Das should pay Mst. Ram Piari a sum of Rs. 4/- for her support on certain conditions. This order was enforced by the Magistrate on some occasions. Subsequently in February 1936, Mst. Ram Piari made a fresh application under S. 488, Criminal P. C. for an order for maintenance and it was pleaded on behalf of the husband that the criminal Court had no jurisdiction to pass an order for maintenance in view of the agreement arrived at by the parties in the earlier case. The view held by the Lahore High Court was placed before the learned Judge who heard the application for revision. He did not agree with the interpretation put by the learned Judges of the Lahore High Court and came to the conclusion that the words "mutual consent" meant the consent on the part of the husband and wife to live apart. The observations of Allsop J. may be quoted with advantage :

> "Where a wife refuses to live with her husband on some specific ground such as cruelty or the fact that he is keeping another woman, I do not think that it can be said that the husband and wife are living apart by mutual consent if the husband does not insist that the wife should live with him. If that expression had this meaning, a husband could, I imagine, defeat almost any conceivable application for maintenance under S. 488, Criminal P. C."

The words "mutual consent" imply that the desire to live apart should emanate from both parties and that none of them should be forced to take recourse to separate living and ultimately to submit to it only as a result of circumstances brought about by one of the parties. If a husband is unwilling to allow his wife to live with him, or has taken a second wife, the only course open to such a wife would be to live apart and if she, under those circumstances, agreed to accept maintenance and live separate, such a separate living would not be deemed to be the result of mutual consent. The test, therefore, should be to find out if the agreement for separate living and

payment of maintenance was the outcome of the desire of both parties, independently reached by each of them, or if one of the parties was forced to submit by circumstances to agree to separate living and payment of maintenance. The view taken by Allosp J. in — 'AIR 1937 All 115 (E)', appears, if I may say so with great respect, to be the correct view, and I find myself in complete agreement with it.

(6) The applicant in the present case entered the witness-box and narrated her tale of woe and stated that she had been maltreated and turned out of the house, her husband had taken a second wife and she was thus driven by force of circumstances to separate living and had to accept maintenance given to her by her husband. The opposite party did not choose to enter the witness-box to controvert the statement made by the applicant. Besides the applicant there were three other witnesses who supported the applicant. The applicant was admittedly driven to take recourse to Courts of law on three different occasions in spite of the agreement, registered and unregistered, executed by the opposite party. No maintenance was paid to her for more than a year when she had to file a suit in 1938 and again in 1941. No doubt the pittance granted to her under the decree passed in 1941 has been paid by the opposite party except perhaps for a few months when the application, which has given rise to this revision, was made by the applicant.

If a party executes an agreement but does not pay maintenance or drives the wife to the necessity of filing a suit for recovery of maintenance from time to time and then takes protection under the provisions of S. 488 (4), Criminal P. C. for pleading a bar to the grant of relief to the wife, it would be difficult for a woman entitled to maintenance to get an effective remedy in Courts of law. Section 488, Criminal P. C. has been enacted only to meet such contingencies and to save a party entitled to maintenance from a prolonged litigation and to get an effective remedy speedily and without much expense from a criminal Court.

(7) It appears, therefore, that the view taken by the learned Magistrate and by the Sessions Judge does not appear to me to be correct. The words "mutual consent" mentioned in S. 488 (4), Criminal P. C. would apply to separate living if such separate living was the result of a desire of both parties and mere agreement to pay maintenance or to live separate would not bar an application under S. 488, Criminal P. C. The applicant is, therefore, entitled to an order of maintenance against the opposite party.

(8) It remains to be seen what should be the proper amount which the opposite party should be ordered to pay to the applicant by way of maintenance. In fixing the maintenance the Court has to take into consideration not only the needs of the applicant but also the paying capacity and circumstances of the person liable to pay maintenance. In the present case the applicant has stated on oath that the opposite party is a vakil of standing and is possessed of considerable immoveable property in the shape of sir and khudkasht and houses and that the applicant should be paid a sum of Rs. 100/- per mensem as maintenance. The applicant has also produced a witness Gajodhar who supports her and states that the income of the opposite party is Rs. 1000/- per mensem. No particulars of the property have, however, been given by this witness.

As remarked above, the opposite party has not entered the witness-box to controvert the evidence adduced on behalf of the applicant. He has been content with producing a witness Mahanidhi. He states tnat the opposite party resides in a rented house paying Rs. 10/- per mensem and that his income does not exceed Rs. 100/- or Rs.125/- per mensem. In a matter like this both parties are apt to exaggerate or minimise the circumstances and the financial position of the party liable to pay. The opposite party has to maintain his second wife and some children and taking all the circumstances into consideration it appears to me that a sum of Rs. 20/- per mensem should be paid to the applicant as maintenance.

(9) The order passed by the Magistrate is, therefore, set aside and the opposite party is ordered to pay Rs. 20/- per mensem to the applicant as maintenance with effect from the date of her application.

C/H.G.P. Order accordingly.

A. I. R. 1954 ALL 35 (Vol. 41, C. N. 29)

ASTHANA J.

Bhartu and others, Appellants v. State.

Criminal Appeal No. 1248 of 1950, D/- 6-7-53, from judgment of Addl. S. J., Meerut, dated 30-11-1950.

(a) Penal Code (1860), S. 97 — Trespasser — Right of private defence of body.

Even if a person is a trespasser and has wrongfully cultivated a certain portion of a field of which he was bound in law to deliver possession to another person, the latter person has no right to take law into his own hands and beat the former in order to dispossess him from the field. If the latter person is an aggressor, there is no doubt that the former person, though a trespasser, has a right of self-defence. (Para 7)

Anno: Penal Code, S. 97 N. 1, 2.

(b) Penal Code (1860), S. 99 — Extent of right of private defence.

Where the total number of injuries on the side of the complainant are somewhat more than those on the side of the accused persons the injuries by themselves do not necessarily prove that the accused were the aggressors and had exceeded their right of self-defence. When lathis, tabar and other sharp-edged weapons are being used by both the parties in the fight, it is very difficult for any side to weigh the strokes that are inflicted by him and to inflict injuries only up to a certain limit and no more. (Para 11)

Anno: Penal Code, S. 99 N. 6.

Vishwa Mitra, for Appellants; B. Mukerji, A. Banerjee and S. N. Mulla, for Respondents; Asst. Govt. Advocate, for the State.

JUDGMENT: These two appeals arise out of two cross-cases relating to the same incident which took place on 30-4-1949 at about 9 a. m.

in the morning in village Mavi Kalan, P. S. Binoli, District Meerut. The dispute was over a field no. 934 in that village. This field at first belonged to Jialal and others who executed a sale-deed in favour of Smt. Kesar, mother of Yadram. She executed a lease in respect of this plot in favour of Yadram. After the sale-deed, Bhartu and Munshi filed a pre-emption suit against Smt. Kesar and obtained an 'ex parte' decree against her. In execution of this ex parte decree the decree-holders (accused) obtained actual possession over the field and ploughed it. Shiam Singh, a brother of Yadram who was one of the defendants in the pre-emption suit got the ex parte decree set aside and the case restored. Thereafter, it was decided in favour of Yadram and he obtained actual possession over the southern half of the field and formal possession over the northern-half, as in this portion the chari crop of the accused was standing at that time. After the chari crop had been cut, Yadram sowed sugarcane crop in it. On 30-4-1949, at about 9 a. m. in the morning when Yadram and Tejram were weeding their sugarcane crop in the field the accused went there armed with spears, tabar and lathis and wanted to sow Juar crop in it. Yadram protested against it and tried to stop them whereupon he was assaulted by the accused. Tejram was also attacked by Ram Singh with a tabar. Both Yadram and Tejram shouted for help and on hearing their cries, Jahana, Chandan, Maharam and Raj Singh who accidentally happened to be present near the place of occurrence rushed to their help. They too were beaten and Maharam died as a result of the injuries received by him the next morning. The report of this occurrence was made by Yadram the same night at 8 p. m. at P. S. Binoli which is five miles to the east of the village Mavi Kalan and the accused were named in it.

(2) A complaint was also made by Balwant, son of Munshi against Yadram, Tejram and eight other persons under Ss. 148/325/336 read with S. 149, Penal Code. It was alleged in this complaint that the complainant had sown sugarcane crop in the plot in dispute and on 30-4-1949 the accused, namely Yadram and others came to the plot in dispute armed with lathis, tabar, spears, etc., and attacked Munshi and beat him, that he shouted for help. Ram Singh went to his help but he too was beaten. Later on, Bhartu Mohkam and other persons went there to intervene and save Munshi and Ram Singh from being further beaten but they too were assaulted and received simple and grievous injuries, that the complainant went to P. S. Binoli to make a report about the occurrence but their report was not taken down as the accused were already present there.

(3) Both these cases were tried by a Magistrate of the first class. He found that the accused had cultivated sugar-cane crop in the northern portion of the plot in dispute, that the party of the complainant Yadram forcibly wanted to dispossess them from this plot and, in order to achieve this object, he and his companions went there armed with lathis and spears and first attacked the party of the accused, that the accused Bhartu and others in their self-defence also struck them with lathis and other weapons and inflicted injuries on them. He, however, convicted the accused Bhartu and others because he was of opinion that they had exceeded the right of self-defence. They were each convicted under S. 304 read with S. 149 and also under S. 148, Penal Code and were sentenced to five years' rigorous imprisonment under the former section and one year's rigorous imprisonment under the latter section and both the sentences were made concurrent.

(4) In the other case which arose out of the complaint of Munshi he found that the accused Yadram, Tejram, Chandan, Jahana and Rajaram alias Raje were the aggressors and he, therefore, convicted each of them under S. 323 read with S. 149, Penal Code and also under S. 148, Penal Code and sentenced each of them to nine months' rigorous imprisonment under S. 149, Penal Code.

(5) It was contended on behalf of the appellants Bhartu and others in Appeal No. 1248 of 1950 that the learned Magistrate had committed a mistake in holding that they had exceeded their right of self-defence. It was also contended that, in view of the finding of the learned Magistrate that Yadram and his party were the aggressors and wanted to dispossess them forcibly from the plot in dispute and with that object in view, they all attacked them with lathis and other weapons, they were justified in beating them in their self-defence and it was not possible for the appellants, in the circumstances, to weigh their strokes before inflicting them on the party of the complainant Yadram and others.

(6) The question which arises for consideration is whether from the evidence on the record it is proved that the accused Bhartu and others were in possession of the northern portion of the plot in dispute and had cultivated the sugarcane crop in it. The prosecution examined several witnesses in proof of the fact that the sugarcane crop had been cultivated by the complainant Yadram and not by the accused, It was, however, not disputed before me on behalf of the complainant that when the 'amin' in execution of the decree for pre-emption went to the spot for delivery of possession, the accused Bhartu and others were in possession of the northern portion of the plot and their chari crop was standing in it. It appears from the record that the amin Sri Benjamin delivered actual possession over the southern portion of the plot to the decree-holders and as regards the northern portion in which the chari crop was standing he delivered only formal possession and the actual possession was to be delivered to the decree-holder after the chari crop had been cut from it; that the accused examined several witnesses in proof of the fact that the actual possession over the northern portion of the plot was not delivered to the complainant Yadram even after the chari crop had been cut and that the sugarcane in it was grown by the accused. Besides the oral evidence produced on behalf of the accused there is also the documentary evidence in proof of the fact that the sugarcane crop was actually cultivated by the accused in the northern portion of the plot and this evidence consists of irrigation parchas and the entries in the khatauni maintained by the patwari. The complainant did not produce any documentary evidence in proof of the fact that the sugar-cane crop had been raised by him.

If he had cultivated the sugarcane crop he must have irrigated it and in that case he would have got irrigation parchas in proof of the fact that it was irrigated by him. There is also no satisfactory explanation as to why his name was not entered over the sugarcane crop in the revenue papers in case he had cultivated it. It appears to me that the accused did not deliver actual possession over this portion of the plot after cutting the chari crop and themselves cultivated sugarcane crop in it and, in my opinion, the finding of the lower Court on this point appears to be correct.

(7) It was next argued on behalf of the complainant that even if the accused did not deliver possession after cutting the 'chari' crop and themselves cultivated the sugarcane crop in it, they were mere trespassers and had no right to beat the complainant when he went to the field in dispute in exercise of his legal right. The question for consideration is whether the accused had any right of self-defence as alleged by them. In my opinion even if the accused were trespassers and had wrongly cultivated the northern portion of the plot after cutting the 'chari' crop the complainants had no right to take the law into their own hands and beat the accused in order to dispossess them from the field. If the complainant's party were the aggressors and beat the accused first, there can be no doubt that they had a right of self-defence. It has, however, been disputed before me on behalf of the complainant Yadram that he or his party were the aggressors.

(8) It has been argued on his behalf that the sugarcane crop had been cultivated by him and the accused wanted to sow Juar in it and actually scattered some juar seeds in the field. I have already held above that from the evidence on the record it was proved that the sugarcane crop had been cultivated by the accused. The allegation in the complaint of Yadram that the accused had gone to the field in order to sow Juar and had actually scattered some Juar seeds in it does not appear to be correct. It appears from the evidence of the investigating Sub-Inspector that he went to the place of occurrence on the same day (30-4-1949) and found some Juar plants standing amidst the sugarcane crop. It is unlikely that the Juar seeds which are said to have been scattered in the field could have become Juar plants on the same day.

(9) The evidence on the record shows that on the side of the complainant Yadram, Maharam, Chandan, Raje and Jahana were injured and that Maharam died as a result of the injuries received by him. These four persons are residents of another village Sankal Puthi, P. S. Binoli. There is no doubt that they were present at the time of the occurrence and took part in it. It appears from the first information report made by Yadram that these four persons were his guests and it was only by chance that they arrived at the field at the time of the occurrence. Sankal Puthi is about 6 or 7 koses i.e. 12 or 14 miles from village Mavi Kalan. There is no satisfactory explanation on behalf of the prosecution as to how these four persons happened to reach the place of occurrence which is at a great distance from the house of Yadram complainant. No doubt Yadram in his report said that these four persons who are related to him were his guests, but in his statement made in the lower Court he denied that these persons were staying at his house. The evidence of Chandan, P. W. 5, is that he, Maharam, Jahana and Raje were going to Yadram's place in order to fetch four tins of ghee for the purpose of a marriage which was to take place at their house and on the way they heard a noise on the side of Yadram's field and then they all went there and tried to save Yadram and Tejram, who were being beaten by the accused Bhartu and others but they too were beaten. The evidence of P. W. 6 Jahana and P. W. 7, Raje is also to the same effect. All these witnesses denied that they were staying at the house of Yadram on the night before the occurrence or that they had been called by Yadram to take part in the beating of the accused Bhartu and others who had wrongly cultivated the plot in dispute and had sown sugarcane crop in it.

(10) The evidence on the record does not show that any 'canaster' was recovered from the possession of these witnesses on the spot. If they were really going to fetch ghee from the village of Yadram, they must have had empty 'canasters' with them. There also does not appear any satisfactory reason why all these four persons should have gone to the village to fetch ghee when it could have been very well brought by one of these persons. The evidence of P. W. 10 Sri Ghansham Singh, Sub-Inspector, shows that these four persons were staying in the village Mavi Kalan with Yadram on the night before the occurrence and that they had arrived there the same night. In my opinion the finding of the lower Court that these four persons who are related to Yadram had been called by him in order to take part in the beating of the accused Bhartu and others is correct. There is otherwise no satisfactory explanation for the presence of all these four persons at the place of occurrence which is at a long distance from their village.

(11) The accused Bhartu and others examined several witnesses in their defence including Dr. Gajraj Singh. The evidence of Dr. Gajraj Singh shows that Munshi had ten injuries on his person including two punctured wounds and two contused wounds and a compound fracture of the right arm, that Ram Singh accused had seven injuries on his person including a contused wound on the head and a contusion in the right ear, that the accused Bhartu had a contused wound in the head, a punctured wound in the left forearm, fracture of the left ulna which was a grievous hurt and two abrasions in the hands. It also appears from the defence evidence that Yadram was in actual possession of the disputed portion of the plot and had cultivated sugarcane crop in it and that the accused were the aggressors. There is no doubt that the total number of injuries on the side of the complainant were somewhat more than those on the side of the accused persons but these injuries by themselves do not necessarily prove that the accused were the aggressors and had exceeded their right of self-defence. When lathis, tabar and other sharp-edged weapons are being used by both the parties in the fight, it is very difficult for any side to weigh the strokes that are inflicted by him and to

inflict injuries only up to a certain limit and no more.

I agree with the finding of the lower Court that from the evidence and the circumstances of the case it is clearly proved that the party of Yadram was the aggressor and they forcibly wanted to dispossess the accused Bhartu and others from the plot in dispute in which they had cultivated sugarcane crop and, in order to achieve this object, Yadram had called his relations Maharam and others from village Sankal Puthi and they all beat Yadram and others and in their defence they too beat them with lathis and inflicted a number of injuries as a result of which one of them, namely, Maharam died. It is very doubtful that the accused Bhartu and others in inflicting injuries in their self-defence exceeded their right. I am not inclined to agree with the lower Court that it has been satisfactorily proved beyond doubt that the accused Bhartu and others exceeded their right of self-defence.

(12) In the circumstances, the appeal of Bhartu and others is allowed and their conviction and sentence under Ss. 304/149 and 148, Penal Code is set aside. They are on bail and they need not surrender. Their bail bonds are discharged. The other Appeal No. 1255 of 1950 filed by Yadram and others is dismissed. As they are on bail, they shall surrender to it and serve out their sentences. Leave to appeal to Supreme Court is refused.

B/D.R.R. Order accordingly.

A. I. R. 1954 ALL 38 (Vol. 41, C. N. 30)

(LUCKNOW BENCH)

RANDHIR SINGH J.

Prabhu and others, Applicants v. Satya Narain, Opposite Party.

Criminal Reference No. 23 of 1953, D/- 29-7-1953, against order of Addl. S.-J., Bahraich, D/- 9-2-1953.

Criminal P. C. (1898), Ss. 139A, 133 — Shall enquire into the matter.

Section 139A, Cr. P. C., enjoins that there should be an inquiry, if a person to whom notice is issued comes forward and denies the existence of a right of public way on the land in respect of which obstruction is alleged. Where, therefore, on an application under S. 133, the non-applicant definitely denied the existence of a public way on the plots in dispute, it was the duty of the Magistrate to have enquired and found out if there was reliable evidence in support of the denial and if he found that there was reliable evidence in support of the denial, the only course open to the Magistrate was to stay the proceedings till the matter of the existence of such right had been decided by a competent civil Court. (Para 3)

Anno: Cr. P. C., S. 139A N. 4, 7; S. 133 N. 24.

S. D. Misra, for Opposite Party.

ORDER : This is a reference by the Additional Sessions Judge, Bahraich, recommending that an order passed by a Magistrate first class under S. 133, Cr. P. C., be set aside.

(2) It appears that Prabhu and others made an application under S. 133, Cr. P. C., against Sat Narain praying that proceedings against Sat Narain be taken under S. 133, Cr. P. C., as he had obstructed the way which lay through plots nos. 2154 and 3717 of village Sheikhdaheer, pargana Rakharpur, district Bahraich. Thereupon a conditional order was passed under S. 133, Cr. P. C., and notice was issued to Sat Narain to show cause why he should not be ordered to remove the obstruction. Sat Narain appeared before the Magistrate and alleged that there was no public way on any of the plots in dispute and that Prabhu and others had no right to maintain the application. The learned Magistrate then held an inquiry and made his order absolute in respect of plot no. 2154 but rejected the prayer in respect of plot no. 3717. He held that there had been no obstruction on the way which existed on the latter plot. Both the parties went in revision. It was contended on behalf of Sat Narain that the procedure adopted by the learned Magistrate was not in accordance with law inasmuch as no inquiry had been made under S. 139A, Cr. P. C. The Additional Sessions Judge has agreed with the contention of Sat Narain and has made the reference.

(3) The judgment of the Magistrate shows that he did not proceed according to law in this case. Section 139A Cr. P. C. enjoins that there should be an inquiry, if a person to whom notice is issued comes forward and denies the existence of a right of public way on the land in respect of which obstruction is alleged. In this case Sat Narain had definitely denied the existence of a public way on the two plots in dispute. It was, therefore, the duty of the learned Magistrate to have enquired and found out if there was reliable evidence in support of the denial made by Sat Narain. If he had then come to the conclusion that there was no reliable evidence in support of the denial, it was open to him to proceed further with the inquiry and then make his final order. It appears from the record that some evidence was adduced by Sat Narain in support of the denial of the existence of a public way. The learned Magistrate should have, therefore, given a finding on this point before proceeding further. If he found that there was reliable evidence in support of the denial, the only course open to him was to stay the proceedings till the matter of the existence of such right had been decided by a competent Civil Court. The view taken by the Additional Sessions Judge, therefore, appears to be correct.

(4) As a result I accept the reference made by the Additional Sessions Judge and set aside the order passed by the learned Magistrate. The case shall be sent back to the Court of the Magistrate, who will re-start the proceedings from the stage after preliminary conditional order had been made under section 133 Cr. P. C. against Sat Narain. He will make an inquiry if there was, in his opinion, reliable evidence in support of the denial of the right of way and then proceed according to law.

C/H.G.P. Order accordingly.

A. I. R. 1954 ALL 39 (Vol. 41, C. N. 31)

CHATURVEDI AND ASTHANA JJ.

Chandra Bhan and others, Appellants v. State.

Criminal Appeal No. 968 of 1951, D/- 3-6-1953, against order of S. J., Agra, D/- 4-9-1951.

(a) Tenancy Laws — U. P. Tenancy Act (17 of 1939) — Rules under, Rule 104 — Delivery of possession effected by Amin without notice to judgment-debtor — Delivery is not invalidated — (Civil P. C. (1908), O. 21, R. 35).

The rules framed under the Act are merely for the guidance of the Amin and are not mandatory provisions. Consequently omission to give notice to the judgment-debtor as required by R. 104 of the Rules framed by the Board of Revenue under the Act would not invalidate the delivery of possession effected by the Amin in accordance with the provisions of the Code of Civil Procedure. (Para 10)

Anno: Civil P. C., O. 21, R. 35 N. 8.

(b) Penal Code (1860), S. 97 — Private defence — Decree-holder obtaining possession in execution.

The right of private defence only arises against acts which constitute an offence except in certain specified circumstances. The right of private defence of person extends to acts which amount to an offence affecting the body of the person exercising the right, or the body of any other person. The right of private defence of property covers cases of acts which are offences falling under the definition of 'theft', 'robbery', 'mischief' or 'criminal trespass' or an attempt to commit any of these. (Para 12)

Where the judgment-debtor offered resistance to the decree-holder who was ploughing the land of which he had obtained delivery of possession in execution of a decree, even if the judgment-debtor had cultivated the fields for a short time after the delivery of possession he had no right of private defence against the decree-holder. (Paras 14, 15)

Anno: Penal Code, S. 97 N. 4, 5.

Vishwa Mitra, (for Nos. 1 and 2), Gopal Behari, M. N. Raina, (for Nos. 2 to 7), R. B. Pandey, B. S. Darbari, (for No. 3) and J. S. David, for Appellants; Sri Ram, Deputy Govt. Advocate and J. N. Takru, for Banwari Lal, for Respondent.

CASES REFERRED TO :

(A) ('34) AIR 1934 Cal 610: 61 Cal 991: 35 Cri LJ 1367

(B) ('49) AIR 1949 All 564: 1949 All LJ 251: 50 Cri LJ 868

ASTHANA, J.: The appellants have been convicted under S. 147 and S. 302 read with S. 149, I. P. C. by the Sessions Judge of Agra for committing riot on 28-7-1950 at about 8.30 in the morning in plot No. 62 of village Bachhgaiya police station Jaitpur district Agra and for beating Phooljari and Gangadin during the commission of the riot as a result of which Phooljari died on the spot and Gangadin on 2-8-1950 in Bah hospital, where he was removed after the occurrence. They have each been sentenced to two years' rigorous imprisonment under S. 147, I. P. C. and to transportation for life under S. 302, read with S. 149, I. P. C. Both the sentences have been made concurrent.

(2) It appears that Phooljari, Gangadin and their brother Sheo Dayal had brought a suit for ejectment in respect of the plot No. 62 under S. 180, U. P. Tenancy Act against Chhotey accused which was decreed in their favour after a protracted litigation lasting for over four years. They obtained possession over the plot on 21-9-1949. As the delivery of possession had been stayed by a general order of the Board of Revenue issued on 15-9-1949 the delivery of possession which had been given to Phooljari and others was wrong and so possession was redelivered to Chhotey.

After the stay order had been withdrawn, Phooljari and others again applied for delivery of possession to the revenue court and it was delivered to them by the court on 8-6-1950; thereafter, on the day of occurrence when Phooljari and Gangadin were cultivating the disputed plot, the appellants along with two others, namely Chhote and Ram Sahai, who have been acquitted by the lower court, came there armed with lathis and three ploughs and began to plough the same field from another corner and asked Gangadin and Phooljari to stop ploughing and on their refusal to do so they started beating them with lathis as a result of which both were severely injured and Phooljari died on the spot and Gangadin in the hospital.

(3) The report of the occurrence was dictated by Gangadin to Pota chaukidar of Nagla Brij who reached the place of occurrence after a short time and Pota chaukidar took the report to police station Jaitpur which is three miles to the north of the place of occurrence and handed it over there the same day at 12.30 in the afternoon. All the accused except Ram Sahai are named in this report.

After the report, the police went to the place of occurrence and there found the dead body of Phooljari, and Gangadin severely injured. An inquest report of the dead body was prepared by the police and, therefore was sent for post-mortem examination. Gangadin was sent to Bah hospital for examination and treatment.

(4) The defence of all the accused except Chandrabhan and Khudda was that they had been falsely implicated on account of enmity. They denied their presence on the spot or that they had taken any part in the alleged occurrence. The defence of Chandrabhan was that he was cuiltvating the plot in dispute from several days before, that Gangadin came there & asked them to stop ploughing and when they refused they both beat him and in his self-defence he also beat them. The defence of Khudda is also to the same effect.

(5) The post-mortem examination on the dead body of Phooljari was performed by Dr. B. L. Gupta, Civil Surgeon, Etawah on 30-7-1950 and the post-mortem report Ex. P7, which has been proved by him shows that Phooljari had eleven injuries on his person, three of which

were contused wounds, seven were contusions and one was an abraided contusion, that his age was 45 years and that he had a well developed body, that the injuries on his person were 'ante-mortem' and were two days old and had been caused by some blunt weapon like a lathi. It further shows that his death was due to fracture of vault and base of the skull bones caused by the injuries on the head.

(6) Gangadin was first examined on the 28th July at 3.45 p. m. in Bah dispensary by Dr. Madan Mohan Misra, Medical Officer in charge of that dispensary and at the time of his examination he had the following injuries on his person:

1. Contused wound $\frac{1}{2}$"x$\frac{1}{4}$"x$\frac{1}{4}$" on the dorsum of the left hand.
2. Bruise 1"x1" just above the left waist joint.
3. Abrasion 3"x$\frac{1}{2}$" on the post surface right forearm.
4. Contused wound $\frac{1}{2}$"x$\frac{1}{4}$"x$\frac{1}{4}$" on the out surface right thigh.
5. Bruise 3$\frac{1}{2}$"x1$\frac{1}{2}$" on the right side of the back.
6. Contused wound 1"x$\frac{1}{2}$"x$\frac{1}{4}$ on the scapula region left side of the head.
7. Contused wound 1"x$\frac{1}{4}$"x$\frac{1}{4}$" on the front of the head on the left side.
8. Contused wound 1"x$\frac{1}{4}$"x$\frac{1}{4}$" on the middle of the head.
9. Contused wound 1"x$\frac{1}{4}$"x$\frac{1}{4}$", middle of the head on the right side.
10. 1$\frac{1}{4}$"x$\frac{1}{4}$"x$\frac{1}{4}$" contused wound on the right side of the forehead.
11. Contused wound $\frac{3}{4}$"x$\frac{1}{4}$"x$\frac{1}{4}$" on the right side of the head.
12. Contused wound 1$\frac{1}{4}$"x$\frac{1}{4}$"x$\frac{1}{4}$" on the right side of the head.

The post mortem examination which was performed on 3-8-1950 shows that he had fifteen injuries on his person which included one incised wound 4"x$\frac{1}{2}$"x muscle deep on the back of the right forearm and one punctured wound $\frac{1}{2}$"x$\frac{1}{2}$"x bone deep on the back of the left hand near the right index finger with fracture of the second metacarpal bone. Three of the injuries, Nos. 5, 6 and 7 noted in the post mortem examination report are not decipherable because the paper at that place was mutilated. The post mortem report, Ex. P4, further shows that out of these fifteen injuries seven were contused wounds, one was an abrasion and two were contusions.

(7) It was contended on behalf of the appellants that there was a difference in the number and nature of the injuries of Gangadin in the injury report Ex. P1 and in the post mortem examination report Ex. P4. There is no doubt that in the injury report Ex. P1 there is no mention of any incised wound or punctured wound on the person of Gangadin when he was examined on 28-7-1950, whereas in the post mortem examination there is a mention of such wounds. It appears to us that this difference is either due to the fact that the doctor who examined Gangadin on 28-7-1950 did not properly examine him or he failed to notice the incised and punctured wounds found at the time of the post-mortem examination. There is otherwise no satisfactory explanation how at the time of the post-mortem examination these two injuries were found.

We are not prepared to accept the suggestion on behalf of the appellants that these injuries were self inflicted in order to aggravate the offence, nor we are prepared to accept that these injuries were inflicted on him while he was in Bah hospital. It would appear from the post-mortem report of Phooljari and Gangadin that the total number of injuries found on their persons were twenty-six in all, eleven on Phooljari and fifteen on Gangadin. It was argued on behalf of the appellants that Chandrabhan, Khudda and Chhotey also received some injuries. There is, however, nothing on the record to show that these three persons were medically examined, nor their injury reports are on the record. There is no doubt that P. Ws. Sheodayal and Kedari mukhia in their statements stated that they had noticed some minor injuries on the person of Chandrabhan and Chhotey. Besides these two witnesses the defence witness Paras Ram (D. W. 3) also stated that Chandrabhan got one injury on the wrist and Khudda two injuries, one on his back and one on his thigh.

(8) The question for consideratioin is, which of the party was the aggressor. On behalf of the appellants it was argued that Chandrabhan and Khudda were ploughing the disputed plot from before when Phooljari and Gangadin came there and asked them to stop ploughing the field and when they refused they beat them with lathis. It has not been suggested on behalf of the appellants that besides Chandrabhan and Khudda there was any other person who took part in the fight on their side.

It appears from the evidence on the record that Chandrabhan is about 74 years old and Khudda is a boy of about 16 years. It further appears from the evidence on the record that Phooljari deceased was 45 years old and was a man of robust constitution and Gangadin was 55 years old. It appears to us very improbable that Chandrabhan and Khudda could have inflicted so many injuries on Phooljari and Gangadin and themselves escaped with very minor injuries. If Phooljari and Gangadin had gone to the field with the determination that they would cultivate it by force and if any resistance was offered to them by Chandrabhan, Chhotey and others they would beat them, it is very unlikely that they would not have taken others with them for their help.

It also appears somewhat unlikely that if these two persons were the aggressors they themselves would have received so many injuries. From the number and the nature of the injuries on the person of Gangadin and Phooljari there can be no doubt that they were not assaulted only by Chandrabhan and Khudda but by other persons also. It appears that after obtaining possession over the plot in dispute in June 1950 these persons were at first afraid to go to the field to cultivate it, but at last they decided to cultivate it and the result was that they were beaten by the other side and their apprehensions were justified. We are not satisfied that Phooljari and Gangadin were the aggressors and first beat Chandrabhan and Khudda. On the contrary, we are of opinion that these persons were cultivating their field and Chandrabhan and others asked them to stop ploughing and when they did not stop

ploughing it they were beaten by Chandrabhan and his companions and it was in their self defence that they too managed to inflict one or two minor injuries on the assailants who outnumbered them.

(9) It was argued on behalf of the appellants that Chandrabhan and others were not actually ejected from the plot in question and that they had been cultivating it from before in their 'bona fide' right and as Phooljari and Gangadin wanted to dispossess them forcibly from it they were justified in defending their property and also their person and therefore they did not commit any offence even if they beat Phooljari and Gangadin which resulted in their death.

From the evidence of Sri Narain Sarup. Amin who was examined as a court witness, it is clearly proved that actual possession over the disputed plot was delivered to Phooljari and Sheodayal against Chhotey accused on 8-6-1950 on the spot and that proclamation of it was made by beat of drums. He also proved the 'dakhalnama' Ex. P15. According to the prosecution evidence the dakhalnama was signed by the accused Shri Dayal, though Shri Dayal, in his statement, denied his signature on it.

(10) On behalf of the appellants it was argued that there was nothing on the record to show that the Amin had given any notice to the judgment-debtors before the delivery of possession or that they had knowledge of it. It was contended that according to R. 104 framed by the Board of Revenue under the U. P. Tenancy Act for the guidance of the amin it is necessary that such notices should have been sent. The Amin was not questioned on this point and it is therefore not known whether such notices were sent or not.

But even if such notices were not sent that would not invalidate the delivery of possession made by the Amin. The rules framed under S. 104 are merely for the guidance of the Amin and are not mandatory provisions the omission of which would invalidate the delivery of possession effected by the Amin in accordance with the provisions of the Code of Civil Procedure. We are, therefore, of opinion that from the evidence of the Amin, Sri Narain Sarup, it has been satisfactorily proved that actual possession was delivered to Gangadin and Sheodayal over the plot in dispute on 8-6-1950 in execution of the decree for ejectment against Chhotey accused.

The other accused, Chandrabhan and Shri Dayal are related to Chhotey accused. We do not think that after the decree for ejectment and the consequent delivery of possession the accused Chhotey, Chandrabhan or Shri Dayal had any right to the plot in dispute. They have not produced any evidence to show that after the decree for ejectment or after the 'dakhalnama' any new right was conferred on them by Gangadin or Sheodayal. In the absence of any such evidence, they were mere trespassers and as such they had no right to cultivate the plot in dispute, and, if they wrongly cultivated it and, when the rightful owners, namely, Gangadin and Phooljari, went to cultivate it they had no right to stop them from doing so. In our opinion no question of right of defence of property arose in their favour. Such a right arises only in the case of rightful owners and not in the case of trespassers, particularly against the rightful owners.

(11) There is no doubt that if the appellants had wrongfully taken possession over the plot in dispute even after their ejectment, Phooljari and Gangadin had no right to take the law into their own hands and beat them, and if they actually beat them first and the accused beat them in self-defence then it can be said that they had some right. But in view of our finding above that Chandrabhan and others beat Phooljari and Gangadin when they did not stop ploughing at their request, no question of the right of self-defence arises in their favour.

(12) The right of private defence only arises against acts which constitute an offence except in certain specified circumstances. The right of private defence of person extends to acts which amount to an offence affecting the body of the person exercising the right or the body of any other person. The right of private defence of property covers cases of acts which are offences falling under the definitions of 'theft', 'robbery', 'mischief' or 'criminal trespass' or an attempt to commit any of these.

(13) As far as the right of private defence of person is concerned, the evidence for the prosecution is, as stated above, that the accused beat Phooljari and Gangadin when the latter did not stop ploughing at the request of the accused. In view of the large number of accused persons, and the presence of only Phooljari and Gangadin on the other side, it is wholly improbable that Phooljari and Gangadin would think of striking the members of the party of the accused. The number of injuries supports the prosecution theory, inasmuch as 21 injuries were inflicted on Phooljari and Gangadin, whereas the injuries inflicted on the persons of two of the accused were merely nominal. In this state of facts and circumstances, the case of private defence of person argued by the learned counsel for the appellants has no substance.

(14) As regards the private defence of property, the position, as we have already stated, is that the act of Phooljari and Gangadin should amount to an offence before the accused could have any right of private defence against such an act. Phooljari and Gangadin had obtained possession through court on 8-6-1950. and, if on 28-7-1950, they went to plough their field, it could not be said that they were committing any offence. The learned counsel for the appellants has urged that one of the prosecution witnesses has admitted that Chandrabhan appellant and his son Chhotey Lal had cultivated the field about four days before the occurrence.

We are not inclined to believe this statement, because Phooljari and Gangadin, having taken possession immediately through court, are not likely to have submitted to this ploughing of the land by Chandrabhan and Chhotey Lal. Further, the statement of the Sub-Inspector of police shows that the whole field had not been ploughed up, but only a small portion of it had been ploughed. The correct fact appears to be that the party of the accused for the first time decided to plough up the field on the date of the occurrence, and there was resistance on the part of Phooljari

and Gangadin, which led to their being given a serious beating causing the death of both of them.

(15) Under the circumstances, the accused had no right of private defence of property either. Assuming, that they had cultivated the land four days earlier, and Phooljari and Gangadin tried to cultivate it on the date of the occurrence, Phooljari and Gangadin were acting 'bona fide' in the exercise of their right, and were not committing any offence of criminal trespass, even if the possession of the land on that date was with Chandrabhan appellant. In order to make out an offence of criminal trespass, it has to be proved that the trespass was made with intent to intimidate, insult or annoy. No such intention could be presumed in the case of Phooljari and Gangadin, because their entry was clearly in the 'bona fide' exercise of their right. See — 'Supdt. and Remembrancer of Legal Affairs, Bengal v. Bhagirath Mahato', AIR 1934 Cal 610 (A).

(16) Learned counsel for the appellant have relied on — 'Rex v. Horam', AIR 1949 All 564 (B), in support of their contention that even if they were trespassers they had a right of self-defence. In our opinion this has no application to the facts of the present case. In that case the trespassers had cultivated the land in spite of a decree for ejectment against them and the decree-holder instead of filing a suit for ejectment against them or taking other legal proceedings used force against them and beat them in order to dispossess them. This is not the case here.

(17) It has further been argued that from the evidence of Kedari and Ram Din it appeared that the accused Chandrabhan and others had been cultivating the plot in dispute from four days before and on the day in question also they had been cultivating it from before and Phooljari and Gangadin came afterwards. There is no doubt that the evidence of these two witnesses is to that effect. The evidence of Ram Din that Chandrabhan and others had been cultivating the plot in dispute from before on the day of occurrence cannot be accepted in view of his statement that he reached the spot when the accused were beating Phooljari and Gangadin with lathis and that he did not know how the fight started.

It appears somewhat improbable that Chandrabhan and Khudda had been cultivating the field in dispute from before on the day of occurrence and that Phooljari and Gangadin came afterwards. If this is correct then there is no explanation about the number of injuries on the person of Phooljari and Gangadin. We have already said above that Chandrabhan and Khudda could not have inflicted all those injuries on them and that there were many other persons with them. This indicates that Phooljari and Gangadin were cultivating the plot on the day of occurrence when Chandrabhan with his party reached there and assaulted them and this alone explains the number of injuries on Phooljari and Gangadin. Even if it is accepted that Chandrabhan and Khudda had been cultivating the disputed plot on the day of occurrence from before and Phooljari and Gangadin went there after them and started ploughing it from the other side when they were beaten by Chandrabhan and others, that does not in any way affect the liability of Chandrabhan and his companions. They had no right to stop Phooljari and Gangadin who were the rightful owners from cultivating the plot and to beat them when they did not comply with their demand.

(17a) The question which is now left for consideration is which of the appellants took part in the beating. As regards Chandrabhan and Khudda, there is no doubt that they were present on the scene of occurrence. They admitted this fact. As regards Murli and Reoti who are closely related to Khudda it has been stated that they have been falsely implicated on account of their relationship with Khudda. There is no doubt that they are closely related to him. Murli is the father of Khudda and Reoti his brother.

It has been argued that they may have been falsely implicated on account of the relationship though at the same time there is also the possibility that they may have taken part in the fight with Khudda. They are both named in the first information report which was made shortly after the occurrence. They have been named by P. Ws. Banwari, Sheo Dayal, Kedari mukhia and Ram Din. It has been argued on their behalf that the evidence of Banwari and Sheodayal was not reliable as they were related to the deceased. We do not think that merely because they were related to them their evidence should be discarded. Nothing has been brought out in their cross examination as to why they would falsely implicate these two accused. There is also no reason why Kedari mukhia and Ram Din have named them. It has not been alleged that there was any enmity against these two appellants. We are, therefore, of opinion that there is sufficient evidence against them and that they took part in the beating.

(18) On behalf of Bhola accused it was argued that he bad been implicated because he made the proclamation at the time of the re-delivery of possession to Chandrabhan and that Bansia who is his cousin has also been implicated because of his relationship with Bhola. There is no doubt that on the evidence on the record it is proved that Bhola made the proclamation when possession was re-delivered to Chandrabhan. We do not think that he was implicated in this case simply because he had made the proclamation on the occasion of the re-delivery of possession to Chandrabhan. Moreover, if the complainant had any grievance against Bhola because he made the proclamation under the orders of the Amin at the time of re-delivery of possession, there does not appear any satisfactory reason why Bansia who is his distant cousin should have been implicated. There was no direct motive for the complainant and the prosecution witnesses to implicate him.

It was argued on behalf of Bansia that the accused Chhotey had been acquitted by the lower court because he was not named at first by Ram Din (P. W.) in his statement before it and that his name was mentioned only at the suggestion of the counsel for the prosecution, and when Chhote was acquitted on this ground, Bansia too should have been acquitted as he too was named by Ram Din

before the lower court after his name was suggested by the counsel for the prosecution. It appears from an examination of the statement of Ram Din made before the lower court that he at first forgot to name Chhote and Bansia before the lower court and when he was reminded of his statement in the committing court, where he had named these persons along with the other accused, that he said that they too were present and took part in the occurrence. It cannot be said that Chhote and Bansia had been implicated in the case subsequently, because their names were mentioned at the earliest opportunity in the first information report and also in the court of the committing Magistrate.

It appears that while giving the names of the accused Ram Din forgot the names of Chhote and Bansia and when he was definitely asked whether they were also among the assailants or not, then he mentioned their names. We do not think that merely because Ram Din forgot to mention their names in the first instance in the lower court it is proved that they were not there. So far as Chhote is concerned, he is a close relation of Chandrabhan and it was he against whom the suit for ejectment had been decreed and possession had been obtained. We do not think that the reasoning given by the lower court for the acquittal of Chhote is correct.

In the circumstances, we are of opinion that merely because Ram Din forgot to mention the name of Bansia at the first instance in his statement before the lower court though he had mentioned his name in the committing court and though he was mentioned in the first information report and in the dying declaration, Ex. P8, made by Gangadin, is no sufficient reason for his acquittal.

(19) About the appellant Shri Dayal, it has been argued that P. W. Banwari in his cross-examination said that he stated in the committing court that this accused was among the persons who first assaulted Phooljari and Gangadin. But his statement before the committing court discloses that he had not made this statement there. It appears from a perusal of his statement before the committing court that he had mentioned the name of Shri Dayal accused among the persons who were present at the time of the occurrence and took part in it.

It is possible that he should not have been one of the accused who first assaulted Phooljari and Gangadin and may have joined them later on. This accused is of the family of Chandrabhan. He too is named in the first information report and in the dying declaration of Ganga Din. It appears improbable that he has been falsely implicated though he was not present at the spot. It was argued on his behalf that his case was parallel to that of Ram Sahai accused who has been given the benefit of doubt and acquitted. In our opinion this contention is not correct. Ram Sahai accused was not named in the first information report and it was merely on account of this reason that he was given the benefit of doubt. In our opinion, there does not appear any satisfactory reason to disbelieve the prosecution evidence against him. We are, however, of opinion that he was present at the place of occurrence and took part in it.

(20) In view of what has been said above, we are satisfied that the appellants formed an unlawful assembly with the common object of beating Phooljari and Gangadin when they did not stop ploughing the field in question on their demand and beat them which caused their death. They have, therefore, been rightly convicted under S. 147 and S. 302 read with S. 149, I. P. C. The appeal is dismissed.

(21) As the appellant Chandrabhan is on bail he shall surrender to it and serve out his sentence.

(22) Leave to appeal is refused.

B/R.G.D. Appeal dismissed.

A. I. R. 1954 ALL 43 (Vol. 41, C. N. 32)

(LUCKNOW BENCH)

MALIK C. J. AND AGARWALA J.

Maiku Lal and others, Appellants v. Munni Lal, Opposite Party.

Appln. No. 60 of 1948, D/- 30-7-1953, to revise order of Civil J., Mohanlalganj, Lucknow, D/- 13-4-1948.

Civil P. C. (1908), Ss. 115, 151 — Interference with orders under inherent power.

Money decree in favour of L and M — Deposit of whole decretal amount by judgment-debtor — M applying for half the amount — L pleading that whole amount belonged to B of whom L and M were mere benamidars — Also that M was a member of a joint Hindu family with L and others and half amount could not be handed over to M without disruption in the family — Court holding that he could not go into those questions at that stage and allowing M to withdraw half amount on furnishing security to safeguard interests of the other party — Court held had authority to pass that order under S. 151 if under no other sections — Order held was just and proper and could not be interfered with under S. 115. (Para 1)

Anno: Civil P. C., S. 115 N. 20; S. 151 N. 10.

Mohd. Naziruddin, for Appellants; Uma Shankar Srivastava, for Opposite Party.

MALIK C. J. : This is an application under S. 115 of the Code. A decree was passed on 5-11-1941 in favour of Lalta Prasad and Manni Lal for Rs. 36,545/5/- with costs and interest. The judgment debtor deposited the whole of the decretal amount on 13-1-1942. After the deposit Manni Lal made an application that half of the decretal amount may be paid over to him. The other decree-holder Lalta Prasad, however, made attempts to get the entire decretal amount attached by the Income Tax authorities in lieu of the Income tax payable by the firm Messrs. Bhagwandas Manni Lal. After some delay in the enquiry whether income-tax was really due and whether the income was payable by the decree-holders the application for refund of half of the decretal amount came up for hearing. Lalta Prasad then raised no objection that the money did not belong to either Manni Lal or himself but that the whole of the decretal amount belonged to Bhagwan Das

who had advanced the money to the judgment-debtor, Ram Janki and the names of Lalta Prasad and Manni Lal in the mortgage deed were merely as 'benamidars'.

It was further pleaded that Manni Lal was a member of a Joint Hindu family with Lalta Prasad and others and a half share in the decretal amount could not be handed over to Manni Lal without disruption in the family and adjudication as to the share of Manni Lal in joint family assets. The learned Judge rightly held that he could not go into the question at that stage whether Bhagwan Das was the beneficial owner of the decree or the decretal amount belonged to Lalta Prasad and Manni Lal nor could he go into the question whether there was a joint Hindu family and the money belonged to that family and adjudicate on the share in that case payable to Manni Lal. All these matters, the learned Judge thought could well be left to further litigation if any of the parties so desired. The learned Judge, therefore, thought it just and proper that Manni Lal should be allowed to withdraw a half share in the decretal amount on furnishing security in the sum of Rs. 20,000/- to safeguard the interest of the other party who might be entitled to claim the amount. It is urged by the learned counsel that this order was not in accordance with any provisions of the Code and was without jurisdiction.

The money was in deposit in Court and was payable to the decree-holders and it cannot be said that by allowing half of the amount to be paid to one of the two decree-holders the learned Judge did something which he was not authorised to do under the law. We think that the order could be passed by him certainly under S. 151 of the Code if under no other sections. In any case it is a just and proper order and there is no reason why we should interfere under S. 115, Civil P. C.

(2) The application is, therefore dismissed with costs.

C/H.G.P. Application dismissed.

A. I. R. 1954 ALL 44 (Vol. 41, C. N. 33)

RAGHUBAR DAYAL AND B. D. MUKERJI JJ.

State, Appellant v. Shri Krishna Pd. Dar, Respondent.

Criminal Govt. Appeals Nos. 540 and 541 of 1951, D/- 4-3-1953, against order of City Magistrate 1st Class, Allahabad, D/- 30-11-1950.

(a) Factories Act (1948), S. 2 (1) — Workers — Meaning.

Only such persons can be classified as workers of a factory who are either directly or indirectly or through some agency, employed for doing the work of any manufacturing process or cleaning, etc., with which the factory is concerned. It does not contemplate the case of a person who comes and that too without the knowledge of the factory owner or without his intervention, either directly or indirectly, and does some work on the premises of the factory. (Para 6)

(b) Factories Act (1948), S. 52 — Breach of, by persons over which employer has no control.

Only such workers alone are contemplated by S. 52 over whom the particular employer has control, not only in the matter of taking work from them, but also in the matter of their employment, leave, holidays, etc., for if that had not been so the Legislature could not have made an employer responsible in the event of there being a breach in regard to lack of substitution of a holiday for a Sunday in the event of the worker being made to work on a Sunday. It is inconceivable that a person should be held responsible for something which he has no control over. (Para 9)

No presumption can be raised that the persons are the workers of the factory from the mere fact that they are found working on the portion of the premises of the factory. (Para 8)

A, a publishing company, engaged B, a contractor to do the work of binding of their printed volumes. The work was not connected with their manufacturing process and was to be done by B outside the premises of A company. B, without the knowledge of the manager of A company brought some workers on the companies premises on a holiday and those persons were found to be working there by the Factory Inspector who prosecuted the company's manager for a breach of S. 52.

Held that as the manager had no control over B's workers, they were not workers as contemplated by S. 52 and the manager could not be convicted of any breach of the section. AIR 1947 Nag 83 and AIR 1934 Cal 546, Distinguished. (Paras 9, 11)

J. R. Bhatt. Asst. Government Advocate, for Appellant; S. N. Katju, for Respondent.

CASES REFERRED TO:

(A) ('47) AIR 1947 Nag 83: 47 Cri LJ 784
(B) ('34) AIR 1934 Cal 546: 35 Cri LJ 1401

B. D. MUKERJI J.: These two appeals by the State arise out of more or less the same facts and consequently we propose to dispose of both these appeals by this common judgment.

(2) In Appeal No. 540 there is only one respondent, namely, Sri Krishna Prasad Dar, Manager Allahabad Law Journal Co. who has figured in both the cases. In appeal No. 541 of 1951 there are two respondents, namely, Rameshwar Prasad Bajoria, resident of 9 Dalhousie Square Calcutta, who is said to be the occupier of Allahabad Law Journal Co. Ltd. and Sri Krishna Prasad Dar, Manager of the Allahabad Law Journal Co. Ltd.

(3) The facts which have given rise to these two Government Appeals lie within a very narrow compass and they may be stated as follows: On 25-6-1950, which was a Sunday, Mr. M. L. Bhagat, Inspector of Factories, paid a visit to the Allahabad Law Journal Co. Ltd. and discovered eleven persons working in the outer portion of the factory building in a verandah. He found that the Chaukidar or the Darwan, as he was called, was also present at the time. The Inspector found the main factory premises locked and he also found that the persons who were working at that time were busy binding certain books. It is pointed out, however, that these men were not using any "power" or machinery of the factory,

which was at that time locked away from all accessibility of these persons. He called for the "Register of Factory Workers" as also the "Inspection Book". These, however, could not be produced because neither the Manager, nor anybody responsible for running the Press, was present at the time.

(4) The Inspector of Factories made a report in regard to this matter and as a consequence of his report, two complaints were filed against Sri Krishna Prasad Dar and one complaint against Rameshwar Prasad Bajoria. In one of the complaints — the complaint which has given rise to Appeal No. 541 of 1951 — the charge was for the breach of S. 52, Factories Act, 1948, namely, Act 53 of 1948. In the other complaint, which has given rise to Appeal No. 540 of 1951 there was a complaint for a breach of S. 62, Factories Act, read with R. 97 of the Act.

(5) Section 52, Factories Act, is in these words: "52 (1) No adult worker shall be required or allowed to work in a factory on the first day of the week (hereinafter referred to as the said day), unless:

(a) he has or will have a holiday for a whole day on one of the three days immediately before or after the said day, and

(b) the manager of the factory has, before the said day or the substituted day under cl. (a), whichever is earlier,

(i) delivered a notice at the office of the Inspector of his intention to require the worker to work on the said day and of the day which is to be substituted, and

(ii) displayed a notice to that effect in the factory: Provided that no substitution shall be made which will result in any worker working for more than ten days consecutively without a holiday for a whole day....."

It is not necessary to quote the other portions of this section.

(6) It appears from this section that a worker cannot be permitted or asked to work on a Sunday unless arrangement has been made to give him a holiday in substitution of the Sunday on which he is made to work; the section further requires that previous notice of this desire of the factory to employ a particular worker on a Sunday and substituting the Sunday by another off-day has to be communicated to the Inspector of Factories before he is made to work. The prohibition contained in the section, however, applies to a worker in a factory. "Worker" has been defined in S. 2 (1) of the Act as follows:

"(1) 'worker' means a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process."

From the definition it is clear that only such persons can be classified as workers of a factory who are either directly or indirectly or through some agency, employed for doing the work of any manufacturing process or cleaning, etc. with which the factory is concerned. It does not contemplate the case of a person who comes and that too without the knowledge of the factory owner or without his intervention, either directly or indirectly, and does some work on the premises of the factory. Section 62 of the Act enjoins:

"No adult worker shall be required or allowed to work in any factory otherwise than in accordance with the notice of periods of work for adults displayed in the factory and the entries made beforehand against his name in the register of adult workers of the factory."

According to the case for the prosecution the persons who were found in a cetain portion of the Law Journal Press premises, had no such notice of periods of work displayed in the factory in regard to them. Under Rule 97 of the Rules framed under the Factories Act (we may mention that the Rules that apply to the present case were the rules that were framed under the Factories Act of 1934, because the Rules framed under the Present Act came into force in 1951) the Manager of a factory was required to maintain a register which indicated certain details and contained certain information in relation to the workers of the factory. The case against Sri Krishna Prasad Dar was that, as Manager, he employed workers on a Sunday without complying with the provisions of the Act with respect to making workers work on a holiday; the charge further was that the register of the factory did not disclose the names and the particulars in regard to the eleven persons who were found working on a certain portion of the premises of the Allahabad Law Journal on 25-6-1950. There were certain other minor infringements to which attention was drawn by the Inspector of Factories, namely, the fact that certain registers were not available to him on demand. We do not consider it necessary to go into the question of these registers, because no particular charge against the respondents hangs thereby.

(7) The main charge, therefore, against the respondents was that they made eleven persons work on a Sunday in contravention of the Factories Act; further that there were no appropriate entries in the registers of the factory relating to these alleged workers. The defence of the Manager as also the Occupier was that these persons who were found by the Inspector on a certain part of the premises of the Allahabad Law Journal Co. Ltd. were not workers of the Company nor had they been employed directly or through any agency by the Company. With regard to the entries in the registers it was stated that obviously the names and particulars in relation to these persons could not have been in the registers maintained by the Company, inasmuch as these persons were not the employees or workers of the Company. As regards the non-production of the various registers called for by the Inspector at the time of his visit, it was said that his visit having been on a holiday, the premises were locked and closed and no officer of the Company being present on the premises, obviously these registers could not have been produced. The defence of the Manager further was that he had given a contract to one Abdul Rahim for binding some volumes and that Abdul Rahim was required to remove the unbound volumes from the premises of the Company to his own premises, bind them there and then hand over the finished bound volumes to the Company, and that Abdul Rahim instead of removing the unbound volumes to his place, without the knowledge of the Manager or anybody else of the Company, brought his labourers on to the premises and started getting work done by these men on that particular day. The persons who were found on the premises were the persons who had been engaged by Abdul Rahim in order to complete a contract which he had taken from the Company. The contract which Abdul Rahim had

was a contract to do a particular piece of work, work not connected directly or indirectly with the process of manufacture going on during the relevant period in the factory but work which the factory had already completed, namely, the printed volumes, which had to be put through a further process of manufacture in order to make them marketable. It was, according to the defence, an independent act of manufacture which had been undertaken by Abdul Rahim by entering into that contract with the Company. It is important to note that Abdul Rahim was, on the application of Sri Krishna Prasad Dar, Manager of the Allahabad Law Journal Co. Ltd., made a party to the proceedings in the court below. As a matter of fact, Abdul Rahim became a co-accused with Sri Krishna Prasad Dar in one of the cases. Abdul Rahim admitted the fact that the labourers who were doing the work of binding in the verandah of the factory were his labourers and that they were working in the verandah of the factory 'against' the instructions of Mr. Dar. On behalf of the prosecution no evidence was produced to indicate that any of the persons found by the Inspector on the premises on that particular Sunday were the employees or workers of the Allahabad Law Journal Company. The Inspector apparently made inquiries from the persons he found working on the premises but his inquiries did not reveal the fact that those persons were the employees, either directly or indirectly, of the Allahabad Law Journal Company.

(8) On behalf of the State it is contended that once persons are found working on some portion of the premises of a factory, then a presumption must be raised that those persons are the workers of the factory and that unless it is proved positively that they are not workers, the liability of the Manager of the Company cannot cease. Reliance was placed on the wording of S. 2 (1), especially the words "employed..... through any agency".

It was contended by Mr. Bhatt that the fact that Abdul Rahim had employed them for getting the work of Allahabad Law Journal Co. completed would make those persons the workers of the Allahabad Law Journal Co. through the agency of Abdul Rahim. We are unable to agree to this interpretation of S. 2 (1). In our judgment, S. 2 (1) contemplates cases where the persons are either employed directly by the Management of the Company for doing the manufacturing processes of the company or cases where the Company employes some agency in order to get employment of labour for itself, labour which is directly used in the processes of manufacture which that particular Company undertakes.

Reliance was placed on the decision of — 'Provincial Government, C. P. and Berar v. R. Robinson', AIR 1947 Nag 83 (A). In this case the Manager, Robinson, was prosecuted for certain breaches of certain sections of the Indian Factories Act. The trial Court acquitted Robinson and an appeal was thereafter filed by the then Provincial Government against the acquittal to the Nagpur High Court. In that case the Electric Supply Co. was having certain additions made to certain plants and for the purposes of getting this done, they had given a contract to Messrs. Babcock and Wilcox of Calcutta. Babcock and Wilcox had really made the infringements complained of. The point that was raised on behalf of the Electric Supply Co. was that the work which Babcock and Wilcox were doing on the premises was not work in relation to the manufacturing process of the Company and, therefore, no offence under the Indian Factories Act had been committed by the Company. This contention of the Electric Supply Co. was overruled by the High Court on the ground that "manufacturing process" had been defined in the Act and that it was inclusive of all alteration, repair, cleaning, breaking up, adapting, etc. within the definition given in the Act and since Babcock and Wilcox were admittedly doing work which fell within the purview of the words used in the definition of "manufacturing process", the liability of the Electric Company was made out. The question whether the workmen on the staff of Babcock and Wilcox of Calcutta could be deemed to be the workers of the Electric Supply Co. Jubbulpore, was not pointedly raised in the case, although reference was made to the definition of "worker" contained in the Factories Act. It was noticed that the word "worker" included a person employed in any manufacturing process or any kind of work whatsoever incidental to or connected with the manufacturing process or connected with the subject of the manufacturing process. It was further pointed out that "worker" included a person who was employed in any kind of work connected with the subject of the manufacturing process. The point, however, was not brought out as to whether or not the workers then employed by Babcock and Wilcox could be deemed to be workers of the Electric Supply Co. But, it does appear that the learned Judges assumed, on the facts of that particular case, that the workers so employed were to be deemed workers of the Jubbulpore Electric Supply Co.

(9) In the case before us it could not be said, at any rate not in the state in which the evidence in this case is, that the workers who were found on the premises of the Allahabad Law Journal Co. or within its precincts were the workers of the Allahabad Law Journal Co. The scope of S. 52, Factories Act, makes it clear to us that only such workers alone are contemplated by that section over whom the particular employer has control, not only in the matter of taking work from them, but also in the matter of their employment, leave, holidays, etc., for if that had not been so the Legislature could not have made an employer responsible in the event of there being a breach in regard to lack of substitution of a holiday for a Sunday in the event of the worker being made to work on a Sunday. It is inconceivable that a person should be held responsible for something which he has no control over. In this particular case the Allahabad Law Journal Co. could not possibly control the leave of the persons who were employed by Abdul Rahim to do a particular job, for the Allahabad Law Journal Co. How could the Allahabad Law Journal Co. know whether or not the workers who were employed by Abdul Rahim on that particular date had or had not "substitution leave" in lieu of the work that they were putting in on a Sunday? In this particular case we have this fact clearly found by the trial Court, a finding with which we are in agreement, that the workers employed by Abdul Rahim were in the precincts of the Allahabad Law Journal Co. without the knowledge and without the permission of the Manager or the occupier of the manufacturing concern.

(10) Reliance was also placed by Mr. Bhatt on the decision of — 'Ramdit Mall v. Emperor', AIR 1934 Cal 546 (B), which is a decision by Costello, J. This decision is not very helpful for our present purposes for the reason that in that

case Costello, J. was dealing with the provisions of the Factories Act of 1911. Some of the provisions of the Factories Act of 1948, particularly the provisions in point, are in different words from the provisions of the Factories Act as it was in 1911.

(11) In the result, we are of the opinion that the decision of the trial Court in Government Appeal No. 540 of 1951 was right in so far as Sri Krishna Prasad Dar could not have been convicted for the contravention of S. 62, Factories Act, 1948. We are also of the opinion that the decision of the trial Court was equally right in Government Appeal No. 541 of 1951, inasmuch as the respondents Rameshwar Prasad Bajoria and Sri Krishna Prasad Dar could not have been convicted under S. 52, Factories Act. We see no merits in either of the two appeals preferred by the State Government and we accordingly dismiss both the appeals.

B/D.R.R. Appeals dismissed.

A. I. R. 1954 ALL 47 (Vol. 41, C. N. 34)

MALIK C. J. AND CHATURVEDI J.

State v. Ballister Singh and others, Respondents.

Govt. Appeal No. 315 of 1953, D/- 7-8-1953, from order of 1st Addl. S. J., Bareilly, D/- 8-9-1952.

(a) Criminal P. C. (1898), Ss. 421 and 417 — "May dismiss the appeal summarily."

Appeal filed under S. 417 by State Government — S. 421 applies and High Court has power to dismiss it summarily if it is not satisfied that there are sufficient grounds for admitting it and issuing notice to the other side. (Para 3)

Anno: Cr. P. C., S. 421 N. 1, 3.

(b) High Court Rules and Orders — High Court Rules and Orders (Allahabad), Ch. 18, R. 2 — Summary dismissal of Criminal Appeals — (Criminal P. C. (1898), S. 421).

Jurisdiction of High Court under S. 421, Criminal P. C., to dismiss a petition of appeal is not affected by the Rules — Appeal cognizable by bench of two Judges — Clauses (2) to (6) and the latter parts of Cl. (1) of Rule 2 deal with civil matters only and do not apply to criminal matters and hence the words "motion for the admission of memorandum of appeal" does not include a criminal appeal, which is specifically provided for by Cls. (7), (8) and (9) of that Rule — Therefore, the appeal cognizable by a bench of two Judges can be summarily dismissed only by that bench and not by the single Judge before whom the petition of appeal is presented for admission. (Paras 6, 8)

Anno: Cr. P. C., S. 421 N. 1, 3.

D. Puniyal Deputy Govt. Advocate, for the State; Bishambhar Dayal (amicus curiae), for Respondents.

CASE REFERRED TO:

(A) ('53) AIR 1953 All 211: 1953 All LJ 166: 1953 Cri LJ 571

MALIK C. J. The point referred to this Bench by a learned single Judge is whether a Government Appeal filed under Section 417, Criminal P. C., can be summarily dismissed under Section 421, Criminal P. C., by a learned Judge sitting alone.

(2) The practice in this Court has been that all criminal appeals, whether cognizable by a Bench of two learned Judges or by a learned single Judge, are presented before a learned Single Judge authorised to receive applications in criminal matters who admits the appeals, directs notices to be issued and cases cognizable by a Bench of two learned Judges are then listed before such Bench for final disposal after service of notice, while cases cognizable by a learned single Judge are listed before a single Judge.

(3) That criminal appeals, whether filed by an accused against an order of conviction or by the State against an order of acquittal, can be dismissed summarily under Section 421, of the Code cannot be doubted, though at one stage the learned Deputy Govt. Advocate urged that S. 421 did not apply to an appeal under Section 417 of the Code. This submission, however, has no force and learned counsel had to concede that Section 421 applied to all appeals. Chapter 31, Criminal P. C., provides for appeals and Sections 405 to 418 lay down what orders or judgments are appealable and to which court. Section 417 authorises the State Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court. Section 418 then provides that an appeal lies both on questions of fact as well as on questions of law. Sections 419 and 420 then deal with the question how appeals are to be presented.

Section 419 lays down that every appeal shall be made in the form of a petition in writing presented by the appellant, or his pleader, and every such petition has to be accompanied by a copy of the judgment or order appealed against; and Section 420 deals with appeals as presented by the appellants in jail. Section 421 deals with all appeals whether presented under Section 419 or Section 420, which would include an appeal filed by the State Government against an order of acquittal. Section 421 lays down that on receiving the petition and copy of the order under Section 419 or S. 420, the appellate court shall peruse the same and if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily. Then there is a Proviso which requires that such summary dismissal can only be after the appellant or his pleader has been given an opportunity to be heard, and the second part of the section gives the Court the power to send for the record, if it thinks necessary, before dismissing the appeal summarily, but it is bound to do so.

Section 422 then provides that if an appeal has not been dismissed summarily then notice is to be issued to the other side and the case is to be heard and disposed of in the manner provided for in the Code. There can, therefore, be no doubt that the Court has the power to dismiss an appeal filed under Section 417 by or on behalf of the State Government summarily, if it is not satisfied that there are sufficient grounds for admitting it and issuing notice to the other side.

(4) The question, however, remains whether such an order of summary dismissal can be passed by a learned single Judge or by a Bench of two Judges. This question has to be decided in accordance with the Rules of the Court. Chapter V deals with jurisdiction of Judges sitting alone or in division courts and reliance is placed on Chapter V, Rule

2 (1) and it is said that a motion for the admission of a memorandum of appeal is cognizable by a learned single Judge whether such a motion is made in a criminal or a civil matter. The question, therefore, is whether a motion for the admission of a memorandum of appeal under Rule 2 (1) of Chapter V includes a petition of appeal in a criminal matter. On behalf of the State, it is urged that clauses (i) to (vi) deal with civil matters and clauses (vii), (viii) and (ix) deal with criminal matters, and this Rule must be divided, therefore, in two parts, the first part dealing with civil matters and the second part dealing with criminal matters.

In support of this interpretation it is urged that in a criminal matter there is no need for a motion for the admission of a memorandum of appeal and the High Court Rules as also the Criminal Procedure Code has used the words "petition of appeal" and not "memorandum of appeal", when referring to appeals in Criminal matters and it is further pointed out that the context in which these words occur goes to show that they were intended to apply only to civil appeals and not to criminal appeals.

(5) A reference to the relevant provision of Civil P. C., would show that Order 41, Rule 9 provides for the presentation of a memorandum of appeal to the appellate court or the proper officer of that court who has to endorse on it the date of presentation and register the appeal in a book to be kept for the purpose. When the memorandum of appeal is in order and it is presented before the court or a proper officer of that court he has to admit it, endorse the date of presentation and register the same in a book known as the Register of Appeals.

The next step is that after the memorandum of appeal has been admitted the appeal is put up again under Order 41, Rule 11, Civil P. C. and the appellate court may dismiss the appeal without sending notice to the other side, but this has to be done after fixing a date for hearing the appellant or his pleader and giving him an opportunity to be heard. If, however, the appeal is not dismissed summarily under Order 41, R. 11 then notice has to be issued under Rule 12 to the other side fixing a date for the hearing of the appeal. Order 41 thus provides for three stages in a civil appeal, the first, when a memorandum of appeal is presented, its admission and registration; the second, its being put up on a fixed date for summary dismissal under Order 41, Rule 11; and third, if the court does not consider it proper to dismiss it summarily and decides to issue notice, then the case is to be heard on a date fixed after service of notice on the other side.

(6) The Criminal Procedure Code, on the other hand, uses the words "petition of appeal" and not "memorandum of appeal" in Section 419 and there is no provision in Criminal P. C., similar to Order 41, Rule 9, Civil P. C. Section 421, Criminal P. C., provides that

> "On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily";

and Section 422 provides that if the appeal is not dismissed summarily then notice of appeal has to be issued and the case has to be decided after notice to the other side.

Chapter 18 Rule 1 of the High Court Rules which deals with appeals and applications in criminal matters, also uses the words "petition of appeal" which has to be presented in Court. Rule 2 then provides for a motion for the admission of the petition of appeal and lays down that where the petition of appeal is in order the Court may make an order admitting it and directing notice to be issued, while in the case of a revision it provides for dismissal of the application even without issue of notice. By the Rules of the Court, the jurisdiction under Section 421, Criminal P. C., could not be taken away and a Proviso has, therefore, been added that it does not preclude the Bench from dismissing any petition of appeal under Section 421 summarily if it thinks it necessary.

Though the Bench has, therefore, the power to dismiss an appeal summarily under Section 421, the Rules contemplate that an appeal would normally be admitted, but Chapter 18 of the Rules of Court does not assist us in deciding the question whether the power under Section 421, Criminal P. C., can be exercised by a Bench of two learned Judges or by a learned single Judge inasmuch as the word 'Bench' has been defined as including a single Judge also. Some indication, however, is given in clause (2) of Rule 13 of this Chapter which has again attempted to preserve the old practice in jail appeals that in cases cognizable by a Bench of two Judges the order of a Judge sitting alone has to be laid before another Judge for concurrence before the order is issued, which clearly indicates that a jail appeal cannot be dismissed summarily by a single Judge.

(7) If the contention of the learned Deputy Government Advocate is accepted that the words " a motion for the admission of a memorandum of appeal" do not include a criminal appeal, then a single Judge clearly has no jurisdiction to dismiss it summarily. Clauses (ii) to (vi) of Rule 2 of Chapter V of the High Court Rules clearly deal with civil matters and the subsequent parts of cl. (1) of Rule 2 cannot refer to criminal matters as they deal with cross-objections or ex parte interim orders on applications. We are inclined to the view that the words "a motion for the admission of a memorandum of appeal" were not intended to include a criminal appeal for which specific provisions were made in clauses (7), (8) and (9) of Rule 2.

(7a) Our attention has been drawn to a judgment of a learned single Judge in — 'State v. Ganga Sahai', A. I. R. 1953 All 211 (A). We agree with the learned Judge that Section 421, Criminal P. C., entitles the Court to dismiss an appeal summarily but we regret that we are not able to agree that such an order can be passed by a Judge sitting alone. Our interpretation of the rules of the Court is in accordance with the old established practice of this Court and in the absence of any clear indication to the contrary we do not think it will be proper to assume that the Rules intended to make a departure from the old practice.

(8) We are, therefore, of the opinion that a petition of criminal appeal can be dismissed under S. 421, Criminal P. C., summarily but in cases which are cognizable by two Judges such an order of summary dismissal can only be passed by a Bench of two learned Judges.

(9) Mr. Bishambhar Dayal was appointed as amicus curiae to represent the other view point and we are glad to note that he has been of great assistance to us in this case.

B/M.K.S. Reference answered.

A.I.R. 1954 ALL. 49 (Vol. 41, C. N. 35)
(LUCKNOW BENCH)

MALIK C. J. AND AGARWALA J.

Badri Narain Lal, Appellant v. Ramji Lal and another, Respondents.

Second Appeal No. 323 of 1946, D/- 27-7-53, against decree of Civil Judge, Mohanlalganj, Lucknow, D/- 5-4-1946.

(a) Civil P. C. (1908), Ss. 100 and 101 — Appeal shall lie from decree passed in appeal.

Trial Court decreeing suit for ejectment but directing plaintiff to pay costs and compensatory costs to defendant 2 — Defendants submitting to the decree but plaintiff filing appeal against portion of decree directing him to pay costs and compensatory costs — Appeal allowed — Defendants filing second appeal not against order of lower appellate Court but against order of the trial Court decreeing suit for ejectment — Decree for ejectment passed by trial Court held was final and could not be challenged in second appeal. (Para 2)

Anno: Civil P. C., Ss. 100 and 101 N. 5.

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Ordinance (3 of 1946), Cl. 3 (d) — Stay of marriage party for two days, if restriction on eviction.

The use of the building for a couple of days for putting up a marriage party cannot be said to be so inconsistent with the purpose of residence and school as to entitle the landlord to put an end to the tenancy. AIR 1929 PC 108; (1898) 1 Ch 424. Distinguished. (Para 4)

(c) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Ordinance (3 of 1946), Cl. 7 — U. P. Control of Rent and Eviction Act (3 of 1947), Ss. 14 and 3 — Applicability.

Clause 7 of the Ordinance or S. 14 of the Act means that if the decree for ejectment is on any of the grounds mentioned in S. 3 the decree can be executed and the tenant ejected, but if the decree for ejectment has been passed on any other ground then also the decree can be executed and the tenant ejected unless he is willing to pay to the landlord reasonable annual rent or the agreed rent whichever is higher. (Para 5)

(d) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Ordinance (3 of 1946), Cl. 7 — U. P. Control of Rent and Eviction Act (3 of 1947), S. 14 — Scope — Stage when undertaking can be accepted.

The provisions are for the benefit of the judgment-debtor and the proviso has been put in to safeguard the interest of the landlord. (Para 5)

Therefore where no undertaking as regards liability to pay rent or reasonable rent was given in the executing court but the execution proceedings were not terminated, nor had the judgment-debtor been ejected, the undertaking to pay rent could be accepted at the appellate stage. (Paras 6, 7)

Niamatullah, for Appellant; Hyder Husain, for Respondent No. 1.

CASES REFERRED TO :
(A) ('29) AIR 1929 PC 108: 7 Rang 157 (PC)
(B) (1898) 67 LJ Ch 205: (1898) 1 Ch 424

MALIK C. J.: These are two connected appeals. Second appeal No. 323 of 1946 has been filed against the decree passed by the lower Court in a suit for ejectment and for certain other reliefs, while the connected appeal,—execution of decree appeal No. 21 of 1947—has been filed against the order passed in execution proceedings dismissing an objection under S. 47, Civil P. C., by the judgment-debtor.

(2) Learned Counsel for the respondent raised a preliminary objection that the second appeal is incompetent. The trial Court had decreed the suit filed by the plaintiff but had directed the plaintiff to pay the costs incurred by defendant No. 2 and to pay in addition a sum of Rs. 25/- as compensatory costs. The defendants had submitted to the decree, but the plaintiff had filed an appeal against the portion of the decree directing him to pay costs and in addition compensatory costs. The appeal was allowed and the lower appellate Court set aside the order of the trial Court awarding costs and compensatory costs to defendant No. 2, against the plaintiff. The defendants have filed an appeal now really not against the order passed by the lower appellate Court but against the order passed by the trial Court decreeing the suit for ejectment. The appeal is clearly incompetent. The decree for ejectment passed by the trial Court had become final, and it cannot be challenged in second appeal when the defendants did not appeal to the lower appellate Court. This appeal, therefore, fails and is dismissed with costs.

(3) As regards the second execution of decree appeal, after the decree for ejectment was passed an Ordinance — (U. P. Ordinance No. III of 1946) — was passed, Cl. 7 of which is as follows:

> "No decree for the eviction of a tenant from any accommodation passed before the date of commencement of this Ordinance shall in so far as it relates to the eviction of such tenant, be executed against him as long as this Ordinance remains in force, except on any of the grounds mentioned in section 3, provided that the tenant agrees to pay to the landlord 'reasonable annual rent' or the rent payable by him before the passing of the decree, whichever is higher."

This Ordinance has now been replaced by an Act — The U. P. Control of Rent and Eviction Act — (U. P. Act No. 3 of 1947), S. 14 of which is exactly in similar terms. When the decree-holder filed an application for execution of the decree and claimed ejectment of the defendant, an objection under S. 47, Civil P. C., was filed on behalf of the judgment-debtor on 16-11-1946. The judgment-debtor relied on Cl. 7 of the Ordinance and urged that in view of the provisions of that clause he was no longer liable to ejectment. The executing Court dismissed the objection and an appeal was filed against his order before the learned District Judge who, however dismissed the appeal on 23-7-1947. The learned District Judge rejected all other contentions of the decree-holder but based his decision on one finding that the tenant was liable to ejectment for contravention of Cl. 3 (d) of the Ordinance inasmuch as he had allowed a marriage party to stay in the premises for a period of two days. The learned Judge held that the judgment-debtor "had no business to allow a marriage party to stay in the house even if it was a question of couple of days", and he thought that this user was inconsistent with the purpose for which the

accommodation had been rented to him. In the earlier part of the judgment the learned Judge came to the conclusion that the premises had been let out to the defendant for purpose of residence and for a school.

(4) On behalf of the appellant, learned counsel has urged that the building having been let out for human habitation, the fact that the marriage party was allowed to stay for two days was not inconsistent with the purpose for which was (the?) building had been let out. Learned counsel has relied on certain observations of their Lordships of the Judicial Committee in — 'U. P. O. Naing v. Burma Oil Co. Ltd.', AIR 1929 PC 108 (A) in which they interpreted S. 108 (o), Transfer of Property Act, and said that the provisions must be liberally interpreted. On behalf of the respondent, however, reliance is placed on — 'Hobson v. Tulloch', (1898) 1 Ch 424 (B) in which case a house given for private residence was used for a boarding house and it was held that it was inconsistent with the agreement that no trade or business would be carried on on the premises. Neither of these two rulings are of much assistance to us. It is the usual practice in villages in this State that on occasions of marriages etc., in the village the 'barat' party is put up in a public building like a school building if the school is closed at the time. The learned Judge has recorded a finding that the stay of the barat party in the building for two days did not cause any damage to the building. In the circumstances, we do not think that the use of the building for a couple of days for putting up a marriage party could be said to be so inconsistent with the purpose for which the house had been let out to the defendant as to entitle the landlord to put an end to the tenancy.

(5) Learned counsel for the respondent has, however, urged that even under Cl. 7 of the Ordinance, and now under S. 14 of the Act, the judgment-debtor could resist the execution of the decree provided he agreed to pay to the landlord the reasonable annual rent or the rent payable by him, whichever is higher and in the case before us the judgment-debtor not having given any such undertaking in the executing court when he filed the objection under S. 47 of the Code he could not rely on Cl. 7 or S. 14. Clause 7 quoted above, read with the proviso means that where the ejectment is not on any of the grounds mentioned in S. 3, a tenant shall not be ejected in execution of a decree for ejectment provided he agrees to pay to the landlord reasonable annual rent or the rent payable by him before the passing of the decree whichever is higher. In other words, if the decree for ejectment is on any of the grounds mentioned in S. 3 the decree can be executed and the tenant ejected, but if the decree for ejectment has been passed on any other ground then also the decree can be executed and the tenant ejected unless he is willing to pay to the landlord reasonable annual rent or the agreed rent whichever is higher.

We have looked into the objection filed by the judgment-debtor. No undertaking as regards liability to pay rent or reasonable rent was given in that objection. In the grounds of appeal before the lower Appellate Court, however it was said that the tenant was always willing to pay the rent. No mention, however, was made that the tenant was willing to pay the reasonable annual rent. In this Court a clear ground was taken to the effect that the judgment-debtor was willing to pay the reasonable annual rent or the rent payable by him before the passing of the decree, whichever was higher. The same undertaking has also been repeated at the Bar by learned counsel for the appellant, Chaudhary Niamatullah. Learned counsel for the appellant has urged that his client was always anxious to continue the tenancy and to pay the reasonable rent and if the undertaking was not given at the earliest opportunity it was because of a mistake made by learned counsel who did not carefully read the clause at the time he filed the objection.

(6) On behalf of the respondent, an objection is taken that it is too late now to give the undertaking; the undertaking should have been given at the earliest opportunity, at any rate in the executing Court. We have already quoted the terms of Cl. 7 of the Ordinance and it provides that if the decree relates to the eviction of a tenant such a decree shall not be executed against him provided he agrees to give the undertaking. The execution proceedings have not yet terminated, nor has the judgment-debtor been ejected. An order has merely been passed that the decree shall be executed and the tenant shall be ejected. As the clause is worded there seems to be no bar to the tenant giving now the undertaking mentioned in the clause. The provisions in this clause are for the benefit of the judgment-debtor and the proviso has been put in to safeguard the interest of the landlord. The undertaking given by learned counsel would to our minds fulfil the intention of the legislature.

(7) Under the circumstances we consider that the undertaking given by Chaudhary Niamatullah on behalf of the appellant that he agrees to pay to the landlord the reasonable annual rent or the rent payable by him before the passing of the decree, whichever is higher should be accepted. We, therefore, accept the undertaking and direct that the tenant shall not be evicted in execution of the decree passed against him.

(8) The appeal is therefore allowed. Inasmuch as no clear undertaking was given either in the trial Court or in the lower appellate court, we consider that this is a fit case in which the appellant should pay the costs of the respondent in all the courts. Learned counsel for the respondent has mentioned that there is some money in deposit in this Court. The money shall be handed over to the learned counsel for the respondent.

B/H.G.P. Order accordingly.

A.I.R. 1954 ALL. 50 (Vol. 41, C. N. 36)

DESAI J.

Ram Padarath. Applicant v. Parsotam and others, Opposite Parties.

Civil Revn. No. 799 of 1953, D/- 24-7-1953, against order of Civil Judge, Allahabad, D/- 20-4-1953.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 276 — Scope — (Civil P. C. (1908), S. 115).

Where the appellate Court which has jurisdiction to entertain and hear an appeal, holds in reversal of the trial Court's

decision that the suit was cognizable by a Revenue Court, the decision even if erroneous is not open to revision under S. 276, U. P. Tenancy Act as no question of jurisdiction of the appellate Court is involved in such case. That section applies only when there is illegal assumption of jurisdiction or failure to exercise jurisdiction or irregular exercise of jurisdiction.

(Para 3)

Anno: C. P. C., S. 115 N. 9 to 12, 13 and 15.

S. N. Dwivedi, for Applicant.

ORDER: The opposite party filed a suit in a revenue Court for a declaration that he is a tenant. The revenue Court held that the suit did not lie in that Court because though the landlord had been made a defendant to the suit no allegations had been made against him. It directed the plaint to be returned to the plaintiff (the opposite party) for presentation in a Civil Court.

(2) The plaintiff filed an appeal against that order which was heard by the Civil Judge. The learned Civil Judge held that the suit was cognizable by the revenue Court and, allowing the appeal, ordered it to receive the plaint and hear the suit. This application in revision is filed against the order of the learned Civil Judge under S. 276, U. P. Tenancy Act.

(3) The revision application is not entertainable because no question of jurisdiction is involved at all. It is not contended that the learned Civil Judge had no right or jurisdiction to hear the appeal. He is not said to have acted with any irregularity while hearing it. What is questioned is the correctness of his finding that the revenue Court has jurisdiction to hear the suit, and nothing else. This does not entitle the applicant to come in revision. The view taken by the learned Civil Judge may be wrong or erroneous but that itself would not give the applicant a right to come upon revision under S. 276, U. P. Tenancy Act.

The question before this Court is not of the jurisdiction of the learned Civil Judge but of that of the revenue Court, whereas the question of jurisdiction on account of which an application for revision will lie on this court is that of the jurisdiction of the Court against an order of which the revision application is filed. Had there been any question about the jurisdiction of the learned Civil Judge a revision application could lie in this Court but there is no such question. The learned Civil Judge has not refused to exercise jurisdiction vested in him, has not exercised jurisdiction not vested in him and has not acted with any irregularity while exercising his jurisdiction. Section 276, U. P. T. Act, therefore, does not apply and the revision application is rejected as not competent.

B/K.S.B. Revision dismissed.

A.I.R. 1954 ALL 51 (Vol. 41, C. N. 37)

ASTHANA J.

Roshan and others, Appellants v. State.

Criminal Appeal No. 1067 of 1950, D/- 2-6-1953, against judgment of S. J., Mathura, D/- 5-10-1950.

(a) Penal Code (1860), S. 365 — Scope.

An offence under the section is clearly made out when there is a finding that the woman in question had been forcibly dragged out of her house and was kept locked up in a room in the house belonging to the accused. It is not correct to say, on the ground that as the house was in the abadi the fact of her having been locked in that house cannot be a secret and that therefore there was no offence under the section. (Para 8)

Anno: Pen. Code, S. 365 N. 1.

(b) Criminal P. C. (1898), S. 423 — Alter the finding — (Penal Code (1860), Ss. 365 and 342).

Accused charged under S. 365, Penal Code, acquitted of that offence but convicted under S. 342 of that Code — Appellate Court has power to alter the finding and convict him under S. 365, Penal Code, without altering the sentence imposed by trial Court so as to enhance the same: AIR 1951 All 365, Rel. on.

(Para 23)

Anno: Cr. P. C., S. 423 N. 31; Pen. Code, S. 365 N. 1; S. 342 N. 1.

P. G. Gautam and Shiv Charan Lal, for Appellants; J. R. Bhatt, for the State.

CASE REFERRED TO:

(A) ('51) AIR 1951 All 365: 1950 All LJ 871

JUDGMENT: The appellants along with 27 other persons were committed to the Court of Session at Mathura for trial under S. 395, I. P. C., for committing a dacoity at the house of one Sohan Lal on 25-7-1949, at 7 p.m. in village Gidoh which is four miles to the south-west of P. S. Kosi, district Mathura. They were further charged under S. 365, I. P. C., by the learned Sessions Judge for abducting Smt. Kalawati, wife of Sohan Lal, with intent to cause her to be secretly and wrongfully confined in the house of one Roshan after abduction during the commission of the aforesaid offence.

(2) The learned Judge found that both these offences were not proved against the accused and he, therefore, acquitted all of them of these offences. He, however, found the appellants guilty of the offence under S. 342, I. P. C. for wrongfully confining Smt. Kalawati in the house of Roshan and sentenced each of them to nine months' rigorous imprisonment. They have come up in appeal against their conviction and sentence.

(3) The prosecution case is that Smt. Gyaso, widow of Tulla, who was the younger brother of Misri accused, was living with Misri after the death of her husband. She was turned out by Misri and went to her father's home in village Dudhola. She married someone in village Chant, P. S. Palwal. The accused Misri thought that Sohan Lal who was her brother-in-law, had sold her in marriage and was, therefore, annoyed with him. He convened a panchayat in the village two days before the Amawas of July 1949, and in that panchayat he accused Sohan Lal of having sold away his sister-in-law Smt. Gyaso. Kunwarpal too asked the panchayat to make inquiries into the matter and punish Sohan Lal if he had really sold away Smt. Gyaso.

The panches agreed to make an inquiry on 25-7-1949, but the accused Loka asked them not to make an inquiry and so the inquiry could not be made. On 25-7-1949, at about 7 p.m. the accused raided the house of Kunwarpal and Sohan Lal and beat them and looted their property. Thereafter they dragged away Smt. Shanti, wife of Kunwarpal, and Smt. Kalawati wife of Sohan Lal. Shanti was left near the house of one Natthan from

where she went to the house of her sister and thereafter to her own house. Smt. Kalawati was taken away to an unknown place and was recovered the next day by the police from the house of Roshan accused where she had been locked in a room. A report of the occurrence was made by Kunwarpal on 25-7-1949, at 9-30 p.m. at P. S. Kosi about two hours after the occurrence and in that report all the accused were named.

(4) The accused Nathua in his statement before the committing court denied the accusations against him and stated that he had been falsely implicated on account of enmity though he did not mention the cause of enmity or the persons with whom he had it.

(5) The accused Misri also denied that he committed the offence with which he was charged. His case was that Sohan Lal had sold his wife & he had convened a panchayat in connection with it and Sohan Lal promised to return his wife but did not do so, that a panchayat was again convened by him and in that panchayat Sohan Lal made a promise and made over his wife to the panches in 'Zamanat' and subsequently he made a report and got this case started against him.

(6) The accused Roshan stated that there were two parties in the village. He denied that Smt. Kalawati was recovered from a locked room in his house on 26-7-1949. He did not specifically mention anything as to why the case had been started against him.

(7) The learned Sessions Judge after a consideration of the entire evidence on the record came to the finding that the prosecution case regarding the forcible removal of Smt. Kalawati from her home and her being wrongfully confined in the house of Roshan from where she was recovered had been fully made out. He, further, found that though she was wrongfully confined but having regard to the fact that the house of Roshan was in the village abadi it could not be unknown to the neighbours that Smt. Kalawati was confined there and in the circumstances it could not be held that she was secretly confined. He was not satisfied that any dacoity had been committed at the house of Sohan Lal or that any of his property had been removed. According to him the only offence which was proved against the three appellants was one under S. 342, I P. C. and he, therefore, convicted and sentenced them as stated above.

(8) In my opinion the reasoning of the learned Judge that the three appellants were not guilty of the offence under S. 365, I. P. C. simply because the house of Roshan wherein Smt. Kalawati was locked was in the abadi does not appear to me to be correct and if the finding that she was forcibly dragged from her house by the three appellants and was kept in a locked room in the house of Roshan is correct the offence under S. 365, I. P. C. is clearly made out.

(9) The question for consideration is whether from the evidence on the record it is proved that the three appellants forcibly dragged away Smt. Kalawati from her house on the night of 25th July 1949. with the intention that she may be secretly and wrongfully confined.

(10-19) (His Lordship after examining the evidence stated): It appears to me that Misri somehow believed that Sohan Lal, who was the brother-in-law of Smt. Gyaso, had given Smt. Gyaso to someone in marriage and on account of this fact he was very much aggrieved against him. It, further, appears that when he was unable to obtain her back he along with a number of other persons went to the house of Sohan Lal and forcibly dragged Smt. Kalawati, wife of Sohan Lal, in order to take revenge against him and after dragging her she was locked in the house of Roshan.

(20) There is no doubt that the intention of the appellants in dragging her was to secretly and wrongfully confine her and this intention is proved from the fact that she was actually locked in the house of Roshan from where she was recovered. Even if the evidence of Kalawati that she was locked in the house of Roshan by all the three appellants is not believed in view of the fact that this statement of her's is inconsistent with that which she had made before the police wherein she has mentioned the name of Roshan only as the person who removed her from the house of Misri and locked her in his own house, the offence under S. 365, I. P. C. against the appellants is proved because they were the persons who dragged her from her house with the intention of secretly and wrongfully confining her and which intention is proved by the fact that she was found locked in the house of Roshan and recovered from there.

(21) It was argued on behalf of the appellants that there was no satisfactory evidence that the house from where she was recovered by the police really belonged to Roshan. All the prosecution witnesses in this case have stated that the house belonged to Roshan and he used to live in it and there does not appear any reason to disbelieve their evidence.

(22) I am, therefore, of opinion that from the evidence on the record it has been satisfactorily proved that Smt. Kalawati was dragged from her house by the three appellants, Roshan, Misri and Nathua with the intention of being secretly and wrongfully confined and that she was recovered from the house of Roshan the next morning where she was locked in a room. There can be no doubt that the intention was to secretly confine her there and this intention is proved from the statement of Smt. Kalawati that she was removed to that house early in the morning when it was still dark. The mere fact that the house is in the 'abadi' does not necessarily prove that her relations or friends knew that she was kept there.

(23) The question which next arises is what offence is made out. In my opinion the offence clearly falls within S. 365, I. P. C. It has been argued on behalf of the appellants that as they have been acquitted of this offence they cannot be convicted of it in appeal. The question for determination is whether it is open to this Court in appeal to alter the conviction from one under S. 342 which is a minor offence to one under S. 365, I. P. C., which is a major offence if from the evidence on the record it is proved that the latter offence was committed.

Learned counsel for the prosecution relied on the case in — 'Raghubir v. Rex', AIR 1951 All 365 (A). In this case the accused were convicted by the trial Court under S. 304, I. P. C. The accused filed an appeal to this Court and it was found in appeal that from the evidence on the record it was proved that the offence under S. 302, I. P. C. had been committed. It was held by a Division Bench consisting of Sapru and V. Bhargava JJ. that under S. 423, Cr. P. C. it was open to an appellate Court to alter the finding and convict the accused under the proper section but the sentence which had been passed by the trial Court could not be enhanced. Accordingly they altered the conviction from S. 304 to S. 302, I. P. C. but maintained the sentence of transportation for life. In view of this decision I am of opinion that the conviction of the appellants

can be altered from S. 342 to S. 365, I. P. C. Accordingly I convict the appellants under S. 365, I. P. C. instead of S. 342, I. P. C. but maintain the sentence which has been imposed on them by the lower Court.

(24) The result is that this appeal is dismissed with this alteration that the conviction of the appellants is altered from one under S. 342 to one under S. 365, I. P. C. As the appellants are on bail they shall surrender to it and serve out the sentence. Leave to appeal is granted.

C/M.K.S. Appeal dismissed.

A.I.R. 1954 ALL. 53 (Vol. 41, C. N. 38)

MALIK C. J. AND V. BHARGAVA J.

Commr. of Income-tax, United Provinces, Lucknow, Applicant v. Lachhman Das Mool Chand, Respondent.

Misc. Case No. 46 of 1950, D/- 14-11-1952.

Income-tax Act (1922), S. 24(2) — Loss of profits or gains, set off — (Civil P. C. (1908), S. 11).

Where the loss in business sustained by the assessee in a particular year is carried forward to the next year under S. 24 (1) but the Income-tax Officer refuses to give a set-off under S. 24 (2) on ground that there were no such profits from the same business in that year against which the amount could be set off and therefore the loss is again carried forward to the third year, the assessee would be entitled to a set-off under S. 24 (2) of the loss so carried forward from the profits of the same business in the third year. The previous order of the Income-tax officer having become final, it was not open to the Income-tax Department to go back on that order and say that the Income-tax officer had made a mistake by reason of which they had refused to grant a relief in a particular year and on the basis that that order was wrong they would now refuse to grant that relief in this year also: (Paras 6, 8)

Anno: Income-tax Act, S. 24 N. 3; Civil P. C., S. 11 N. 28.

S. C. Das, for Applicant; R. K. S. Toshniwal and B. Upadhya, for Respondent.

CASE REFERRED TO:

(A) ('50) AIR 1950 All 249: 1950-18 ITR 812

MALIK C. J.: This is a reference under S. 66 (1), Indian Income-tax Act, and the point raised is a nice question of law on which learned counsel are agreed that there is no previous decision. The question formulated by the Tribunal is as follows:-

"Whether in the circumstances of the case, a loss of Rs. 19,228/- sustained by the assessee in the previous year relevant to the assessment year 1942-43 could legally be treated as a carried forward loss in the assessment year 1944-45 and be set off under the provisions of S. 24 (2) I. T. Act, against the profits from the same business for the previous year relevant to the 1944-45 assessment in spite of the fact that it was not so set off although there were profits from the same business to cover the loss in the previous year relevant to 1943-44 assessment?"

(2) The facts are really not in dispute. The assessee carried on business at Delhi and at Agra. At the head office at Agra the assessee carried on business in ready goods in colour, yarn and 'Kairana' and also entered into forward contracts in 'sonth, kali mirch', grain and gold. The branch shop at Delhi carried on forward contract business in yarn, silver, grain and gold. The Income-tax Officer dissected the two businesses into two portions considering the business in ready goods as one business and the forward contract business a separate business. In the assessment year 1942-43 the profits and loss were worked out by the Income-tax Officer and it was found that the profits from the business in ready goods in that year were much less than the loss incurred in speculation, the difference being a sum of Rs. 19,228/-. After the profits were set off against the loss in accordance with the provisions of S. 24 (1), Income-tax Act, the loss was carried forward to the next year.

In the year 1943-44 it was found that while the business in ready goods had ended in profit there was a further loss in speculation and that loss was set off against the profits made, but as the Income-tax Officer held that the two businesses were separate he did not allow the sum of Rs. 19,228/- which was the loss carried forward from the previous year to be set off against the profits of the business in ready goods in the year 1943-44. The assessee submitted to the assessment and the case did not come up to the Appellate Tribunal. In the year 1944-45 the Income-tax Officer again calculated the profit and loss of the dealings in forward contract business separately and found that there was a loss in the forward contract business but the profits in the dealings in ready goods exceeded the losses. The Income-tax Officer, however, again refused to allow the amount of Rs. 19,228/- which had been carried forward from the year 1942-43 to be set off against the profits of 1944-45. The case came up to the Tribunal and in its appellate order the Tribunal carefully went into the facts and came to the conclusion that as a matter of fact the assessee was carrying on only one business and the Income-tax Officer was not entitled to dissect the business into two parts and deal with the transactions in ready goods separately from the forward contracts. Having come to the conclusion that the profits made were from the same business from which the loss of Rs. 19,228/- had been incurred the Tribunal allowed a set off. On behalf of the Commissioner an application was made for a reference that the Tribunal was not entitled to allow the set off as the case did not come under S. 24 (2), Income-tax Act. The Tribunal agreed that a point of law did arise out of the appellate order and referred the question mentioned above for decision by this Court.

(3) Reliance is placed on the language of S. 24 (2), Income-tax Act, and it is urged that a set off in a subsequent year can be allowed only if the case comes within the express words of S. 24 (2), Income-tax Act. Learned counsel has pointed out that previous to the amendment in the year 1939 the loss of one year could never be carried forward and set off against the profits in a subsequent year. It was by the amendment in 1939 that it was provided that if a loss had been incurred in any particular business which could not be set off against the total profits made in the same year then that loss could be carried forward to the next year

against the profits made from the same business and this process was to continue for a maximum period of six years.

(4) The relevant portion of S. 24 (2), Income-tax Act, is as follows:-

"Where any assessee sustains a loss of profits or gains in any year .....under the head 'profits and gains of business, profession or vocation', and the loss cannot be wholly set off under sub-s (1) (from the income, profits and gains of that year) the portion not so set off shall be carried forward to the following year and set off against the profits and gains. ....."

Learned counsel for the Commissioner has urged that a loss for the previous year can be set off against the profits of a subsequent year only if that loss could not be wholly set off under sub-s. (1) in that year and it is the portion which could not be so set off that can be carried forward. In other words, the argument is that the finding of the Appellate Tribunal amounts to this that the loss of Rs. 19,228/- should have been set off in the assessment year 1943 and it cannot, therefore, be urged that the loss could not be wholly set off in that year. Learned counsel has urged that the section provides for a case where the profits of the subsequent year are not sufficient to set off the loss in its entirety and it is only in that case, where the profit is either nil or less than the amount of the loss, that the loss can be carried forward to be set off against the profits from the same business in a subsequent year. It is pointed out that on the finding of the Appellate Tribunal that it was the same business and there were no two separate businesses it is not possible to urge that the loss could not be wholly set off in the subsequent year 1943-44 and this sub-section is, therefore, not applicable.

(5) The fact, however, remains that in the year 1943-44 the assessee wanted that this loss of Rs. 19,228/- which had been carried forward in accordance with the provisions of S. 24 should be set off against the profits made in that year and the Income-tax Officer had held as follows:-

"In this case a sum of Rs. 19,228/- has been brought forward from last year on account of loss. The entire loss is on account of speculation. The figures of this year showed that there was again a loss in speculation, hence the entire amount has to be carried forward."

On behalf of the Commissioner the argument in effect is that the Income-tax Officer had made a mistake in 1943-44 and it was due to that mistake that the loss had not been set off and had been carried forward and if the assessee had filed an appeal under S. 30 he might have had the mistake corrected. That the assessee cannot claim that the loss be set off in 1944-45 when it should have in fact been set off in the previous year.

(6) The argument, at first sight, appears to be attractive but it is fallacious. The Income-tax Officer rightly or wrongly had held in 1943-44 that the loss could not be wholly set off and should be carried forward. This was an order under S. 24, Income-tax Act. It is not open to the Income-tax Department to claim that the Income-tax Officer had made a mistake in the previous year and thus deprive the assessee of his rights to have the loss set off from the profits of the next year. It is true that the Tribunal has, in its appellate order, in considering the facts, come to the conclusion that there was only one business from the very beginning and the Income-tax Officer had no right to dissect that business into two separate businesses and deal with the profits and losses separately, but that does not mean that that opinion of the Tribunal has nullified in any way the effect of the previous order of the Income-tax Officer for the assessment year 1943-44.

In the appeal against the order of the Income-tax Officer in the assessment year 1944-45 the Tribunal could only deal with the correctness or otherwise of the order of the Income-tax Officer passed in that year. The previous order of the Income-tax Officer had become final and, in our view, it was not open to the Income-tax Department to go back on that order and say that the Income-tax Officer had made a mistake by reason of which they had refused to grant a relief in a particular year and on the basis that that order was wrong they would now refuse to grant that relief in this year also. It is true that the rule of 'res judicata' applies to income-tax cases only to a limited extent as was pointed out by a bench of this Court in — 'Kamlapat Motilal v. Commissioner of Income-tax, U. P'. AIR 1950 All 249 (A) but it is one thing to say that an order in one year will not be taken as binding in an assessment for a subsequent year and quite another that the Income-tax Department can go back on their own order for a particular year and say that as that order was wrong the assessee should be deprived of a relief which he was entitled to get under that order.

We are inclined to the view that during the assessment year 1943-44 the order of the Income-tax Officer that the amount of Rs. 19,228/- could not be set off from the profits made in that year had become final and, if that order is treated as such, then there is nothing to bar the Tribunal from considering whether in the year 1944-45 there were profits against which that amount could be set off. The argument in effect on behalf of the Commissioner is that the amount could not be set off in 1944-45 because the amount should have been set off in 1943-44 and the Income-tax Officer had made a mistake in holding that the amount could not be set off in that year. We do not think it is open to the Commissioner to go back on an order passed by the Income-tax Officer in a particular year which had become final and try to go behind that order in considering the effect of that order in a subsequent year. In that view of the matter when the Income-tax Officer had held that the amount of Rs. 19,228/- could not be set off in 1943-44 as there were no profits against which the amount could be set off the Appellate Tribunal was entitled in the assessment year 1944-45 to set off that amount against profits made from the same business if it came to the conclusion that in that year there were profits from such business against which the previous loss could be set off. The finding that in the year 1944-45 there were profits from the same business is a finding of fact. It is not challenged and there is no reference on that question before us. On the finding that there were profits from the same business in the year 1944-45 and on the previous finding given by the Income-tax Officer that in the year 1943-44 there were no such profits from the same business in that year against which the amount

could be set off, S. 24 (2) Income-tax Act, was clearly applicable.

(7) We have already said that the facts are more or less admitted and there is really no dispute. In that view and in the view that we have expressed above the words "although there were profits from the same business to cover the loss in the previous year relevant to 1943-44 assessment" occurring in the last few lines of the question referred to us should really be omitted as in our view it is not open to the Department to go back on the order of the Income-tax Officer for the assessment year 1943-44 and urge that the profits in that year were from the same business and could cover the loss.

(8) Our answer to the question referred to us therefore, is that in the circumstances of the case the Tribunal was entitled to set off the amount of Rs. 19,228/- brought forward from the year 1942-43 against the profits made in the year 1944-45 on its finding that these were profits from the same business.

(9) The assessee is entitled to his costs which we assess at Rs. 300/-

B/K.S. Answer accordingly.

A.I.R. 1954 ALL. 55 (Vol. 41, C. N. 39)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Inder Chand, Applicant v. State.

Criminal Reference No. 14 of 1953, D/- 23-7-1953, reference made by S. J., Lucknow, D/- 17-1-1953.

(a) Essential Supplies (Temporary Powers) Act (1946), Ss. 7 and 8 — Effect of withdrawal of U. P. Foodgrains Rationing Order (1949) on offence committed under it.

At the time when A, a shop keeper, committed an offence by infringing certain provisions of the U. P. Food Grains Rationing Order, 1949, that order was in force. At the time when A was convicted under Ss. 7 and 8, Essential Supplies (Temporary Powers) Act, which continued to be in force, the said Rationing Order was withdrawn. It was contended that the withdrawal of the U. P. Foodgrains Rationing Order, 1949, would have the effect of wiping out the criminal liability already incurred by A:

Held that the effect of the withdrawal of the U. P. Foodgrains Rationing Order was that the rules made for the maintenance of accounts or for certain other matters now ceased to be operative and a breach of these rules, after the order had been withdrawn, would cease to be an offence. But any breach already committed would not be affected by a withdrawal of this Order. AIR 1949 Lah 191 (FB); AIR 1933 All 669 (FB), Disting. (Paras 6, 6a)

(b) Essential Supplies (Temporary Powers) Act (1946), S. 9 — Burden and nature of proof.

The persons mentioned in S. 9 will be held liable for contravention of an order made under S. 3, unless they establish that the contravention took place without their knowledge or that the contravention could not be prevented in spite of an exercise of due diligence on their part. (Para 8)

Babu Ram Gir, for Applicant; Uma Shankar Srivastava, Addl. Govt. Advocate, for the State.

CASES REFERRED TO :
(A) ('49) AIR 1949 Lah 191: 50 Cri LJ 783 (FB)
(B) ('33) AIR 1933 All 669: 55 All 961: 34 Cri LJ 1030 (FB)

ORDER : This is a reference by the Sessions Judge of Lucknow recommending that the conviction of Inder Chand under S. 7, Essential Supplies Act for infringement of cls. 25 and 26, U. P. Foodgrains Rationing Order, 1949, and the sentence of fine of Rs. 75/- be set aside.

(2) It appears that Inder Chand was the Manager of Consumers Co-operative Society shop in Mansoornagar. This Co-operative society held a licence as an authorized retail dealer and used to sell rations to card holders. On 4-12-1951, an Inspector of the Rationing Department inspected the shop and found certain irregularities. He found that rations had been given to some persons and not entered on the cards and also that certain rations entered on the cards were not given to the card holders. He also found that the accounts had not been kept correctly. Inder Chand and Lalta Prasad were prosecuted for breach of certain provision of the U. P. Foodgrains Rationing Order, 1949, under Ss. 7 and 8 Essential Supplies (Temporary Powers) Act.

(3) The defence of the accused was that he was not present in Lucknow on 4-12-1951, and as such had no knowledge of what was done by Ram Sarup who was in charge of the shop at Mansoornagar. Lalta Prasad pleaded ignorance of the affairs, as he was only a weighman at the shop.

(4) The learned Magistrate came to the conclusion that Inder Chand being the Manager of the Consumers Co-operative Society shop could not be absolved of his liability for any acts of commission or omission and as he did not exercise due diligence to prevent the contravention of the provisions of the order, he was liable for punishment in view of the provisions of S. 9, Essential Supplies Act. Lalta Prasad was acquitted by the Magistrate. Inder Chand then went in revision to the Sessions Judge. It was contended before him that the U. P. Foodgrains Order, 1949, had been withdrawn by the time when the case came up for hearing before the Magistrate and as such any conviction for a breach of this Order on that date was incompetent and invalid. The Sessions Judge agreed with this contention and has made the reference which is before me.

(5) The learned counsel for Inder Chand, who has appeared in support of the reference made by the Sessions Judge has cited two rulings in support of the view taken by the Sessions Judge, vide — 'Crown v. Haveli', AIR 1949 Lah 191 (FB) (A) and — 'Emperor v. Bans Gopal', AIR 1933 All 669 (FB) (B). In both these cases the temporary Act or Ordinance under which the accused were convicted had ceased to be operative, as they had neither lapsed or were withdrawn before the date when the conviction was made. It was held in these two cases that S. 6. General Clauses Act is not attracted if a temporary Act or Ordinance lapses and no provision is made in the subsequent legislation, if any, for the repeal of the earlier Acts or for the

continuance of the liabilities incurred under the previous Act or Ordinance. None of these cases is, however, applicable to the facts of the present case.

(6) In the present case Inder Chand has been convicted under S. 7 read with S. 8, Essential Supplies (Temporary Powers) Act, which is still in force. An order known as the U. P. Foodgrains Rationing Order, 1949, was passed by the State Government which prescribed certain rules to be observed by authorized retail dealers. A breach of the provisions of this Order was punishable under the Essential Supplies (Temporary Powers) Act. It is not disputed that the offence for which the applicant Inder Chand was tried had been committed when this Order was in force. It is also not in dispute that the Act under which the applicant Inder Chand has been convicted is still in force. The effect of the withdrawal of the U. P. Foodgrains Rationing Order is that the rules made for the maintenance of accounts or for certain other matters now ceased to be operative and a breach of these rules, after the Order had been withdrawn, would cease to be an offence. Any breach already committed would not be affected by a withdrawal of this Order. The Order was in force on the date when the offence was committed in this case and the Act under which he was convicted is still in force.

(6a) The rulings cited by the learned counsel for the applicant have, therefore, no application to the present case. In the reported cases the accused were convicted for offences created by the temporary Act or Ordinance and if they ceased to be operative on the date when the conviction was made, the conviction could not be upheld as there was no provision of law under which they could be convicted. The view taken by the Sessions Judge, therefore, that the withdrawal of the U. P. Foodgrains Rationing Order, 1949 would have the effect of wiping out the criminal liability already incurred by the applicant does not appear to be correct.

(7) The reference was made by the Sessions Judge on the point of law referred to above, but the learned counsel for the applicant has tried to support the reference on other grounds also.

(8) It has been argued on behalf of the applicant Inder Chand that he, although a Manager of the Consumers Co-operative Society shop, was not in fact looking after the affairs of the shop at Mansoornagar, which was being run by Ram Sarup a clerk, and that Inder Chand only visited the shop occasionally and inspected the accounts. He was not in Lucknow on 4-12-1951, and as such had no knowledge of what happened on the shop on the 4th December. The learned Magistrate has come to the conclusion that Inder Chand did not exercise due diligence in keeping himself in touch with the work of Ram Sarup and left the entire business of the shop to Ram Sarup. Section 9, Essential Supplies (Temporary Powers) Act provides as follows :

> "If the person contravening an order made under S. 3 is a company or other body corporate, every director, manager, secretary or other officer or agent thereof shall, unless he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention, be deemed to be guilty of such contravention."

It would, therefore, appear that the persons mentioned in S. 9 will be held liable for contravention of an order made under S. 3, unless they establish that the contravention took place without their knowledge or that the contravention could not be prevented in spite of an exercise of due diligence on their part. No doubt it is difficult for a person who has to look after more shops than one to have active knowledge about the affairs of each such shops and reliance has to be placed on other persons, who were in charge of the shops. It was, however, the duty of Inder Chand to have exercised due diligence to prevent such contraventions as were alleged in the present case. He should have examined the accounts every day to satisfy himself that the accounts were kept properly and the stock was in accordance with the books. On his own showing he inspected the shop only occasionally and was concerned only with the receipt of cash. This could not be said to be an exercise of due diligence to prevent a contravention of the U. P. Foodgrains Rationing Order, 1949. It is difficult, therefore, to come to a conclusion different from the one arrived at by the learned Magistrate on this point.

(9) No other point has been pressed in arguments on behalf of the applicant.

(10) The applicant has been sentenced to a fine of Rs. 75/-. In view of the fact that he was managing more than one shop and had placed reliance on one Ram Sarup who was the clerk in charge of the Mansoornagar shop, the fine imposed on Inder Chand, who is technically guilty of the offence, appears to me to be excessive. Under the circumstances I think it fit to reduce the fine to a sum of Rs. 5/-.

(11) As a result, the reference made by the Sessions Judge is rejected, but the order passed by the Magistrate is modified to this extent that the sentence of fine imposed upon the applicant Inder Chand is reduced to Rs. 5/-. If the fine has been paid in full, the rest of the fine shall be refunded to the applicant.

B/V.S.B. Sentence modified.

A.I.R. 1954 ALL. 56 (Vol. 41, C. N. 40)

MALIK C. J. AND V. BHARGAVA J.

Municipal Board of Kanpur, Defendant-Appellant v. Dominion of India, as owner of East Indian Railway, Plaintiff-Respondent.

First Appeal No. 269 of 1948, D/- 3-8-1953, against decision of 1st Civil Judge, Kanpur, D/- 13-5-1948.

Municipalities — U. P. Municipalities Act (2 of 1916) — Municipal Manual, Volume I, Part II — Taxation of Railway Administration — Procedure — (Railways Act (1890), S. 135) — (Government of India Act, 1935, S. 154) — (Constitution of India, Art. 285) — (Railways (Local Authorities' Taxation) Act (1941), S. 3).

Where the procedure prescribed in sub-s. (2) of S. 3, Railways (Local Authorities' Taxation) Act (Act No. 25 of 1941) was not

followed and neither there was any notification authorising the Municipal Board to charge a certain sum per annum as house tax and water-rate, nor has any person appointed by the Central Government varied the award already given by the officer appointed under S. 135, Railways Act, the Municipal Board cannot claim in its own right to enhance the amount of tax payable by Railway Administration and make a demand and, on failure of the Railway Administration to meet that demand, to issue a distress warrant or threaten to cut off the water supply.

(Para 3)

Anno: Railways Act, S. 135 N. 1.

A. P. Pande, for Appellant.

MALIK, C. J.: This is an appeal filed on behalf of the Municipal Board of Kanpur in a suit filed by the Dominion of India as the owner of the East Indian Railway through the General Manager, East Indian Railway, for the following relief:

"The plaintiff claims that the defendant be restrained by injunction from cutting off water supply from all or any of the holdings of the plaintiff East Indian Railway Administration mentioned in para. 2 of the plaint."

The learned Civil Judge of Kanpur decreed the plaintiff's suit and it is against the order of the learned Civil Judge that this appeal was filed by the Municipal Board of Kanpur. The Municipal Board appears to have taken up a hopeless position as the facts given below will show:

(2) The Municipal Board of Kanpur revised the house tax and water-rate of the buildings within its jurisdiction and enhanced the rate with the result that it demanded from the East Indian Railway Administration house tax and water-rate at the rate of Rs. 19,860/- per annum with effect from 1-4-1943, for a period of five years. The Railway Administration, under S. 135, Indian Railways Act, referred the matter to Shri F. N. Crofts, District Judge, Kanpur, for adjudication as he was the officer empowered by a notification of the Government issued under the Railways (Local Authorities' Taxation) Act (Act No. 25 of 1941) to determine the amount payable in lieu of taxes by the Railway Administration. Shri Crofts gave his award on 1-8-1945, and determined that the sum of Rs. 8,000/- per annum was the proper amount payable by the Railway Administration to the Municipal Board as house tax and water-rate.

As the determination was in respect of a lump sum for six properties which were separately numbered, he was asked to apportion the amount between the various properties and fix their liabilities separately. He, therefore, gave a supplementary award on 21-3-1946. Soon after the award was made by Shri Crofts, the Municipal Board passed a resolution, claiming to enhance the house tax and water-rate from Rs. 8,000/- per annum to Rs. 12,038/- and, to a protest made by the Railway Administration, it sent a reply dated 13-11-1946, that the Municipal Board had the right to increase the amount and that if the Railway Administration felt aggrieved, they can pay the amount under protest and take up the matter again before the District Judge.

The position taken, therefore, was that the Board had a right to fix such amount as it thought proper for house tax and water-rate and it was for the Railway Administration, if they did not like the decision of the Board, to move the District Judge for a fresh award. It is this position which has been maintained by learned counsel for the appellant. It will, therefore, be necessary to refer to the various provisions under which the local authorities are allowed to levy taxes on government properties.

(3) Section 154, Government of India Act, 1935, (before the Adaptation Order) provided:

"154. Property vested in His Majesty for purposes of the government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a Province or Federated State:

Provided that, until any Federal law otherwise provides any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto."

Similar provisions were made in Art. 285 of the Constitution but as this case is not governed by the provisions of the Constitution, it is not necessary for us to refer to the terms of that Article.

The Federal Law referred to in S. 154, Government of India Act, 1935, is S. 135, Indian Railways Act (Act 9 of 1890) which runs as follows:

"Notwithstanding anything to the contrary in any enactment, or in any agreement, or award based on any enactment, the following rules shall regulate the levy of taxes in respect of railways and from railway administrations in aid of the funds of local authorities, namely:

(1) A railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the (general controlling authority) has by notification in the official gazette, declared the railway administration to be liable to pay the tax.

"(2) While a notification of the general controlling authority under Cl. (1) of this section is in force, the Railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or, in lieu thereof, such sum, if any, as an officer appointed in this behalf by the general controlling authority may, having regard to all the circumstances of the case, from time to time, determine to be fair and reasonable.

(3) The general controlling authority may at any time revoke or vary a notification under Cl. (1) of this Section."

It is not necessary for us to quote the other two clauses as they are not relevant for purposes of this case. Then we come to the rules under the U.P. Municipalities Act (Act No. 2 of 1916) and, in Part II of Volume I of the Municipal Manual, 1952 Edition, page 307, under the heading "Taxation of railways," the rule provides that

"a municipal board has no power to levy any of its taxes from a railway company until the Central Government has notified, under S. 3 (1), Railways (Local Authorities' Taxation) Act 25 of 1941 that the railway administration is liable to pay the particular tax. When a board wishes to levy a tax from a railway administration, an application for sanction must be submitted to the State Government explaining clearly the amount of the tax to be demanded and the direct or indirect services which justify the imposition of the particular tax on the railway administration."

The only other Act that need be referred to is the Railways (Local Authorities' Taxation) Act (Act No. 25 of 1941), S. 3 of which is important and is to the following effect:

"3 (1). In respect of property vested in His Majesty for the purposes of the Central Government, being property of a railway, a railway administration shall be liable to pay any tax in aid of the funds of any local authority if the Central Government, by notification in the official Gazette, declares it to be so liable.

(2) While a notification under sub-S. (1) is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or in lieu thereof such sum, if any, as a person appointed in this behalf by the Central Government may, having regard to the services rendered to the railway and all the relevant circumstances of the case, from time to time determine to be fair and reasonable. The person so appointed shall be a person who is or has been a Judge of a High Court or a District Judge."

Admittedly, the procedure prescribed in sub-s. (2) of S. 3, Railways (Local Authorities Taxation) Act (Act No. 25 of 1941) was not followed in this case and neither there is any notification authorising the Municipal Board to charge the sum of Rs. 12,038/- per annum as house tax and water-rate, nor has any person appointed by the Central Government varied the award already given, by Shri Crofts. The Municipal Board could not, therefore, claim in its own right to enhance the amount and make a demand and, on failure of the Railway Administration to meet that demand, to issue a distress warrant or threaten to cut off the water supply. Though, in this case, it does not appear from the record that the Government anywhere by any order specifically directed the increase of the amount of tax from Rs. 8,000/- to Rs. 12000/- and odd, in view of the provisions of S. 135 Indian Railways Act and S. 3, Railways (Local Authorities Taxation) Act (Act No. 25 of 1941), we doubt whether the State Government could have any power to grant the sanction and allow the Municipal Board to enforce its claim against the Railway Administration.

A reference to the State Government was probably made in the Municipal manual as it was intended that, when the Municipal Board had moved the State Government, the State Government would move the Central Government to issue a new notification or appoint a person in accordance with the provisions of sub-s. (2) of S. 3, Railways (Local Authorities' Taxation) Act (Act No. 25 of 1941) to determine afresh the amount of tax to be paid by the Railway Administration.

(4) The appeal has no force and is dismissed. As the respondent is not represented, we make no order as to costs.

B/R.G.D. Appeal dismissed.

A.I.R. 1954 ALL. 58 (Vol. 41, C. N. 41)

MALIK C. J. AND V. BHARGAVA J.

Commr. of Income-tax, U. P. and C. P. and Berar, Lucknow, Applicant v. I. D. Varshani, Respondent.

I. T. Misc. Case No. 44 of 1944, D/- 8-5-53.*

(a) Income-tax Act (1922), Ss. 7, 10 — Salary or profits from business.

The question, whether a particular income is income from business or salary, must be decided **in view of the facts and** circumstances of each case. (Para 4)

Anno: I. T. Act, S. 7 N. 1; S. 10 N. 1.

(b) Companies Act (1913), Ss. 87B, 87C — Managing agent and Manager — Distinction — (Income-tax Act (1922), Ss. 7, 10).

A managing agent must be entitled as of right to the management of the affairs of the company, the right being granted by an agreement with the company; secondly, a manager must always work subject to the control and direction of the directors whereas the control and direction of the directors over the managing agent may be modified by the terms of the agreement; and, thirdly, a managing agent may be a person, a firm or a company, the manager can be only as individual.

No servant can claim the management of the company as of right and the manager cannot, therefore, do so, while a managing agent has the right to manage the affairs of the company by virtue of the agreement entered into by him with the company. AIR 1952 All 706, Foll.

Normally if a person is called a managing agent, he would be deemed to be carrying on the business of managing agency and would not be a servant of the company. (Paras 5, 6)

Anno: Comp. Act, S. 87B N. 1; S. 87C N. 1; I. T. Act, S. 7 N. 1; S. 10 N. 2.

(c) Income-tax Act (1922), Ss. 7, 10 — Remuneration of Managing Agent — (Companies Act (1913), S. 87C).

Where the assessee was called a Managing Agent, but the powers conferred upon him under the Articles were more in the nature of powers given to a servant and those powers could be terminated, he was admitted to the benefits of the Company's Provident Fund as being an employee of the Company and the value of the rent-free quarters occupied by him was added as income under the head 'salary';

Held that the assessee was in fact the Chief Manager of the Company and his remuneration was properly assessed to income-tax as salary. (Para 6)

Anno: I. T. Act, S. 7 N. 1.

S. C. Das and J. Swarup, for Applicant; G. S. Pathak and S. N. Katju, for the Respondent.

CASE REFERRED TO:

(A) ('52) AIR 1952 All 706: 1952-22 ITR 108

MALIK C. J.: In this reference under Section 66 (1) Income-tax Act, the question referred to us is as follows:

"Whether in the circumstances of this case the assessee's remuneration was rightly assessed under the head 'salaries' within the meaning of Section 7, Income-tax Act, and not as income, profits and gains of business"

(2) The assessee is the Managing Agent of the U. P. Glass Works Limited. His remuneration was fixed at 15 per cent. of the net profits or a monthly pay of Rs. 1,000/- whichever he would elect at the end of each year. The duties and powers of the assessee-respondent as Managing Agent are enumerated in Article 17 of the Articles of Association, which is printed at page 12 of the Statement of the Case. The Managing Agent under the said Article is given the right to manage the business

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* (Note: The earlier judgment dated the 11th November 1952 holding that the Reference has not abated by reason of the death of the assessee is reported as AIR 1953 All 414).

of the company and to do all that may be necessary in connection with that business. In the year of account the assessee elected to receive his remuneration at 15 per cent. of the net profits. The Income-tax Officer treated this remuneration as business profits, while the case of the assessee is that the remuneration received by him is salary and he is the servant of the company.

(3) The Appellate Assistant Commissioner affirmed the Income-tax Officer's decision and held that the amount received by the assessee as commission was business profits. On appeal the Appellate Tribunal held that it was salary and not business income. The Commissioner of Income-tax then applied that a case be referred to this Court for decision whether the amount received by the assessee as Managing Agency commission was income from salary or profits and gains of business.

(4) We have said in several cases that the question, whether a particular income is income from business or salary, must be decided in view of the facts and circumstances of each case. The circumstance relied on on behalf of the Commissioner of Income-tax is that Articles 9 and 10 of the Articles of the Association provide that the assessee shall hold office unless and until he voluntarily resigns or is removed by an extraordinary resolution passed at a general meeting etc. and that he shall have a right to nominate a successor. In the Statement of the case it is mentioned that as early as 1923 the Managing Agent had renounced his rights and privileges under Articles 9 and 10 of the Articles of Association. On behalf of the Commissioner it was further relied upon that the assessee was not a whole time employee of the U. P. Glass Works Ltd. and he could not, therefore, be said to be a servant.

(5) In one of our recent decisions in — 'Inderchand Hari Ram v. Commissioner of Income-tax, U. P., and C. P.', AIR 1952 All 706 (A) we discussed the distinction between a managing agent and a manager. We pointed out that a managing agent must be entitled as of right to the management of the affiairs of the company, the right being granted by an agreement with the company; secondly, that a manager must always work subject to the control and direction of the directors whereas the control and direction of the directors over the managing agent may be modified by the terms of the agreement; and, thirdly, that a managing agent may be a person, a firm or a company, the manager can be only an individual. We also pointed out that no servant can claim the management of the company as of right and the manager cannot, therefore, do so, while a managing agent has the right to manage the affairs of the company by virtue of the agreement entered into by him with the company.

(6) Normally, therefore, if a person is called a managing agent, he would be deemed to be carrying on the business of managing agency and would not be a servant of the company. In the case before us, however, in the appellate order the Tribunal pointed out that the duties assigned to the assessee were not such as to enable one to come to a definite conclusion as to whether he was a servant or was carrying on business of his own. The Tribunal also pointed out that, though the assessee was called a Managing Agent, the powers conferred upon him under the Articles were more in the nature of powers given to a servant and those powers could be terminated and the Managing Agency agreement itself put an end to, as was decided on by certain resolutions passed by the Board at the time when the Managing Agent was appointed. The resolutions were dated 26-3-1923, and 11-1-1926. It was urged before the Tribunal that the Managing Agent was admitted to the benefits of the Company's Provident Fund as being an employee of the Company. The Appellate Tribunal have not said whether this contention was justified or not and before us the fact has been denied by learned counsel for the Department. Reliance was also placed on the fact that the Income-tax Officer had added the value of the rent-free quarters occupied by the assessee as income under the head 'salary'. The Tribunal after going into the facts and circumstances held that though the assessee was called a Managing Agent he was in fact the Chief Manager of the Company.

(7) It is not possible for us in this case to say that there were no materials on which the Tribunal could come to the finding that the remuneration received by the assessee was salary. We cannot say that on the facts and circumstances pointed out by the Appellate Tribunal it was not possible for it to hold that the income was not income from business. This is our answer to the question referred to us for decision.

(8) The assessee is entitled to his costs which we fix at Rs. 300/-.

B/D.R.R. Reference answered.

A.I.R. 1954 ALL. 59 (Vol. 41, C. N. 42)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Gaya Prasad and others, Appellants v. State.

Criminal Appeal No. 367 of 1952, D/- 31-7-53, from Order of Addl. Sess. J., Pratapgarh, D/- 31-10-1952.

(a) Evidence Act (1872), S. 33 — Applicability — Consent of accused.

Important witnesses in serious cases of murder or attempt to murder should be examined before the Sessions Judge so that he may be able to form his own opinion about their veracity by observing their behaviour in the witness-box. Courts should be loath to admit evidence under S. 33 by observing only formalities of law and the importance of examining witnesses before the Sessions Judge should, under no circumstances, be under-rated. It is, however, difficult to lay down a hard and inflexible rule which should govern all cases in all matters. It is primarily for the Sessions Judge to satisfy himself that there are good and lawful grounds for admitting the evidence of witnesses examined earlier, under S. 33. (Para 7)

Mere expense should not ordinarily be taken as a ground for refusing to summon a witness in a Sessions Case. Consent of the accused to the admission of the evidence under S. 33 has practically no meaning. Consent given by an accused would not relieve the Court of the duty of examining the circumstances and coming to a decision as to whether or not the evidence was legally admissible. Consent can, however, lead to some inference on a point of fact, such as that a certain witness is seriously ill, or that the whereabouts of some witnesses are not known. (Statements held admitted on good grounds). (Paras 7, 8, 9)

Anno: Evidence Act, S. 33 N. 1, 8, 14.

(b) Evidence Act (1872), S. 1 — Witness not belonging to locality.

Witnesses mentioned in first information report — Mere fact that they did not belong to the locality where the occurrence took place should not be enough to discredit their testimony. (Para 10)

Anno: Evidence Act, S. 1 N. 9.

(c) Penal Code (1860), S. 307 — Intention.

There should be an intention to murder or the knowledge that the injuries caused would result in the death of the person attacked before a man can be held guilty under S. 307, if the injured persons luckily escape death. The injuries inflicted should therefore be taken into consideration in arriving at the conclusion about the intention of the persons who had made the attack. Two incised wounds on the head and nose which were both bone deep and were caused by spear coupled with severe fractures of bones of other parts of the body do lead to the inference that it was the intention of the assailants to cause the death of the deceased. (Para 14)

Anno: Penal Code, S. 307 N. 3.

Saraswati Prasad and M. M. Lal, for Appellants; Uma Shankar Srivastava, for Addl. Govt. Advocate, for the State.

CASES REFERRED TO:

(A) ('46) AIR 1946 PC 1: ILR (1944) Lah 451
(B) ('44) AIR 1944 Bom 338: 46 Bom LR 589

JUDGMENT: This is an appeal on behalf of Gaya Prasad, Ram Sundar, Ram Ratan and Sheo Shankar, who have been convicted by the Additional Sessions Judge of Partabgarh and have been sentenced to seven years' rigorous imprisonment under Section 307 and to one year's rigorous imprisonment under S. 323, Penal Code.

(2) The case for the prosecution was that there was long standing enmity between the appellants on one side and Rameshwar and his son Bindeshwari on the other side so much so that the appellants and Rameshwar had ceased to be on speaking terms. Ultimately a complaint was filed by Ram Ratan and Gaya Prasad against Rameshwar in the Court of a Magistrate in Partapgarh. 11-4-1951 was fixed for the hearing of this case at Partabgarh. The parties are residents of a place about 22 miles away from Partabgarh, and there was a lorry service which touched Derwar bazar and persons of the village, to which the parties belonged, used to catch the lorry plying between Derwa bazar and Parbtagarh at Derwa which was at a distance of two miles from the place where the parties resided. Mangla Prasad, son of Rameshwar, was sent early in the morning of the 11th of April by Rameshwar to Derwa bazar to arrange for seats for them for Partabgarh.

At about 7 a. m. Bindeshwari and his father Rameshwar were going to the lorry stand and on the way passed in front of the house of Gaya Prasad. When Bindeshwari arrived near the house of Gaya Prasad, it was alleged by the prosecution, that the appellants and two others, who have been acquitted by the Sessions Judge, came out of the house of Gaya Prasad and started beating Bindeshwari. One of them was armed with a spear and the others had lathis in their hands. Rameshwar, who was some 50 paces behind Bindeshwari, ran up to the rescue of Bindeshwari on seeing the assault. He was also assaulted by the appellants and their two companions with spear & lathis. Rameshwar fell down and the assailants continued to strike him even after he had fallen down. It is also alleged that the assailants shouted that he should be killed.

An alarm was raised by Bindeshwari and Rameshwar and some persons who were near about ran up when the assailants left the place. Rameshwar was taken on an ekka to the police station Jethwar which was at a distance of four or five miles from the place of occurrence. A report was lodged by him at 8. 45 a. m. The details of the incident were mentioned in the first information report and the names of eight persons were mentioned as witnesses besides others who were not named. Investigation was taken up by the police and the Sub Inspector visited the place of occurrence. Ultimately six persons, including the four appellants, were sent up for trial.

(3) The defence of the appellants was that Rameshwar and Bindeshwari had been assaulted by some unknown persons at a distance from the house of Gaya Prasad and that as the assailants could not be known, Rameshwar implicated the appellants on account of enmity. The Sessions Judge found the case established against the appellants and convicted them as mentioned above. He entertained reasonable doubt about the complicity of two of the six accused and acquitted them. The appellants have now come up in appeal.

(4) The prosecution examined Rameshwar and Bindeshwari, the two persons who had received injuries. The injuries of Rameshwar and Bindeshwari had been examined by the Civil Surgeon when these persons were taken to the hospital. He found a number of injuries on the person of Bindeshwari. He had a contused wound on the top of his head 5"x¾"x bone deep and a set of six contused wounds on the left side of the head. There were two contused wounds on the right leg and two contused wounds on the left arm. Besides these contused wounds there were a number of contusions on the arms and back. The Civil Surgeon has noted the number of these injuries as 11, but it appears that the injuries were more numerous as he has shown six wounds as one injury and five contusions on the right side of the back also as one injury.

Rameshwar had an incised wound bone deep on the right side of the forehead half an inch above the right eye-brow and another incised wound on the left side of the nose and upper lip. There was a contusion with fracture of both bones of the forearm and two contusions with swelling and with fractures of the left leg and foot. There were three contused wounds also on the left leg besides some marks of contusions and two abrasions. Two of the injuries on the person of Rameshwar were found to be grievous and the incised wound had been caused by some sharp-edged weapon. The Civil Surgeon also noticed tenderness and rigidity with pain on palpitation over left side of the abdomen which was indicative of the fact that there had been injury caused to the internal organs also. The right pulse was found to be weak and the injured was in a condition of shock. The respiration at the time of the examination was hurried and shallow and the general condition of Rameshwar was serious.

The Civil Surgeon had been examined to prove the injuries received by these two persons. Besides Rameshwar and Bindeshwari, some other witnesses were also examined in this case. Wali Mohammad who stated that he had gone near the place of occurrence to roll his camel supported the version given by Rameshwar and Bindeshwari. His evidence has been criticised by the learned counsel for the appellants on the ground that the statement given by him before the Committing Magistrate was different from the statement given by him before the Sessions

Judge. Wali Mohammad had stated in the Court of the Committing Magistrate that he had gone with his camel to get it loaded while in the Court of the Sessions Judge he stated that he had gone to graze his camel and to allow it to roll on the ground. Wali Mohammad was confronted with his earlier statement and he stated that the word used by him in the Court of the Committing Magistrate was "lotana" and not "ladana". This mistake is possible, and the explanation given by Wali Mohammad cannot be rejected as wholly fantastic or incorrect. There was no particular purpose in giving a different version on this point which was wholly immaterial for the purposes of this case in the Court of the Sessions Judge. There is, therefore, no ground to reject the evidence of Wali Mohammad because of this discrepancy.

It has also been argued that Wali Mohammad did not reside very close to the place of occurrence and had therefore no valid reason to be there at the time of the occurrence. The story given by Wali Mohammad that he had gone with his camel is not improbable or unusual and his testimony which has been accepted by the Sessions Judge, should not be rejected on this ground also.

(5) Another witness Budh Ram who is a boy aged about 12 years was also examined on behalf of the prosecution. He supported the story given by the prosecution. Learned Counsel for the appellants has pointed out that this witness had, in his statement made before the Sub-Inspector, stated that the assailants were sitting near the khaliyan while in his statement before the Sessions Judge he deposed that they came out of the house. It is in evidence that the khaliyan of Gaya Prasad adjoins the house of Gaya Prasad and if there was some slight discrepancy on this score between the statement made by the witnesses before the Sub-Inspector and the statement given before the Sessions Judge it would not make his testimony unworthy of belief. Three other witnesses, Mosim, Babu Ram and Dudh Nath, were examined in the Court of the Committing Magistrate and their evidence has been read under S. 33, Evidence Act by the Sessions Judge on the ground that these persons could not be found and could not be had without unreasonable delay.

(6) Learned Counsel for the appellants has argued that the evidence of these witnesses should not be admitted under S. 33, Evidence Act and reliance has been placed on two rulings, — 'Chanchal Singh v. Emperor', AIR 1946 PC 1 (A) and — 'Savlimiya Miyabhai v. Emperor', AIR 1944 Bom 338 (B). Section 33, Evidence Act reads as follows:

> "Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case, the Court considers unreasonable."

In order, therefore, to enable a Court to admit evidence given by a witness in a judicial proceeding at an earlier stage, or in any other case, the requirements of S. 33 have to be fulfilled. In the present case, the learned Sessions Judge has admitted the evidence of Mosim and Babu Ram on the ground that they could not be found and their presence could not be obtained without an amount of delay which under the circumstances of the case the Court considered unreasonable. It appears from the record of the Court below that both these witnesses, who had been examined earlier before the Committing Magistrate, were summoned to appear before the Court of Session. Direction was sent as usual to the Committing Magistrate to obtain their presence before the Sessions Judge on the date of hearing. Whether summonses were actually issued to these persons, or whether they were served on them, is not quite clear from the record, but there is on the record a letter addressed by the Sessions Judge to the Magistrate pointing out that these two witnesses were not present on the date fixed for their appearance and that their attendance should be procured.

Warrants for their arrest were issued twice, though at short intervals by the Sessions Judge and the reports of the constables who took the warrants for execution show that they were not available and their whereabouts were not known. These constables were examined before the Sessions Judge and they stated that these persons were not to be found & their whereabouts were not known. The accused also agreed to their statements being taken into evidence under S. 33, Evidence Act. One other witness, Dudh Nath, was said to be seriously ill and unable to move and evidence was led to prove his illness. His previous statement was also admitted into evidence under S. 33, Evidence Act.

(7) It cannot be disputed that important witnesses in serious cases of murder or attempt to murder should be examined before the Sessions Judge so that he may be able to form his own opinion about their veracity by observing their behaviour in the witness-box. Courts should be loath to admit evidence under S. 33 by observing only formalities of law and the importance of examining witnesses before the Sessions Judge should, under no circumstances, be under-rated. It is, however, difficult to lay down a hard & inflexible rule which should govern all cases in all matters. It is primarily for the Sessions Judge to satisfy himself that there are good & lawful grounds for admitting the evidence of witnesses examined earlier, under S. 33, Evidence Act.

In the first case cited, — 'Chanchal Singh v. Emperor', (A), a witness was summoned in a sessions case. He wrote on the summons as follows:

> "Sir, I am seriously ill and am unable to attend the Court. My statement may kindly be recorded at my place of residence."

The police officer who had gone to serve the summons was examined before the Sessions Judge and he stated that he found the witness ill and unable to move from his house. Their Lordships of the Privy Council held that the statement made in the Court of the Committing Magistrate should not have been admitted in evidence under S. 33, Evidence Act. In this reported case it is evident that the witness, though ill, was capable of giving a statement and he had in fact suggested in the endorsement on the back of the summons that he may be examined at his place of residence. It was also not clear from the evidence which was produced before the Sessions Judge in the reported case that the witness could not become fit to be examined sometime later. On these facts their Lordships of the Privy Council held that the evidence of this witness should not have been admitted before the Sessions Judge under S. 33, Evidence Act.

(8) In the other case cited on behalf of the appellants, — 'Savimiya Miyabhai v. Emperor', (B), the witness who had been examined in the Court of the Committing Magistrate was summoned to appear before the Sessions Judge in a case of murder. The endorsement on the summons sent to the witness was that he was undergoing special training at Bombay. It was held that the circumstances did not justify the admission of his evidence under S. 33, Evidence Act as it could not be said that the witness could not be found. He could have been easily summoned to come from Bombay to Ahmadnagar which was only a night's journey.

In this reported case the accused had not cross-examined the witness and the learned Judge had not recorded any reason to show that he was satisfied that the presence of the witness could not be procured without undue expense or delay. There are some other cases also in which the circumstances under which S. 33, Evidence Act is attracted have been discussed. Mere expense should not ordinarily be taken as a ground for refusing to summon a witness in a Sessions case.

(9) In the present case the witnesses had been cross-examined at length in the Court of the Committing Magistrate and this circumstance also seems to have weighed with the Sessions Judge in being a little more lenient in admitting the evidence of the witnesses under S. 33, Evidence Act. Consent of the accused to the admission of the evidence under S. 33, Evidence Act has practically no meaning. Consent given by an accused would not relieve the Court of the duty of examining the circumstances and coming to a decision as to whether or not the evidence was legally admissible. Consent can, however, lead to some inference on a point of fact. If it is alleged on behalf of the prosecution that a certain witness is seriously ill and evidence is led to prove the illness of the witness and no cross-examination is directed on this point, the consent of the accused may lead to the inference that he does not challenge the validity of the assertion that the witness was very unwell and the Court can take into consideration this circumstance in accepting the evidence on a question of fact. Similarly, if the whereabouts of some witnesses are not known and evidence is led to prove that fact, the consent of the accused to the admission of the evidence and the absence of cross-examination on the evidence led to prove a question of fact with regard to the whereabouts about the witness, may lend support to the evidence led by the prosecution to prove that the whereabouts were not known.

No cross-examination in this case was also made of the witnesses who were examined to prove that the whereabouts of Mosim and Babu Ram were not known. It appears, therefore, that the Sessions Judge under these circumstances accepted the testimony of the two witnesses examined on behalf of the prosecution to prove that Mosim and Babu Ram were not available and in view of the fact that they had been cross-examined at considerable length in the Court of the Committing Magistrate and that the whereabouts of the witnesses were not known the Sessions Judge thought it fit to admit their evidence under S. 33, Evidence Act. It appears, therefore, that the statements of Mosim and Babu Ram as also that of Dudh Nath, which have been admitted into evidence and relied upon by the Sessions Judge, were admitted on good grounds. These witnesses have deposed that Rameshwar and Bindeshwari were attacked by the appellants and that they were attracted to the scene of the occurrence by the alarm raised by Rameshwar.

(10) The names of Babu Ram and Mosim were mentioned in the first information report and the mere fact that they did not belong to the locality where the occurrence took place should not be enough to discredit their testimony. The site plan made by the Sub-Inspector who investigated the case shows that the houses of Gaya Prasad and Rameshwar are not situated in the thick of the locality but are more or less isolated and it is therefore not at all improbable that witnesses who were not residents of the locality but were nearabout the place of occurrence were attracted to the place of occurrence after the alarm was raised.

(11) Much stress has been laid on the circumstances that Rameshwar and Bindeshwari were allowed to remain lying injured at the place of the occurrence for about half an hour or an hour and were not removed to their house. It is in evidence that arrangements for an ekka were made before these persons were removed from the place of occurrence, and nobody could foresee at that moment that an ekka would not be available for some appreciable time. There was, therefore, nothing improbable if these persons who had been injured seriously were not removed till an ekka was available.

(12) The defence has set up the story that these two persons, Bindeshwari and Rameshwar, had been assaulted by some unknown persons at a place which was different from the place of occurrence. The investigating officer found blood-stained earth at the place of occurrence, and this blood-stained earth was scraped and collected in a 'handi'. The learned Counsel for the appellants has argued that the blood-stained earth was not sent to the chemical examiner or the serologist for examination if the blood found on the earth was human blood. No doubt the blood-stained earth was not sent for examination and it is difficult to find out definitely, the origin of the blood, but coupled with the evidence produced on behalf of the prosecution the recovery of the blood at the place of the occurrence has its own significance.

(13) Even if the evidence of the two witnesses, Mosim and Babu Ram, is ruled out on the ground that it should not have been admitted the evidence of the two injured, and the two witnesses, Wali Mohammad and Budh Ram satisfactorily establish the guilt of the appellants. They had a clear motive for making the attack. Their evident object was to wipe out the existence of Rameshwar and Bindeshwari, who were the cause of so much trouble to them.

(14) Lastly, it has been argued on behalf of the appellants that the facts of this case do not establish a case under S. 307, Penal Code. It had been argued that the two incised wounds which were found on the head and nose of Rameshwar were not in themselves sufficient to cause the death of Rameshwar and it should not, therefore, be inferred that it was the intention of the assailants to cause the death of Rameshwar. Some rulings have also been cited to illustrate the viewpoint urged on behalf of the appellants. It is unnecessary to discuss these rulings as each case has to be decided on its own facts. The principle laid down in these rulings is not disputed. There should be an intention to murder or the knowledge that the injuries caused would result in the death of the person attacked before a man can be held guilty under S. 307, Penal Code, if the injured persons luckily escape death. The injuries inflicted in this case should therefore be taken into consideration in arriving at the con-

clusion about the intention of the persons who had made the attack on Rameshwar. Besides the evidence adduced to prove that the assailants had given out that Rameshwar should be put to death, the presence of two incised wounds on the head and nose which were both bone deep and were caused by spear coupled with severe fractures of bones of other parts of the body do lead to the inference that it was the intention of the appellants to cause the death of Rameshwar.

It is well nigh impossible to gauge the exact intention of an assailant and his intention can only be gathered from the nature of injuries caused. In the present case I have no doubt that the injuries do lead to the inference that the assailants were actuated with a motive to murder Rameshwar and the Civil Surgeon's evidence also lends support to this inference. The appellants have, therefore, been rightly convicted under S. 307, Penal Code for the injuries caused to Rameshwar and under S. 323 for the injuries caused to Bindeshwari.

(15) The learned Sessions Judge has sentenced the appellants to rigorous imprisonment for a period of seven years. This sentence appears to me to be a little too severe. A sentence of four years' rigorous imprisonment should in this case meet the ends of justice.

(16) The appeal, therefore, is allowed to this extent that the sentence passed under S. 307, Penal Code is reduced to four years' rigorous imprisonment. The conviction under S. 307 and the sentence of one year's rigorous imprisonment under S. 323, Penal Code as also the order about the sentences running concurrently are maintained.

B/R.G.D. Order accordingly.

A.I.R. 1954 ALL 63 (Vol. 41, C. N. 43)

BRIJ MOHAN LALL J.

Rajendra and another, Decree-holders-Appellants v. Balmukand and another, Judgment-debtors-Respondents.

Ex. Second Appeal No. 805 of 1951, D/- 14-8-1953, against decree of Dist. J., Agra, D/- 23-2-1951.

(a) Debt Laws — U. P. Debt Redemption Act (13 of 1940), Ss. 8, 24 — Mortgage decree — Judgment-debtor found agriculturist — Interest reduced and new decree passed — It is not discharge of decree — Second appeal from new decree — (Civil P. C. (1908), Ss. 47, 96 and 100).

Where in execution of a final mortgage decree under O. 34, R. 5, Civil P. C. the execution Court holds that the judgment-debtors were agriculturists within the meaning of the U. P. Debt Redemption Act, and amends the decree and reduces the amount of the interest, the decision is not one relating to the discharge of the decree and, as such, does not amount to a decree under S. 47 read with S. 2(2), Civil P. C. Therefore, no execution second appeal lies from such an order. AIR 1950 All 713 (FB), Applied. (Para 6)

But the decision amounts to a new decree although, by fiction of law recognised by sub-s. (2) of S. 8, Debt Redemption Act, this decree shall be deemed to bear the date of the original decree. Such a decree is open to appeal and second appeal under S. 96 and S. 100, Civil P. C., respectively. AIR 1946 All 89 (FB), Relied on. (Para 8)

Anno: Civil P. C., S. 47 N. 28, 84; S. 96 N. 11; S. 100 N. 5.

(b) Debt Laws — U. P. Debt Redemption Act (13 of 1940), Ss. 8, 9 — Mortgage suit pending when Act came into force — Reduction of interest cannot be asked for after passing of decree.

Law confers no right on the judgment-debtor to ask the Court to reduce the interest after a decree has been passed in a suit which was pending at the commencement of the Act. A suit for sale on the basis of a mortgage is deemed to be a pending suit till the date of the passing of the final decree.

Where the final decree had not been passed before the Act, it must be held that the suit was pending when the Act came into force. In such a case the judgment-debtor should have moved the Court for reduction of interest under S. 9 at the time of the passing of the decree. If he failed to make that request to the Court at that time, he has no right to do so afterwards. Section 8 has no application to a case like the present. (Paras 10, 11)

Harish Chandra Sharma, for Appellants; B. Dayal, for Respondents.

CASES REFERRED TO:

(A) ('42) AIR 1942 All 390: ILR (1943) All 35 (FB)
(B) ('42) AIR 1942 All 394: ILR (1943) All 48 (FB)
(C) ('50) AIR 1950 All 713: 1950 All LJ 847 (FB)
(D) ('46) AIR 1946 All 89: ILR (1946) All 413 (FB)
(E) ('30) AIR 1930 All 779: 52 All 910
(F) ('31) AIR 1931 All 386: 53 All 283 (FB)

JUDGMENT: This is a second appeal by the decree-holders. On the basis of a simple mortgage deed they obtained a decree for sale under O. 34, R. 4, Civil P. C. on 24-8-1939 and a final decree under O. 34, R. 5, Civil P. C. on 15-8-1942. They applied for execution of the final decree on 8-7-1944. On 27-8-1945 the judgment-debtors lodged a petition of objections and therein claimed that they were agriculturists within the meaning of the Agriculturists' Relief Act and the Debt Redemption Act. On the basis of that claim they prayed that the interest awarded in the decree might be reduced. The decree-holders denied the judgment-debtors' status as agriculturists.

(2) At the time of hearing, the judgment-debtors gave up their claim as agriculturists under the Agriculturists' Relief Act, and the learned Munsif recorded a definite finding that they were not agriculturists within the meaning of the said Act. This finding has not been challenged at any stage of the litigation. The learned Munsif, however, held that "the judgment-debtor is an agriculturist so far as the Debt Redemption Act goes." It may be pointed out that the learned Munsif speaks of the judgment-debtor in singular number, but obviously he meant that both the judgment-debtors (who are brothers) were agriculturists. This finding was based on a certain khatauni in which the name of Balmukand (one of the judgment-debtors) was recorded in respect of plots Nos. 713 and 719. Treating the judgment-debtors as agriculturists, the learned Munsif amended the decree and reduced the amount of interest.

(3) The decree-holders preferred an appeal which was heard by the learned District Judge of Agra. By the time the appeal came up for hearing the Commissioner of Agra Division had ordered the expunction of the entry on the basis of which the learned Munsif had treated Balmukand and his brother as agriculturists. The decree-holders sought the learned District Judge's permission to produce a copy of the Commissioner's judgment which had come into existence during the pendency of the appeal in the learned District Judge's Court. This prayer was refused and on the basis of the materials already on the record the learned District Judge upheld the decision of the learned Munsif.

(4) Against this decision this second appeal has been preferred. The appellants treat the decision of the Courts below as a decision of an objection under S. 47 and the appeal has been filed as an execution second appeal.

(5) A preliminary objection has been taken by the learned counsel for the respondents to the effect that no appeal lay to the District Judge and that, in any case, none lies to this Court.

(6) To meet this objection, the learned counsel for the appellants has adopted two different and independent lines of argument. It is contended that when a judgment-debtor puts forward a contention to the effect that, although the decree had been passed for a larger amount the amount actually payable under the decree is a smaller amount he really contends that a portion of the decree has been discharged. It is urged that a decision of the Court upholding this contention is, in substance, a decision to the effect that a portion of the decree has been discharged and therefore it is a decision under S. 47 which amounts to a decree as defined in S. 2 (2), Civil P. C. The above argument was considered and upheld in two Full Bench decisions reported in — 'Mt. Ketki Kunwar v. Ram Saroop', AIR 1942 All 390 (FB) (A) and — 'Mohammad Abdul Razzak v. Mt. Parvati Devi', AIR 1942 All 394 (FB) (B). Both these were three-Judge decisions.

Later on, a somewhat similar question came up for decision by a Full Bench of seven Judges in — 'Badri Prasad v. Shankar Lal', AIR 1950 All 713 (FB) (C). In that case the Court had rejected, and not allowed, the petition for amendment of a decree. The view taken by the majority in the Full Bench was that the decision of the Court refusing to amend the decree by reducing the interest did not amount to a discharge of the decree. In face of this decision, it is no longer open to contend that an order refusing to amend a decree amounts to a decision relating to a discharge of the decree. A necessary corollary of this decision is that even if the decision had been one amending a decree and reducing the interest, still there would have been no decision relating to the discharge of the decree. It cannot reasonably be maintained that if the Court accepts the judgment-debtors' contention it decides a question relating to the discharge of a decree and if it rejects it it makes no such decision. The nature of the question under consideration will not depend upon the decision made thereon. I am, therefore, of the opinion that the decision under appeal, although a decision allowing the objection, is not one relating to a discharge of the decree and, as such, does not amount to a decree under S. 47 read with S. 2 (2), Civil P. C. Therefore, no execution second appeal lies. The first line of argument put forward by the learned counsel for the appellants cannot, therefore, be accepted.

(7) The second line of argument adopted by the learned counsel for the appellants is that by amending the decree the learned Munsif passed a new decree and that every decree passed by a Munsif is (subject to certain exceptions none of which applies to this case) open to appeal and second appeal under Ss. 96 and 100, Civil P. C., respectively.

By virtue of S. 24, Debt Redemption Act, the provisions of the Code of Civil Procedure have been made applicable to the proceedings under the said Act "save in so far as they are inconsistent with the provisions of this Act." The learned counsel maintains that there is no inconsistency between the two and therefore an appeal lay to the learned District Judge and a second appeal lies to this Court as regular appeal and regular second appeal respectively. He concedes that if the appeal is treated as a regular second appeal, he will have to pay additional court-fee. He is prepared to pay that.

(8) In my opinion, the learned counsel stands on firmer ground in advancing this argument. The learned Munsif has undoubtedly passed a new decree, although, by fiction of law recognised by sub-s. (2) of S. 8, this decree shall be deemed to bear the date of the original decree. But there is no gainsaying the fact that this decree is not the same as the original decree. It is a new decree and, as such, it is appealable. In — 'Manmohan Lal v. Raj Kumar Lal', AIR 1946 All 89 (FB) (D) it was held that a decree passed in such circumstances was appealable under S. 96, C. P. C. and that the period of limitation would run from the date on which the amendment took place, notwithstanding the fact that notionally the amended decree would bear the date of the original decree.

The authority of this Full Bench has not been shaken by anything contained in the later Full Bench of seven Judges. The question whether an appeal would lie under S. 96, C. P. C. did not arise in that case. But two of the learned Judges, Kidwai and Chandiramani JJ., observed by way of obiter dictum that, if the Court amends the decree and reduces the interest, an appeal would lie under S. 96, Civil P. C. In the circumstances, I treat this second appeal as a regular second appeal on the understanding that the appellants would pay the deficiency in court-fee. The preliminary objection is, therefore, overruled.

(9) Coming to the merits, the first point that will arise for decision would be whether the judgment-debtors were agriculturists. I am told by the learned counsel that the Commissioner's decision, on the basis of which the decree-holders sought the setting aside of the learned Munsif's decision, is itself the subject-matter of an appeal before the Hon'ble Board of Revenue and that the appeal is still pending. At a certain stage I thought of postponing the decision of this appeal pending the disposal of the appeal by the Board of Revenue. But later on it transpired that it was not necessary to postpone the decision of this case because, even on the assumption that the judgment-debtors are agriculturists, this appeal is bound to succeed.

(10) Assuming that the judgment-debtors are agriculturists, they had a right to apply under S. 8, Debt Redemption Act for amendment of a decree passed before the commencement of the said Act. In respect of a suit pending at the commencement of the Act they had a right to ask for reduction of interest at the time of the passing of the decree in the said suit. If in a pending suit they failed to ask for reduction of interest at the time of the passing of the decree,

they had no further right to claim any reduction. Law confers no right on them to ask the Court to reduce the interest after a decree has been passed in a suit which was pending at the commencement of the Act.

(11) The Act came into force on 1-1-1941. As already stated, the preliminary decree had been passed before that date, but the final decree had not been passed till then. A suit for sale on the basis of a mortgage is deemed to be a pending suit till the date of the passing of the final decree. This was held in — 'Anmol Singh v. Hari Shankar', AIR 1930 All 779 (E). This decision was approved of in the Full Bench case of — 'Sat Prakash v. Bahal Rai', AIR 1931 All 386 (FB) (F). It will, therefore, follow that the present suit was a pending suit on the date of the commencement of the Act. The judgment-debtors should have moved the Court for reduction of interest under S. 9 at the time of the passing of the decree. If they failed to make that request to the Court at that time, they have no right to do so afterwards. Section 8 had no application to a case like the present. Their application for amendment should, therefore, be rejected on that very ground.

(12) The learned counsel for the decree-holders offered to file a declaration under S. 4 in order to defeat the judgment-debtors' claim for reduction of interest. But this declaration cannot be filed because it is provided by S. 4(2) that a declaration can be filed in the case of a suit pending at the commencement of the Act till the disposal of the suit only and not afterwards.

(13) As a result of the finding that the application for amendment presented after the decision of the suit was not maintainable, this appeal must succeed. The appeal is allowed. The appellants shall make good the deficiency in court-fee of both the Courts within two months from today. So long as the deficiency is not made good, they shall not be entitled to execute their decree. The deficiency shall be taxed in costs, if made good within two months, but not otherwise. The appellants shall get the costs of this appeal and of the lower appellate Court from the respondents only if they make good the deficiency within the aforesaid period, but not otherwise.

B/R.G.D. Order accordingly.

A.I.R. 1954 ALL. 65 (Vol. 41, C. N. 44)
(LUCKNOW BENCH)

MALIK C. J. AND AGARWALA J.

Abdul Ghafoor and others, Defendants-Appellants v. Abdus Salam and others, Plaintiffs-Respondents.

Second Appeal No. 145 of 1945, D/- 31-7-1953, against order of Addl. Civil Judge, Gonda, D/- 11-12-1944.

Debt Laws — U. P. Encumbered Estates Act (7 of 1934), S. 11 — Effect of failure to file objection.

Where an owner of property which is included in the list given by the landlord applicant under S. 8 of the Act fails to file any objection under S. 11, his right to the property will not automatically come to an end and his right to file a suit for declaration of his title in a civil Court will not be barred. The fact that he had knowledge of the proceedings under the Act cannot affect the question. AIR 1952 All 227 (FB). Foll. (Para 1)

J. S. Trivedi, for Appellants.

CASE REFERRED TO:

(A) ('52) AIR 1952 All 227: 1952 All LJ 153 (FB)

MALIK. C. J.: Learned counsel had raised a short point and that is whether the plaintiffs who had not filed an objection under s. 11, U. P. Encumbered Estates Act, could ignore the proceedings before the learned Special Judge and come to the civil court for a declaration that the property which had been included by the landlord in his written statement under s. 8 belonged to the plaintiffs. The learned single Judge before whom the case came up referred it to a larger Bench but in view of the Full Bench decision in — 'Krishnapal Singh v. Mst. Babban', AIR 1952 All 227 (A), the learned Judge changed the order and said that instead of a Full Bench the case may be listed before a Division Bench.

Today, however, the learned counsel has raised a slightly different point. He has urged that he had made a mistake in urging before the learned single Judge that the plaintiffs had filed no objection under S. 11 and he referred us to the replication filed by the plaintiffs to show that they had, as a matter of fact, filed an objection under S. 11. In paras. 19 and 20 of the replication, the plaintiffs pleaded that they were not parties to the Encumbered Estates Act proceedings and had no information or knowledge of these proceedings and said that

> "in order to avoid dispute, the plaintiffs have filed objections in encumbered suits under S. 11. But the plaintiffs absolutely deny this fact that due to encumbered suit the proceedings of this case could not be taken."

The point urged is that the plaintiffs having filed an objection under S. 11 in the Encumbered Estates Act proceedings, they had no right to proceed with this suit. The suit from the paragraph in replication, appears to be an earlier instituted litigation and the objection under S. 11 seems to have been filed later. We have no information as to the stage at which the Encumbered Estates Act proceedings were nor do we know what happened to that objection if it was filed, that is, if it was ever admitted or registered. We cannot, therefore, allow the learned counsel to raise a new point. The case is fully covered by the decision of the Full Bench in Krishnapal Singh's case (A).

Learned counsel, however, has tried to distinguish that case on the ground that while in that case the plaintiff had no knowledge of the Encumbered Estates Act proceedings, in the case before us, the plaintiffs knew of the U. P. Encumbered Estates Act proceedings and they should have, therefore, filed objections under S. 11 before the Special Judge. We are not informed on what provision of law this argument is based. It may be that S. 11, Encumbered Estates Act, gives a third party, whose property has been included by the landlord in his written statement under S. 8 of the Act a right to put in an objection that the property is not saleable in payment of the debt of the landlord applicant. If such an objection is filed and is decided, S. 11 itself provides that such a decision will be deemed to be a decision of a competent civil court. There is however, no section in the U. P. Encumbered Estates Act that if no objection is filed under S. 11, the right of any third party to the proceedings, to whom the property may rightfully belong, will automatically come to an end and he will have no right to come to a civil court of competent jurisdiction for the adjudication of those rights.

In the case of debts, the Legislature has provided in S. 13, U. P. Encumbered Estates Act, that if the creditors do not put forward their claims within a certain period, the claims would be deemed to be discharged for all purposes. If it was the intention of the Legislature that the same result should follow if the owner of a property which had been included in the list given by the landlord applicant had failed to file his objection under S. 11 and his right to the property should cease or his right to file a suit for a declaration of his title should be barred, then a section similar to S. 13 would have been enacted. We have no doubt that the contentions advanced by learned counsel have no force. The appeal, therefore, is dismissed but as the other side is not represented, we make no order as to costs.

B/K. S. B. Appeal dismissed.

A.I.R. 1954 ALL. 66 (Vol. 41, C. N. 45)

(LUCKNOW BENCH)

V. BHARGAVA J.

Sheo Dayal and another, Plaintiffs-Appellants v. Ram Harakh and another, Defendants-Respondents.

Second Appeal No. 375 of 1947, D/- 13-4-1953, against decree of Civil J., Gonda, D/- 29-1-1947.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 36, 37 — Succession to holding as widow.

In order to find out whether the woman succeeded to an interest in the land in suit as a widow one has to go back to the law as it stood on the date when the husband died and the succession opened. Held, that the law, as it applied when the husband died (Avadh Rent Act (1886)) granted no tenancy rights to the widow in the land of which the husband had been the tenant and the execution of the new lease in her favour was thus the conferment of new rights of tenancy on her. Consequently, S. 36 was not applicable and the succession must be governed by S. 37.

(Para 3)

S. N. Srivastava, for Appellants; N. Banerji for Respondents.

JUDGMENT: This second appeal arises out of a suit for possession over certain tenancy plots.

(2) The facts found by the lower appellate Court are that some of the plots in suit were originally the tenancy of Ram Padarath upto the year 1328 Fasli; that some time during 1328 Fasli Ram Padarath died so that, in 1329 Fasli, those plots were shown as being in the possession of his widow, Shrimati Maharaj Dei; that in 1331 Fasli Shrimati Maharaj Dei obtained a lease of all the plots in suit, which included the plots which had been shown in the name of Ram Padarath in 1328 Fasli, from the landlord and she was granted the rights of a statutory tenant; and that Shrimati Maharaj Dei died in 1945 and then a dispute arose as to who was entitled to succeed to the tenancy rights in those plots. The plaintiffs-appellants are the sons of the daughter of Ram Padarath and Shrimati Maharaj Dei whereas the respondents are the brother and the brother's son of Ram Padarath. The appellants claimed that, by virtue of the lease of 1331 Fasli, Shrimati Maharaj Dei had become a tenant of those plots in suit in her own rights and, consequently, under S. 37, U. P. Tenancy Act, which was applicable when Shrimati Maharaj Dei died, they were entitled to succeed to her tenancy. On behalf of the respondents the contention was that Shrimati Maharaj Dei had originally acquired tenancy rights in the plots in suit as a widow and consequently, on her death, succession would be governed by Ss. 35 and 36, U. P. Tenancy Act, so that respondent 1, Ram Harakh, brother of Ram Padarath deceased, had a right to succeed in preference to the daughter's sons. The lower appellate Court, following two decisions of the Board of Revenue, held that Shrimati Maharaj Dei succeeded to the tenancy rights in the plots in suit as a widow and the succession was consequently governed by Ss. 35 and 36, U. P. Tenancy Act. Consequently, the lower appellate Court decided the suit in favour of the respondents and dismissed the suit of the appellants.

(3) Section 37, U. P. Tenancy Act has been made applicable only to such female tenants who are not mentioned in S. 34 or S. 36 of the Act so that it is a residuary section and, in order to apply this section, it is necessary to interpret Ss. 34 and 36 of the Act. Section 34 is, in this case, not applicable at all and need not be mentioned. Section 36 is as follows:

"36 (1) When a female tenant, other than a tenant mentioned in S. 34, who, either before or after the commencement of this Act has inherited an interest in a holding as a widow, as a mother, as a step-mother, as a father's mother, or as a daughter dies or abandons such holding, or surrenders such holding or a part of such holding, or, in the case of a tenant inheriting as a widow or as a daughter, marries, such holding or such part of such holding shall, notwithstanding anything in S. 45, devolve in accordance with the order of succession laid down in S. 35, on the heir of the last male tenant, other than a tenant who inherited as a father's father under the provisions of that section."

What has to be examined in this case is whether Shrimati Maharaj Dei can be held to have inherited an interest in the land in suit as a widow of Ram Padarath. In order to find out whether she succeeded to an interest in the land in suit as a widow, we have to go back to the law as it stood on the date when Ram Padarath died and the succession opened. Learned counsel for both parties are agreed that Ram Padarath died before the Avadh Rent (Amendment) Act (U. P. Act 4 of 1921) came into force so that the law then applicable was Avadh Rent Act of 1886. Under that Act, there was no provision for succession to tenancy or to interest in holdings of a tenant. The only provision granting a right to an heir was S. 48 of that Act which merely gave to the heir the rights (i) to retain occupation of the holding at the rent paid by the deceased statutory tenant for the unexpired portion of the period for which the deceased tenant might have held it without liability to enhancement of the rent or ejectment and (ii) to receive compensation under the provisions of that Act for improvements, if any, made on the holding by himself or by his predecessor-in-interest. There was an additional clause laying down that the heir of that tenant shall not be entitled to a renewal of the tenancy. It was under this provision that Shrimati Maharaj Dei, on the death of Ram Padarath continued in possession of some of the plots in suit, viz., those plots of which Ram Padarath was a tenant in 1328 Fasli.

There is no finding by the lower Courts and learned counsel for the parties have not drawn my attention to any evidence to show what was

the unexpired portion of the period for which Ram Padarath would have been entitled to continue in possession as a tenant. It was three years later in 1331 Fasli that Shrimati Maharaj Dei was given a fresh lease by the landlord and then she was given the right of a statutory tenant as defined in the Avadh Rent Act of 1886, as amended by U. P. Act 4 of 1921. It is clear that this lease cannot be construed as continuing her possession in the same right in which she had originally come into possession, on the death of Ram Padarath, of some of the plots in suit. It has been pointed out by learned counsel for the respondents that the lease granted to Shrimati Maharaj Dei in 1331 Fasli was either in respect of those very plots of which Ram Padarath had been a tenant or included other plots which were given in lieu of those from which Shrimati Maharaj Dei was dispossessed though she had come into occupation of those plots also on the death of Ram Padarath. Even though the lease was in respect of the same land or land granted in lieu of the land which had been held by Ram Padarath, it is also clear that this lease cannot be construed as a renewal of any rights, which Shrimati Maharaj Dei already had on the date of the lease, in the land as the heir of Ram Padarath.

In the capacity of the heir of Ram Padarath, she was only entitled to be in occupation of the land for a certain period which, as I have said above, it is not possible to determine in this case; but she was not a tenant at all. The law, as it applied when Ram Padarath died, granted no tenancy rights to Shrimati Maharaj Dei in the land of which Ram Padarath had been the tenant and the execution of the new lease was thus the conferment of new rights of tenancy on Shrimati Maharaj Dei. Renewal implies the continuance of pre-existing rights are not continued (sic) but entirely fresh rights are created. The new lease in 1331 Fasli, it appears, was permissible as the right of occupation of Shrimati Maharaj Dei as heir of Ram Padarath must have terminated due to the lapse of the period permissible under S. 48, Avadh Rent Act of 1886. There is no clear finding that that period had expired but the circumstances reasonably justify an inference that this lease was granted to her by the landlord at the time when she became liable to be ejected from the land. The landlord, at this stage, appears to have agreed to let the land continue in the cultivation of the family of Ram Padarath. He consequently, granted a fresh lease to Shrimati Maharaj Dei and granted her statutory rights for a period of ten years renewable after expiry of that period with liability to enhance the rate of rent.

This right of tenancy conferred by the landlord was acquired by Shrimati Maharaj Dei in her own right and not in the capacity of the widow of Ram Padarath with the result that, from the date of the execution of that lease, it must be held that her occupation as heir of Ram Padarath ceased and she started possession in the capacity of a statutory tenant under the lease which had been granted to her in her own right. In this view, on the day when Shrimati Maharaj Dei died, she was in possession by virtue of the lease granted to her in her own right in 1331 Fasli and not by virtue of any interest to which she might have succeeded on the death of Ram Padarath as his widow. Consequently, S. 36, U. P. Tenancy Act is not applicable to this case and the succession must be governed by S. 37 of the Act.

(4) As a result, I allow the appeal with costs, set aside the decree passed by the lower appellate Court and decree the suit of the plaintiffs-appellants for possession by ejectment of the respondents. There was also a claim for damages but the amount of damages has not been determined by the lower Court and I do not consider that, in the circumstances of this case, it is necessary to have the damages ascertained and a decree in respect of damages also granted. The dismissal of the suit, so far as damages are concerned, shall stand.

(5) Leave to appeal to a Division Bench is granted.

B/D.H.Z. Appeal allowed.

A.I.R. 1954 ALL. 67 (Vol. 41, C. N. 46)

(LUCKNOW BENCH)

AGARWALA J.

Jodha Ram, Accused-Applicant v. State through Bishun Dutt, Complainant-Opposite Party.

Criminal Revn. No. 14 of 1953, D/- 3-8-1953, against order of 2nd Civil and S. J., Lucknow, D/- 15-12-1952.

Penal Code (1860), S. 441 — "To annoy."

The annoyance which is spoken of in S. 441, I. P. C. is not intended to be instantaneous i.e. at the moment of entry. It may happen subsequently. When the accused knows that another person is lawfully in possession of property and illegally enters into possession of it, in the absence of that another person, his intention cannot be anything else but that of annoyance to the person in possession. (Para 4)

Anno: Penal Code, S. 441 N. 4.

I. A. Abbasi, for Applicant; R. K. Rai, for Opposite Party.

ORDER: This is an application in revision by Jodha Ram Gadaria, a resident of Ahata Agha Turab Khan, Husainganj, Lucknow.

(2) The applicant was convicted by a Magistrate under S. 448, I. P. C. and sentenced to a fine of Rs. 60/- only. His appeal before the Sessions Judge was dismissed. The facts which led to his prosecution and conviction may be briefly stated as follows:

On 30-10-1950, the applicant purchased a house situate in Ahata Agha Turab Khan Husainganj, Lucknow, from one Jagdamba Prasad its previous owner. The house was then occupied by Bishun Dutt, complainant as a tenant. The applicant could not, therefore, enter into actual possession of the house. On 30-11-1950, Bishun Dutt who is employed as a driver in the Transport Section of the U. P. Co-operative Department and Marketing Federation left Lucknow for Benaras with his family after locking the house. The rent for the month of November is alleged to have been sent by him to Jodha Ram on 19-12-1950. It is alleged that Jodha Ram refused to accept this money order. He again sent the rent for December, 1950 on 18-1-1951 and the rent for January 1951 on 26-2-1951. These two money orders are also alleged to have been returned by the applicant. The applicant's case, however, is that these money orders were never received by him.

During this interval, however, Jodha Ram applied to the City Magistrate on 12-1-1951, for

permission to break open the lock and enter into possession of the house. His allegation was that Bishun Dutt had unnecessarily locked the house and that he had really given up possession of the house. The City Magistrate ordered that the applicant could do what he desired at his own risk but that he must break open the lock and take over possession in the presence of respectable persons. Armed with this order, Jodha Ram broke open the lock on 27-2-1951. The goods of Bishun Dutt were found in the house. An inventory was made and Jodha Ram entered into possession of the house and intimated this fact to the City Magistrate on 3-3-1951.

On 4-4-1951, Bishun Dutt returned from Benaras. To his surprise he found that the house had been occupied in his absence by Jodha Ram. He also discovered that Jodha Ram had taken certain legal proceedings before entering into possession of the house. Naturally he at first applied to the City Magistrate that the order passed by him was passed in his absence and that he was entitled to possession of the house. He also filed a complaint in Court. The complaint was, however, dismissed in default and his application to the Magistrate was also dismissed. Then he made another application on 8-9-1951, and although it was at first dismissed by the Magistrate under S. 203, Cr. P. C. it was restored to the file by the order of the Sessions Judge for further inquiry. On further inquiry, the applicant was convicted by the Magistrate as stated above and his appeal was also dismissed by the learned Sessions Judge. Both the Magistrate and the learned Sessions Judge held that the occupation by the applicant was wholly illegal and unauthorized and that it was done mala fide with a view to annoy the complainant.

(3) The question for determination in this revision mainly is whether the act of the applicant in entering into possession over the house was with the intent, in the words of S. 441, I. P. C., "to commit an offence or to intimidate, insult or annoy any person in possession of such property." It is not the case of the complainant that the applicant wanted to commit any offence or to intimidate or insult the complainant. Therefore the question merely is whether the applicant broke open the lock and entered into possession of the house in order to 'annoy' the applicant. The Court below has found that this was in fact the applicant's intention and after hearing learned Counsel for the applicant, I have no hesitation in endorsing the conclusion reached by the learned Sessions Judge.

The circumstances of the case speak for themselves. The complainant was in occupation of the house when the applicant purchased it. In these days of scarcity of house accommodation, it is unthinkable that a tenant would willingly give up possession of the house. Bishun Dutt could not have intended to give up possession as he left his goods in the house and locked it. If he had voluntarily intended to give up possession of the house he would have told the applicant that that was his intention and would have delivered possession to him. He did not do so. Moreover when he went to Benaras, he sent money orders to the applicant. The postal receipts and the money order coupons which have both been filed by the complainant have been sufficiently proved. One of the postmen who took one of the money orders to the applicant was also produced in the Court below. Chandra Shekhar, P. W. 4, the postman swore that he took the money order to the applicant, that the applicant refused to take it and thereupon he returned the money order. He further swore that on the very money order which he took to the applicant, the applicant himself wrote down the words "Refused and returned."

The Court below believed this witness and I have no reason to differ from the view of the learned Sessions Judge. The applicant's case was that he never received the money orders. This could not be believed. It is hard to think that the money orders were forged ones. On no less than three occasions were the money orders returned as having been refused. The testimony of Chandra Shekhar having been believed, the denial of the applicant must be considered to be false. He having himself refused to take the money orders there can be no other conclusion but that he employed the subterfuge of applying to the City Magistrate to enter into possession of the house under cover of his orders and that his real intention was to enter into possession of the house unlawfully against the wishes of the complainant and oust him from possession unlawfully. In the circumstances his intention was clearly to annoy the complainant.

(4) It was urged that it could not be assumed that the intention of the applicant was to 'annoy' the complainant when the entry was made into the house in the absence of the complainant. I cannot accept this contention. If this contention were accepted, this would give a free licence to landlords to take possession of tenants' property in their absence even for a short while. When a landlord takes possession of a house in the absence of the tenant, the tenant is certainly annoyed when he comes to know that he was forcibly ousted from his house. The annoyance which is spoken of in S. 441, I. P. C. is not intended to be instantaneous. It may happen subsequently. There is no warrant for thinking that annoyance mentioned in the section must be caused to the person in possession at the moment when another person enters into or upon the property. What has to be seen is the present intention of the accused. If the accused enters into possession of the property in the possession of another with the intention to annoy that person, the offence is completed even though the annoyance is not actually caused to the person in possession at the moment of entry. When the accused knows that another person is lawfully in possession of property and illegally enters into possession of it, his intention cannot be anything else but that of annoyance to the person in possession.

(5) There is no force in this application. It is accordingly dismissed.

(6) Before leaving this case I must observe that the sentence of fine of Rs. 60/- is very inadequate. The possession of the house has not yet been returned by the applicant to the complainant. The action of the applicant was, as held above, high handed in the extreme. I was inclined to issue notice for enhancement but I have refrained from doing so as there was no prayer for doing so from the side of the complainant or of the Government Advocate.

C/H.G.P. Revision dismissed.

A.I.R. 1954 ALL. 69 (Vol. 41, C. N. 47)

DESAI J.

Richhpal and another, Applicants v. State.

Criminal Misc. Case No. 1048 of 1953, D/- 22-7-1953.

(a) Criminal P. C. (1898), S. 526(1)(a) — Station officer always standing by side of Assistant Public Prosecutor in Court during proceedings — This is no ground for transfer. **(Para 1)**

Anno: Cr. P. C., S. 526 N. 5.

(b) Criminal P. C. (1898), S. 526(8) — Magistrate's duty to stay proceedings.

A Magistrate has to stay further proceedings in the case as soon as the accused intimate to him their intention to apply for transfer of the case. It is not necessary that the accused should bring a stay order from the District Magistrate or file an affidavit accompanying the application for adjournment. (Para 2)

Anno: Cr. P. C., S. 526 N. 19.

(c) Criminal P. C. (1898), S. 526(1)(a) and (8) — Ground for transfer — Magistrate disobeying S. 526(8).

Disobedience of statutory provisions is not one of the grounds for the transfer of a case. Therefore it cannot be laid down as a rule that a case must be transferred if a statutory provision is disobeyed by the Magistrate. Thus, where the Magistrate's disobedience of the mandatory provisions of S. 526(8) is 'bona fide' it would not furnish a ground for the transfer of the case. AIR 1928 All 660(1), Distinguished. (Para 2)

Anno: Cr. P. C., S. 526 N. 5 Pt. 56; N. 19 Pt. 16.

B. S. Darbari, for Applicants; S. K. Dongree, for the State.

CASE REFERRED TO:

(A) ('28) AIR 1928 All 660(1): 26 All LJ 1321: 29 Cri LJ 671

ORDER: This is an application by two men who are being prosecuted under S. 110, Cr. P. C., in the Court of the Magistrate, for transfer of the case to another Court. Before coming to the main ground I would deal with other grounds which can be dealt with shortly. One allegation made by the applicants is that the station officer always stands by the side of the Assistant Public Prosecutor in the Court during the proceedings and that the witnesses are thus influenced. The learned Magistrate writes in his explanation that the station officer generally comes for the 'pairvi' of the cases, that it is possible that he stood by the side of the Assistant Public Prosecutor, that he himself never permitted him to stand by his side, that the applicants never objected to his standing by his side and that he has been transferred and another station officer has taken charge of the case.

If the station officer stands by the side of the Assistant Public Prosecutor during the trial of the case, the Magistrate cannot be blamed. I do not know what authority a Magistrate has to say to the station officer not to stand by the side of the Assistant Public Prosecutor or to stand in a corner of the Court room. Further, if there was anything objectionable, the applicants should have brought the matter to the notice of the learned Magistrate. But this has never been done. There is no force in this allegation. Another allegation is that on one date the station officer did not come to the court and the learned Magistrate said that the case would not be taken up because he was not present. It is not mentioned on what date this happened with the result that the learned Magistrate could not give a definite reply. He says that he does not remember if such a thing happened at all. No action can be taken on this allegation also.

(2) I now come to the most important allegation and it is that when the applicants applied to the learned Magistrate for adjournment of the case under S. 526 (8) of the Code, the learned Magistrate did not stay the proceedings and examined five prosecution witnesses. This is admitted by the learned Magistrate. He writes in his explanation that "no affidavit for staying the proceedings was accompanied with it", that consequently he asked the applicants to bring a stay order from the Court of the District Magistrate and that he examined the five prosecution witnesses so that they may not have to come again at the cost of the State. The explanation given by the learned Magistrate is not sound in law. It was for him to stay further proceedings in the case as soon as the applicants intimated to him their intention to apply for transfer of the case. When the Legislature cast the duty upon him to stay further proceedings, there could not possibly arise any question of the applicants' bringing a stay order from the District Magistrate. Nor was there any question of any affidavit accompanying the application for adjournment.

All that the applicants had to do was to intimate to him their intention to apply for transfer. He had nothing to do with the question of diet money and it was no concern of him that the witnesses may have to be called again. But there is no reason for me to think that the learned Magistrate deliberately or flagrantly refused to stay further proceedings and knowingly disobeyed the provisions of S. 526 (8), Cr. P. C. It has not been alleged that in spite of his attention being drawn to the provisions of S. 526 (8) he refused to stay further proceedings. It may be that he was ignorant of the provisions of S. 526 (8) and did not know that he was bound to stay further proceedings on being informed by an accused of his intention to move for transfer. In these circumstances his disobedience of the mandatory provisions of S. 526 (8) was 'bona fide' and would not furnish a ground for the transfer of the case.

Mr. Darbari referred me to cases in which it was held that if a Magistrate refuses to adjourn a case under S. 526 (8) that alone is a ground for transfer of the case from his Court. One of them is —'Walidad Khan v. Emperor', AIR 1928 All 660 (1) (A). That was a case of "flagrant disobedience of a statutory mandate". There is no reason for me to say that in the present instance the disobedience by the learned Magistrate was of a flagrant nature. The circumstances in which a Magistrate disobeys a statutory provision vary from case to case and it is impossible to lay down one rule to meet all cases of disobedience of statutory provisions. The Legislature has mentioned the grounds in which a case can be transferred from a Court. Disobedience of statutory provisions is not one of those grounds. It is not for a High Court to add to the grounds. Therefore it cannot be laid down as a rule that a case must be transferred if a statutory provision is disobeyed by the Magistrate.

The remedy of the aggrieved party against the disobedience is an appeal or revision, if at all. If the disobedience is deliberate, the Magistrate may

be punished, but transfer of the particular case from his Court is no punishment. One of the grounds mentioned in S. 526 is that a fair and impartial trial cannot be had. In some instances the disobedience of a mandatory provision may cause an apprehension that a fair and impartial trial cannot be had. But the same cannot be said of every disobedience of a mandatory provision. Certainly disobedience of a mandatory provision is not tantamount to not trying the case fairly and impartially. The two are quite different and it would be wrong to confuse one with the other. Mandatory provisions contained in Ss. 145, 202, 252 (2) etc. of the Code are frequently violated by most Magistrates, but I have never heard of any case being transferred on the ground of this violation.

The only ground on which the applicants can succeed in the present case is that a fair and impartial trial cannot be had from the Court of the learned Magistrate. They have failed to satisfy me that this apprehension results merely from the fact of the learned Magistrate's refusal to stay further proceedings in the case. The refusal has nothing to do with the fair and impartial trial. The applicants should have had justification for their apprehension before they intimated to the learned Magistrate their intention to move for transfer. They cannot, without having any justification for the apprehension that they would not have a fair and impartial trial, ask for an adjournment under S. 526 (8) in the hope that the Magistrate would refuse to stay further proceedings and thereby furnish a ground for transfer when so far none existed.

(3) No case is made out for transfer of the case under S. 526 (8), Cr. P. C., and the application is dismissed.

B/V.R.B. Application dismissed.

A.I.R. 1954 ALL. 70 (Vol. 41, C. N. 48)

(LUCKNOW BENCH)

AGARWALA J.

Bans Ali and others, Defendants-Appellants v. Mohammad Ali and others, Plaintiffs-Respondents.

Second Appeal No. 573 of 1947, D/- 11-8-1953, against decree of Civil J., Bahraich, D/- 19-5-1947.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 36, 37 — Applicability.

Section 36 applies when a female tenant (other than a tenant mentioned in S. 34) held the property in her capacity as a widow or other female mentioned in the section. It does not apply to the case of a female holding a tenancy in her own right. Succession to a female tenant holding a tenancy in her own right is governed by S. 37.

Plaintiffs brought a suit in 1945 for recovery of possession of a holding, claiming succession under S. 36, as reversioners to the deceased A, after the death of A's widow M who had succeeded A as his heir from before 1922-23 and had remained in possession till her death in 1943. Defendants pleaded that on account of a patta executed by the landlord in favour of M in 1922, she was a tenant in her own right and did not hold possession as heir to her husband A. Lower Appellate Court passed the decree in favour of plaintiffs. On second appeal,

Held, that the Oudh Rent Act was abolished and statutory tenancy introduced in 1921. Therefore M entered into possession either as an heir of a statutory tenant or as an heir of a non-occupancy tenant. In either event she was liable to be ejected from the holding and, therefore, when the zemindar executed a patta in her favour in 1922 for ten years she became a tenant in her own right under the patta which was entirely a new contract. She, therefore, became a hereditary tenant when the U. P. Tenancy Act came into force in 1939. Succession to her would be governed not by S. 36 but by S. 37 of the Act. (Para 4)

Hakimuddin and Halimuddin, for Appellants; Akhtar Husain, for Respondents Nos. 1 to 3.

JUDGMENT: This is a defendant's appeal arising out of a suit for recovery of possession of two holdings, one in village Lauki and the other in village Shekhapur. The plaintiffs' case was that one Habi was originally a tenant of these holdings. He left three sons, Karimullah, Fakhrullah and Akbar Ali who succeeded him on his death. After the death of Akbar Ali, Mst. Muliman his widow succeeded him as his heir and remained in possession of the property till her death in 1943. The plaintiffs 1 and 2 being the sons of Karimullah and Fakhrullah respectively and plaintiff No. 3 being the grandson of Fakhrullah are now entitled to the holdings on the death of Mst. Muliman as the reversioners of her husband, Akbar Ali. The suit was instituted in 1945. The plaintiffs claim that the succession to the tenancy was governed by S. 36, U. P. Tenancy Act.

(2) The defendants are the sons of Malka daughter of Muliman. Their defence was that Mst. Muliman was a tenant of the holdings in her own right and did not hold possession as an heir of Akbar Ali. They further state that she had obtained two pattas of the holdings in the year 1330F for ten years ending at the end of 1339F and that in whatever capacity she might have entered into possession of the holdings in the beginning she became a tenant in her own right by reason of these two pattas.

(3) The trial Court dismissed the suit with regard to the holding in village Lauki but decreed it with regard to the holding in village Shekhapur. The defendants were satisfied with this decree and did not appeal. The plaintiffs being dissatisfied with the dismissal of the suit in respect of the holding in village Lauki appealed to the lower appellate Court and succeeded. During the pendency of the appeal in that Court, Majeed defendant, son of Malka died and his heirs were brought on the record. The lower appellate Court held that Muliman entered into possession of the holding as an heir of Akbar Ali, that the patta executed in her favour in the year 1330F was merely a conversion of grain rent into cash rent and did not confer on her any new rights or make her a tenant in her own right. Against this decree the defendants have appealed.

(4) It has been urged by learned counsel for the appellants that assuming that Muliman inherited the tenancy in dispute from Akbar Ali, she became a tenant in her own right when she obtained a patta of the holding from the landlord. The point of time when Muliman succeeded to the tenancy is not known because we do not

know when Akbar Ali died. But this much is known that Muliman was in possession of the holding from before 1330F that is from before 1922-23. In 1921 the Oudh Rent Act which applied to the case was abolished and statutory tenancy was introduced for the first time. Non-occupancy tenants became statutory tenants. If, however, Akbar Ali died after 1921 then Akbar Ali was a statutory tenant and Muliman entered into possession of the holding as an heir of a statutory tenant. If Akbar Ali was a mere non-occupancy tenant, Muliman was also a non-occupancy tenant.

Therefore, Muliman entered into possession either as an heir of a Statutory tenant or as an heir of a non-occupancy tenant. In either event she was liable to be ejected from the holding and, therefore, when the zemindar executed a patta in her favour in the year 1922 for ten years she became a tenant in her own right under the patta. It is wholly immaterial that the patta was given by the zemindar after the rent in kind had been commuted into a rent in cash. The main point to be noticed is that she had no right to remain in possession of the holding as an heir when the patta was granted to her or at the most after five years of the death of Akbar Ali. The execution of the patta in her favour was entirely a new contract between the zemindar & Muliman and Muliman acquired title to hold the tenancy in her own right under the patta. She, therefore, became a hereditary tenant when the U. P. Tenancy Act came into force in 1939. Succession to her would be governed not by S. 36, U. P. Tenancy Act, but by S. 37 of the Act. Section 36 applies when a female tenant (other than a tenant mentioned in S. 34) held the property in her capacity as a widow or other female mentioned in the section. It does not apply to the case of a female holding a tenancy in her own right. Succession to a female tenant holding a tenancy in her own right is governed by S. 37. The expression in S. 36

"who either before or after the commencement of this Act has inherited an interest in the holding as a widow....."

refers to a female tenant who has inherited the holding as a widow etc. still continuing to hold possession of the holding in that capacity at the time of her death. In the present case, as I have stated already though Muliman inherited the property as a widow she acquired the holding in her own right by entering into a fresh contract with the landlord. If she were a tenant who could not have been ejected, for instance, if she were an occupancy or ex-proprietary tenant, the position might have been different. The plaintiffs were, therefore, not entitled to inherit the holding. Their suit should have been dismissed.

(5) I, therefore, allow this appeal, set aside the decree of the Court below and restore that of the Munsif with costs throughout.

(6) Special leave to appeal to a Division Bench is refused.

B/H.G.P. Appeal allowed.

A.I.R. 1954 ALL. 71 (Vol. 41, C. N. 49)

CHATURVEDI J.

Jagdeo Singh and another, Defendants-Appellants v. Sitla Pd., Plaintiff-Respondent.

Second Appeal No. 1622 of 1949, D/- 4-8-1953, against decision of Civil Judge, Faizabad, D/- 31-8-1949.

(a) Limitation Act (1908), S. 6 — Privilege under Section is not confined to proceedings instituted after cessation of disability.

In order to claim the benefit of S. 6, it is not necessary that the suit should be filed by the minor after attaining majority. Hence, a suit filed on behalf of a minor who is entitled to benefit of S. 6, by his next friend will not be barred by limitation even though it is filed beyond the ordinary period of limitation. (Para 6)

(b) Hindu Law — Debts — Alienation — Alienation of ancestral property for antecedent debts — Who can make.

It is not correct to say that under the Hindu Law no other member of the family except the father can alienate the joint family property in order to pay up the antecedent debts of the father. The important question, in such cases is whether the alienation was justified on account of some pressure or necessity, apart from the fact that the debt was an antecedent debt of the father. (Paras 7, 10)

Hence, a sale deed executed by the guardian of a minor son in respect of ancestral property, for payment of ancestral debts of the father would be binding on the minor provided there is any pressing necessity for the execution of the sale deed. If no such pressing necessity is established the sale is voidable at the instance of the minor. AIR 1949 All 501 and AIR 1938 All 147, Rel. on. AIR 1933 All 273 (FB), Distinguished. (Para 11)

(c) Civil P. C. (1908), O. 23, Rr. 1 and 2 — On such terms as it thinks fit.

Under O. 23, R. 1 a Court while permitting the plaintiff to withdraw his suit with liberty to bring a fresh suit has no right to cut down the period of limitation provided by the statute. Such an order if passed is ultra vires the powers of Court and the law of limitation laid down in the Limitation Act would nevertheless apply to such fresh suit. The wordings of O. 23, R. 2 that 'the plaintiff shall be bound by the law of limitation in the same manner' suggest that the binding force that applies to the suit is the force of the statute of limitation and not the force of the order that may have been passed by any Court. (Para 14)

Anno: C. P. C., O. 23, R. 1 N. 31 Pt. 14; O. 23 R. 2 N. 1.

(d) Civil P. C. (1908), O. 23, R. 1 — 'On such terms as it thinks fit.'

Where the plaintiff is allowed under O. 23, R. 1 to bring a fresh suit on condition that he should deposit the costs before instituting the fresh suit but there is no specific period of time provided for depositing such costs the Court is entitled to accept the deposit after the institution of the suit provided the suit is not barred by limitation on the date of deposit. AIR 1933 All 810, Foll. (Para 16)

Anno: C. P. C., O. 23 R. 1 N. 31.

J. N. Chatterji, for Appellants; S. Murtaza Husain and A. N. Kaul, for Respondent.

CASES REFERRED TO :

(A) ('33) AIR 1933 All 273: 55 All 370 (FB)
(B) ('38) AIR 1938 All 147: 174 Ind Cas 311

(C) ('49) AIR 1949 All 501: 1949 All WR HC 533
(D) ('43) AIR 1943 Mad 80: 206 Ind Cas 394
(E) ('33) AIR 1933 All 810: 56 All 10

JUDGMENT: This is a defendants' appeal from a decree of the learned Civil Judge of Faizabad decreeing the plaintiff's suit.

(2) The suit was for cancellation of a sale deed executed by the grandmother of the plaintiff as his guardian on 23-8-1939. The plaintiff's case was that the property was ancestral property of the plaintiff, and his grandmother was not his guardian inasmuch as his mother was also alive. It was next contended that the deed was executed without any legal necessity, and the guardian had failed to claim the benefits of the Agriculturists' Relief Act and the Debt Redemption Act.

(3) The main defences to the suit were that the mother of the plaintiff had remarried soon after the death of the father, and the grandmother was the legal and de facto guardian of the plaintiff. She, therefore, could not act as his guardian. It was also alleged that the deed was executed for legal necessity, and for payment of the antecedent debts of the minor's father. The third plea was that the plaintiff brought a suit in 1942 under the guardianship of his mother; but this suit was withdrawn with liberty to bring a fresh suit. As a condition for granting leave to withdraw the suit, the court ordered that the suit was permitted to be withdrawn on two conditions, namely, that a fresh suit was to be instituted within a year of the date of the order, and that the plaintiff paid the costs incurred by the defendants, before bringing the suit. This order was passed on 14-3-1942. The present suit was brought in 1947 without paying costs, and the defence was that the suit was, therefore, not maintainable, though costs were subsequently deposited in the trial court.

(4) The learned Munsif found that the plaintiff's grandmother was the de facto guardian of the plaintiff on the date when she executed the sale deed; that the sale deed was for payment of the antecedent debts of the father and was, therefore, valid, and that the suit was further barred because the conditions laid down in the order dated 14-3-1942 were not complied with.

The plaintiff went up in appeal, and the learned Civil Judge has agreed with the learned Munsif in so far that the grandmother of the plaintiff was held to be his de facto guardian on the date of the execution of the sale deed. He also appears to have agreed with the learned Munsif that the sale deed was executed in order to pay off the antecedent debts of the father. But, according to the learned Civil Judge, it was the father and the father alone who could execute the sale deed of the ancestral property in payment of his antecedent debts. No other relation of the minor could transfer the property in order to pay up the antecedent debts of the father, and the sale deed was therefore, an invalid document.

As regards the last point, the learned Civil Judge held that the court could not, by an order, reduce the period of limitation provided for bringing a suit in the Limitation Act. The condition, therefore, providing for the institution of a fresh suit within a year, was not enforcible. The costs were paid by the plaintiff during the pendency of the suit, and the learned Civil Judge was of the opinion that this was a sufficient compliance of the previous order. In this view of the matter, the learned Civil Judge decreed the suit.

(5) The defendants have now come up in appeal to this Court, and their learned counsel has also raised three points before me. The first contention is that the present suit was barred by time, inasmuch as more than three years have elapsed since the date of the execution of the sale deed, and the plaintiff can get the advantage of his minority only if the suit were brought after he had attained majority. It is next contended that, it having been proved that the deed was executed in order to pay up the antecedent debts of his father, it was quite open to the de facto guardian to execute the sale deed, and the view of law taken by the lower appellate court, to the contrary, was not correct. His last submission is that both the conditions laid down in the order dated 14-3-1942 having not been complied with, the present suit should have been dismissed.

(6) The first point urged by the learned counsel for the appellants need not detain us. The plaintiff was a minor on the date of the previous suit, and he still continues to be a minor. He will have time till up to three years of attaining his majority to bring a suit for setting aside the sale deed executed by his guardian. The argument of the learned counsel, that in order to take the advantage of the three years' period, the suit must have been filed by the plaintiff himself on attaining the majority, does not appeal to me. The suit can be filed during his minority by a legal or de facto guardian of his, and it cannot be said that, three years' period having expired since the execution of the deed of sale, the suit has become barred by time. As already stated, the suit can be brought till the expiry of three years on attaining majority by the plaintiff. That period has not expired as yet, and the suit, therefore, cannot be said to be barred by time.

(7) As regards the next point, the findings of both the courts below are that there were antecedent debts of the father evidenced by usufructuary mortgages executed by the father. The learned Civil Judge, however, has set aside the sale deed on the ground that it is only the father who can alienate the joint family property in order to pay his own antecedent debts, and such a right cannot be exercised by any other member of the family. It is true that the father has certainly been granted that privilege, but I do not think that the learned Civil Judge is right, when he says that no other member of the family or a guardian can execute a sale deed for the payment of the antecedent debts of the minor's father.

(8) The learned counsel for the respondent cited a Full Bench decision reported in — 'Chiranji Lal v. Bankey Lal', AIR 1933 All 273 (A), but that was a case where apart from the son, there were a number of other relations also of the debtor, who were all members of the joint Hindu family. The alienation of the family property, therefore, could not be considered to be an alienation in respect of ancestral debts of the father, because the family

consisted of more persons than the sons of the debtor only. In such a case, it must be proved that the alienation was for some legal necessity binding on the family. The case, therefore, can be easily distinguished.

(9) The position has been made clear in a subsequent case reported in — 'Ram Singh v. Sri Charan', AIR 1938 All 147 (B). In this case, the alienation was by one of the sons, while the other son was a minor, and a Division Bench of this Court held that if the debt contracted by the father was not tainted with immorality and if it could not be paid without the sale of family property, a case of the legal necessity for the son to transfer undoubtedly existed.

(10) In another case reported in — 'Lakhmi Singh v. Mahendra Singh', AIR 1949 All 501 (C), it has been laid down that the alienation of the joint family property by adult members for discharging the antecedent debts of the father may be supported on the ground of legal necessity. But such necessity must be of a type which entails a certain degree of pressure on the estate to justify the alienation. In this case, the alienation, it was held, would be justified on the ground of legal necessity provided it was proved that there was some pressure on the estate to justify the alienation. The important question, therefore, in such cases, is whether the alienation was justified on account of some pressure or necessity, apart from the fact that the debt was an antecedent debt of the father.

(11) In the present case, there is a clear finding that the debt was an antecedent debt. But the further question whether there was any pressure on the family necessitating the execution of the sale deed appears to have been answered in favour of the plaintiff by the learned Civil Judge. The finding of the learned Civil Judge on this point is as follows:

> "The only grounds on which such transfer can be upheld are (1) that it was in the interest of the minor or (2) for the benefit of the minor's estate. No such consideration has been proved in the present suit. It is noteworthy that the creditors had not obtained any decree in respect of their previous debts; nor was the property in suit in any imminent danger of being sold. It is equally worthy of note that plaintiff's father had died in 1938, and that the present sale deed in question was executed nearly six months after his death without taking advantage even of the Agriculturists' Relief Act. There is absolutely no evidence on record to justify or warrant this unwholesome haste. Thus there being no pressing necessity for the sale in suit, it cannot be upheld."

As would appear from the above extract of his judgment, the learned Civil Judge did consider the question whether, in this case, it was proved that, apart from the debt being an ancestral one, there was also any pressing necessity for the execution of the sale deed in question. After considering the fact, he came to the conclusion that no such pressing necessity had been established. In view of these findings, and in view of the decision in — 'AIR 1949 All 501 (C)', mentioned above, it must be held that the present sale by the grandmother could not be upheld, and it was voidable at the instance of the minor.

(12) The last point argued was that the plaintiff had failed to comply with the conditions laid down in the order dated 14-3-1942 permitting the withdrawal of the first suit. As already said, this order directed the plaintiff to bring the second suit within one year, and also directed that the costs incurred by the defendants must be paid before the institution of the second suit. The learned Civil Judge has held that the condition providing for the institution of a suit within one year is void, because it cuts down the period of limitation provided by the Limitation Act. I have already, while considering the first point, held that the present suit, when it was filed, was within time, according to the provisions of the Indian Limitation Act, and the question that has to be decided is whether the court could impose a condition reducing the period of limitation provided by the statute. The relevant provision on the point is contained in O. 23, R. 2, C. P. C. This rule may be quoted in full,

> "In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted."

This rule lays down that the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

(13) The learned counsel for the respondent has drawn my attention to a case where a direction, given in the order permitting the withdrawal of the suit, which extended the period of limitation, was held to be inoperative. In a case like that, of course, there is no difficulty in applying the provision of this rule, because the rule makes the plaintiff bound by the law of limitation in the same manner as if the first suit has not been brought. In that case it was the plaintiff, who was seeking to extend the period of limitation because of the order passed by the court, and it was held that the plaintiff was not entitled to any such extension of time, and the direction of the court in that respect was ultra vires. See — 'Virupakshappa v. Veerabhadra Gowd', A. I. R. 1943 Mad 80 (D).

(14) The position in the present case is slightly different. Here it is to the advantage of the plaintiff to say that the suit should be governed by the statute law irrespective of the condition laid down in the order permitting the withdrawal of the suit. In spite of this difference, I think that, on a proper reading of this rule, the position is that the law of limitation laid down in the Limitation Act would apply to a suit brought by the plaintiff, and a court has no right to cut down the law of limitation provided by the statute.

The wordings of the rule that 'the plaintiff shall be bound by the law of limitation in the same manner' suggest that the binding force that applies to the suit is the force of the statute of limitation and not the force of the order that may have been passed by any Court. In case, it is held that the court could reduce the period of limitation, the position would be that it could not be said that the plaintiff was bound by the law of limitation in the same manner, because he would then be bound by the limitation provided in the order of the court, and not by that provided in the

law of limitation. For these reasons, I agree with the learned Civil Judge in holding that the order of the court, directing the institution of the suit within one year, was not an enforcible order and was ultra vires the powers of the court.

(15) This brings me to the second question, namely, whether the plaintiff has complied with the other portion of the order concerning the deposit of costs. In one way, the order may be interpreted to mean that costs were also to be deposited within one year, because the suit itself was directed to be brought within a year. But what the order actually said was that costs should be deposited before bringing the suit, and no period of time was expressly provided for depositing the costs. If the condition reducing the period of limitation to one year was void, then it might well be said that the only effective part of the order was that the costs were to be deposited before bringing the fresh suit. In the present case, the costs were deposited after the suit had been brought.

(16) In a Division Bench case of this Court reported in — 'Jadu Teli v. Mahboob Raza Khan', AIR 1933 All 810 (E), a distinction has been drawn between a case where a specific period of time is provided for depositing the costs and in a case where no specific period of time is provided, but there is a direction that costs should be deposited before the institution of the suit. The decision of the Bench is to the effect that in a case where specific period of time is provided, costs must be deposited within that period. In case the plaintiff fails to comply, the second suit would be barred. But if the order does not specify any exact period, and only says that the costs should be deposited before the institution of the suit, then it is open to the court, before which the second suit is brought, to accept the costs during the pendency of the suit.

Even in a case like this, the court may refuse to accept the costs on the ground that the condition had not been fulfilled. At the same time there is nothing to prevent the court from allowing the plaintiff to fulfil that condition by depositing the costs, where no question of limitation arises. In such a case the suit should be taken to have been instituted on the date when the costs were deposited, and if it was within time on that date, the provisions of the previous order are sufficiently complied with.

In the present case, there is no doubt that the suit was within time, even on the date that the costs were deposited, and it was open to the court to have accepted the deposit, which it did in this case. I have already held that, in my opinion, the correct interpretation of the order dated 14-3-1942 is that no specific period of limitation was provided for depositing the costs, though it was directed that the costs were to be deposited before bringing the suit. The learned Civil Judge has also taken the same view of the matter, and I agree with the conclusions arrived at by him.

(17) The result is that the appeal fails and is hereby dismissed with costs.

(18) Leave to appeal to a Division Bench is granted.

A/K.S.B. Appeal dismissed.

A.I.R. 1954 ALL. 74 (Vol. 41, C. N. 50)

AGARWALA AND CHATURVEDI JJ.

Padrauna Raj Krishan Sugar Works Ltd. and others, Appellants v. Kunwar Laxmi Pratap Narain Singh and others, Respondents.

F. A. F. O. No. 17 of 1953, D/- 24-7-1953, from order of learned Civil J., Deoria, D/- 17-12-1952.

Specific Relief Act (1877), Ss. 21, 56 — Forcing services of employee on unwilling employer.

No injunction can be issued, which has the effect of forcing the personal services of an employee upon an unwilling employer. If five or six of the share-holders sit down and write out a number of resolutions and after that obtain the signatures of a number of other share-holders also, so that the total number of the share-holders signing them constitutes the majority, it cannot be said to be an act of the employer company at all unless this procedure is sanctioned by the Articles of Association of the company. It is the individual act or acts of the different share-holders, but not the act of the company. In such a case, the employee would not be entitled to obtain any decree for damages against the employer company, because the company, as such, has not committed any act, and it certainly cannot be held liable for the individual act of the different share-holders. The only relief which the employees can have, under such circumstances, is a relief for injunction against share-holders preventing them from acting on the resolutions. Case law discussed.

(Paras 18, 19)

Anno: S. R. Act, S. 21 N. 3; S. 56 N. 6.

S. D. Dhawan, for Appellants; G. S. Pathak, R. S. Pathak, Shambhu Prasad, K. L. Misra and Harish Chand Tripathi, for Respondents.

CASES REFERRED TO:

(A) (1865) 13 LT 586: (1865) LR 1 Eq 411
(B) ('81-82) 6 Bom 266
(C) ('12) 13 Ind Cas 868: 16 Cal WN 289
(D) ('34) AIR 1934 Bom 427: 59 Bom 218
(E) ('42) AIR 1942 Lah 47: 199 Ind Cas 667
(F) ('54) AIR 1954 Mad 113: 1953-1 Mad LJ 781
(G) ('50) AIR 1950 PC 81: 77 Ind App 128 (PC)

CHATURVEDI, J.:

This is a plaintiffs' appeal against an order of the learned Civil Judge of Deoria confirming a previous order of his predecessor dated 31-5-1952. By this order the learned Civil Judge had allowed an application for the grant of a temporary injunction in favour of the plaintiffs, as prayed for by them. The plaintiffs had prayed for the issue of an ad interim injunction restraining the defendants from acting on the basis of the resolutions said to have been passed at a meeting of the shareholders of the company on 24-4-1952; and from taking any steps in pursuance of or in furtherance to those resolutions, until the decision of the suit. The resolutions referred to were ten in number, but it is not necessary to reproduce them here.

(2) Plaintiff 1 is Padrauna Raj Krishna Sugar Works Ltd., and plaintiff 2 is Kr. Rudra Pratap Narain Singh, the Managing Director of plaintiff 1. Defendants 1 to 10 are the Directors or the shareholders of the said company. Padrauna Raj

Krishna Sugar Works Ltd. is a public limited liability company which was incorporated in the year 1921. The first Managing Director of the Company was Rai Bahadur Narain Singh, father of plaintiff 2 and defendants 1 to 3, and he continued as the Managing Director till the date of his death, namely, 13-6-1941.

After his death, the eldest son, plaintiff 2, was appointed as the Managing Director of the company for a period of 20 years on a remuneration of Rs. 1000/- per mensem, and a commission of 7 per cent. on the net profits of the company. The appointment of plaintiff 2 as the Managing Director for a period of 20 years is mentioned in Art. 104 of the Articles of Association, and there was also an agreement on 2-9-1941 between the company and plaintiff 2, one of the terms of which was that plaintiff 2 was appointed as the Managing Director for a period of 20 years on the remuneration mentioned above. It was further provided that he could not be removed from the office excepting by an extraordinary resolution passed at an extraordinary general meeting of the company to be convened for the express purpose, of which meeting three months' notice should be given to each shareholder. At that meeting at least half the members of the company for the time being entitled to vote should be present in person or by proxy, and not less than 3/4th of the paid up share capital should be represented.

(3) We might mention here that the entire paid up capital of the company amounts to a sum of Rs. 14,36,500/- divided into 2873 shares of the value of Rs. 500 each. Plaintiff 2 continued to act as the Managing Director for a period of about ten years, and no complaint appears to have been made against the manner in which he was conducting the management.

(4) It appears that in the year 1950 disputes arose between plaintiff 2 and his three brothers, and a suit for partition of the family property was filed about that time. The proceedings which led up to the present litigation started on 25-1-1952, according to the case set up by the defendants. It is said that on that date the shareholders, holding more than one-tenth of the share capital, sent a notice to plaintiff 2 calling upon him to summon an extraordinary general meeting of the shareholders of the company to consider the resolution of his dismissal and the other resolutions. It is said the Managing Director ignored the requisition; and the requisitionists a month later, sent out notice to the shareholders on 27-2-1952 calling a general meeting for 24-4-1952 to consider the said resolutions. The meeting of the shareholders was said to have actually taken place on 24-4-1952 at the residence of Kr. Lakshmi Partap Narain Singh, defendant 1, and ten resolutions were passed at that meeting.

These resolutions are detailed in Sch. A attached to the plaint. A copy of these resolutions is said to have been sent to the Registrar, Joint Stock Companies, Lucknow, under a registered cover on 6-5-1952. On 17-5-1952 copies of the resolutions were sent to plaintiff 2 with a request that he should obey the directions contained in the said resolutions. On 27-5-1952 a copy of the resolutions was sent to the Central Bank of India, which was acting as the banker of this company, intimating to it that plaintiff 2 was no more authorised to operate on the bank accounts of the company. Immediately on receipt of this notice, the bank informed plaintiff 2 of the fact, and the present suit was filed by the plaintiffs on 31-5-1952.

(5) The important allegations contained in the plaint are that plaintiff 2 was duly appointed as the Managing Director for a period of 20 years of 1941, and besides an agreement entered into between the company and plaintiff 2, the fact was mentioned in Article 104 of the Articles of Association of the company. It is then said that disputes had arisen between plaintiff 2 and defendants 1 to 3, who are all brothers, and a suit was actually pending between them in the Court of the Civil Judge of Gorakhpur. Defendants 1 to 3, therefore, wanted to injure plaintiff 2; and with the aforesaid object in view they drew up the resolutions detailed in Schedule A attached to the plaint, and wrongly gave out that notices were issued to the share-holders, and that the meeting was held on 24-4-1952.

As a matter of fact, no notice for calling a meeting was given to plaintiff 2. No notices were issued to the shareholders for convening the meeting on 24-4-1952, and no resolutions were passed at any such meeting on the said date. The whole thing was a fabrication from beginning to end. It was then said that, assuming that the resolutions were passed, the resolutions were illegal, 'ultra vires' and void. It was alleged that plaintiff 2 was appointed a Managing Director for a period of 20 years, and he could not lawfully be removed before the expiry of that term in such a summary fashion, nor even by a regular and valid meeting of the shareholders of the company without complying with the necessary conditions required by law, the Articles and the agreement aforesaid.

The allegations of misfeasance and misappropriation were vehemently denied, and it is alleged that the company had been in a very flourishing condition under the management of plaintiff 2, and in the year 1950-51 it made a profit of about six lacs of rupees. In the end the plaintiffs prayed that it might be declared that the extraordinary special meeting of the plaintiff company alleged to have been held on 24-4-1952 was fictitious, illegal & 'ultra vires'; and that the resolutions detailed in Schedule A of the plaint, purporting to have been passed at that meeting, were fictitious, illegal and 'ultra vires' and also ineffectual.

(6) The second prayer was that the defendants be restrained by a perpetual injunction from giving effect to the resolutions mentioned in Schedule A, and from interfering in any manner with the management of the affairs of the plaintiff company by plaintiff 2 on the basis of the alleged resolutions of 24-4-1952. An application for the issue of a temporary injunction in terms of the second prayer of the plaint was also moved the same day before the learned Civil Judge. The learned Civil Judge passed an order directing an interim injunction to issue as prayed for, and the application was to be heard finally after hearing all the defendants. This hearing subsequently took place, and after a long and protracted hearing extending over months, the order under appeal was passed on 17-12-1952 making the interim order absolute.

(7) An appeal was previously filed by the defendants against the interim order of injunction dated 31-5-1952, but that appeal was subsequently withdrawn, and the present appeal against the final order was filed on 13-1-1953.

(8) The defendants in their written statement denied all the main allegations contained in the plaint, and they asserted that a notice was duly sent to plaintiff 2 on 25-1-1952 for summoning a general meeting, and, on the plaintiffs' failure to summon it, the requisitionists themselves summoned the meeting for 24-4-1952, and sent proper notices to all the shareholders on 27-2-1952. The meeting was properly held on 24-4-1952 in which more

than half the present shareholders of the company were present, and more than 3/4th of share capital was represented. The resolutions were duly passed and were in due course communicated to the Registrar, Joint Stock Companies, to plaintiff 2 and to the bankers of the company.

It was further pleaded that the suit was not maintainable and plaintiff 2 had wrongly impleaded the company as plaintiff 1; as a matter of fact, the interests of the company are adverse to those of plaintiff 2. It was also pleaded that the plaintiffs were not entitled to the injunction prayed for, inasmuch as the granting of the injunction would amount to forcing the personal services of plaintiff 2, who was an employee, on the employer, namely, the company. A prayer like this could not be granted in view of the provisions of Sections 21 and 56, Specific Relief Act. The defendants also filed objections to the plaintiffs' application praying for the issue of a temporary injunction on practically the same grounds as were contained in their written statements. It was further contended that plaintiff 2 had no prima facie case nor would an order issuing an injunction be just and proper in all the circumstances of the case.

(9) Before the learned Civil Judge the question whether the meeting was actually held and the notices duly issued was strenuously contested, but he had not given any finding on the point as to whether a meeting was actually held on 24-4-1952 or not. He has considered the connected question as to whether the resolutions alleged to have been passed at this meeting could validly be passed or were beyond the power of the shareholders assembled at the meeting. On this point the learned Civil Judge held that resolutions 1 and 2 passed at this meeting were illegal and 'ultra vires'. On the point as to whether the issue of the injunction would be tantamount to forcing an employee on an unwilling employer, the learned Civil Judge held that this was not a case of that nature. On the other hand, it was a case where a prayer was made for preventing a breach of contract. He held that the plaintiffs had made out a prima facie case, and the balance of convenience lay in directing the injunction to issue as prayed for. He accordingly issued the injunction.

(10) The learned counsel for the appellants has strenuously urged the same three points as were urged by him in the Court below, namely, (1) that no prima facie case had been made out by the plaintiffs, (2) that the injunction could not be issued in this case, as prayed for, because that would amount to forcing the personal services of an employee on an unwilling employer, which is prohibited by the provisions of Sections 21 and 56, Specific Relief Act; it was also urged in this connection that the company should not have been made a plantiff in the case, and plaintiff 2 has not acted 'bona fide' in making the company as one of the plaintiffs, and (3) that it was not just and proper to issue the injunction prayed for in all the circumstances of the present case.

(11) In dealing with the above points, we shall try to be as brief as possible and shall be deciding only the points absolutely necessary for the decision of the above appeal, because the suit is still pending in the Court below, and decisions that we arrive at may prejudice one or the other of the parties in the trial of the suit. We may also make it clear that the decisions arrived at by us in this judgment are merely tentative and based on the evidence and the facts, as they stand on the record of the case at the present time. No evidence has yet been recorded in the suit itself, and it will be open to the learned Civil Judge to arrive at his own conclusions on questions of fact and law, when all the evidence that the parties have to produce has been brought on the record. It is quite possible that the circumstances, which appear to be very suspicious at the present moment, may have some good explanation and the evidence produced in future may be of such a nature as to explain the improbabilities in the defence case which so far have not been explained.

(12) We shall now deal with the points in the order in which they have been mentioned above. Under the first point, namely, whether the plaintiffs have made out a prima facie case, we have found it necessary to enter into the question as to whether a meeting was actually held on 24-4-1952 as alleged by the defendants or not. The learned Civil Judge has not given any decision on the point, but, in our view, this is the most important point in the case and a decision has to be arrived at in order to decide the above appeal. In order to prove the holding of the meeting, the defendants have filed a certificate of posting issued from Khadda post office concerning a notice to plaintiff 2 on 25-1-1952 asking for the summoning of a meeting. They have also filed a number of postal certificates of the same post office showing the posting of a number of notices to the shareholders of the company on 27-2-1952.

These postal certificates were filed within time; but the minute book, which contains these ten resolutions said to have been passed on 24-4-1952, was not filed till after the present appeal had been filed in this Court. 27-4-1953 was the date fixed for settling the issues in the Court below, and on that date an application was made on behalf of the defendants praying for time to file certain documents which were not available or had been misplaced. Some of the documents, for which time was prayed for, were this minute book, the proxy papers, and a receipt of the registered letter sent to the Registrar, Joint Stock Companies.

(13) Out of the postal certificates filed, one bears the seal dated 25-1-1952, and the rest bear seals dated 27-2-1952. The notice sent on 25th January was a notice to the Managing Director for calling an extraordinary general meeting of the company, and the notices purporting to have been sent on 27th February were notices to the shareholders of the extraordinary general meeting of the company. In the postal certificates concerning these notices one serious mistake has been committed, which throws a great deal of doubt about the fact whether the first notice to the Managing Director was sent on a date different from that on which notices to the shareholders were sent. In giving the description of the notice, the first postal certificate bears the following endorsement:

> "Notice of an extraordinary general meeting of the Padrauna Raj Krishna Sugar Works Ltd., Padrauna, by requisitionist."

The endorsement on the postal certificates concerning the notices of the meeting sent to the shareholders is as follows:

> "Notice of requisition for calling an extraordinary general meeting of the Padrauna Raj Krishna Sugar Works Ltd., Padrauna."

It is obvious and the fact has not been disputed that the endorsement made on the first postal certificate should have been written on the certificates of posting of notices issued to the shareholders on 27-2-1952, and the endorsement on the postal certificates sent to the shareholders should have been that which finds its place on the first certificate of posting purporting to be dated the 25-1-1952. It is

conceded on behalf of the appellants that there has been a mistake in putting down the gist of the contents of the notice in all the certificates of posting.

We agree that it is a mistake, and nobody suggests that it is anything but a mistake. But the question arises whether such a mistake was possible if the notices were sent, as alleged, after an interval of more than a month. A mistake like this very strongly points to the conclusion that really all the certificates of posting were written on the same date, and the endorsement, which was meant to have been written on the certificate of posting concerning the notice to the Managing Director for calling a meeting, has been written on the certificates of posting obtained for the notices sent to all the shareholders, and vice versa. This mistake raises a serious doubt as to whether any notices were sent at all either to the Managing Director for calling an extraordinary general meeting, or to the shareholders giving them information of the date of the meeting to be held.

It is well known that it is not at all difficult to obtain a postal seal of a prior date on a certificate of posting; and the mistake committed, in the present case, appears to be due to the fact that all these certificates of posting were written on the same date, and on one the seal of 25th January was obtained and on the rest the seals of 27th February. This means that no notices for holding the meeting were issued at all and false evidence had been tried to be procured that these notices to the shareholders and to the Managing Director were sent on different dates. It may be that some good explanation for this mistake may be coming forth; but so far there is none on the record. The learned counsel, appearing for the defendants in the Court below, tried to give an explanation, but we could take no notice of that unless the learned counsel had appeared in the witness-box and faced the cross-examination.

(14) The next circumstance which creates a doubt about the issuing of these notices is the fact that the notices purport to have been posted at the sub-post office at Khadda, where some of the defendants reside and are really managing the sugar mill situated at Khadda. The notices were sent in connection with a meeting to be held at Padrauna which concerned the sugar mill at Padrauna, and one would have expected these notices to have been posted at Padrauna specially because defendant 1, at whose house the meeting is ultimately said to have taken place, also resides at Padrauna. There should, therefore, have been no difficulty in posting the notices at Padrauna post office, if the matter was above board and it was not the scheme of the defendants to keep plaintiff 2 wholly ignorant of these proceedings.

(15) Then there is the fact that the defendants could easily have suspected that plaintiff 2 would not call a meeting, the object of which was to dismiss plaintiff 2 himself; and one would have expected the defendants, in such circumstances, to have sent a registered letter to plaintiff 2, and not to have satisfied themselves by just obtaining a certificate of posting. Subsequent to this, it is admitted that no meeting was ever called; but the notices of the meeting, said to have been summoned by the requisitionists, were again not sent under registered covers, and the device of obtaining certificates of posting was resorted to for purposes of proving the sending of these notices also.

(16) As regards the alleged proxies too, the learned Advocate-General, for the plaintiffs, pointed out a number of suspicious circumstances. These proxies were handed over to the learned Advocate-General for the plaintiffs by the learned counsel for defendants in our presence during hearing of the appeal. But subsequently they were not filed till 8-5-1953 at least, and we do not know whether they have been filed as yet or not. The meeting was said to have been held on 24-4-1952, but the only step, taken in pursuance of the resolutions passed at that meeting till the 6th of May, was to send a copy of the resolutions to the Registrar, Joint Stock Companies, on that date. The plaintiffs would have no knowledge of the sending of this copy to the Registrar.

After this there was again a lapse of 11 days and then a copy of the resolutions was actually sent to plaintiff 2. In view of the serious apprehensions entertained by the defendants, it is somewhat curious that they did not intimate to plaintiff 2 the fact of his dismissal for more than three weeks after the passing of the resolutions.

(17) There were several other points also mentioned by the learned Advocate-General for the plaintiffs in his argument, but we do not consider it necessary to go into all the points that were raised, because the facts mentioned above are, in our opinion, sufficient to make out a prima facie case in favour of the plaintiffs. We are satisfied that the plaintiffs have succeeded in showing that probably no meeting of the shareholders of the company has been held on 24-4-1952, nor were any notices issued to the share-holders of the holding of any such meeting. It is true that the resolutions are to be found now in a register, and they purport to be signed by 27 share-holders either in person or by proxy. The entire number of the shareholders was 53. Out of these six had died, so 27 clearly represented the majority of the shareholders. We have also calculated the shares owned by these share-holders, and there can be no doubt that the shareholders, who have signed the minutes, owned 1952 shares out of the total of 2873 shares. They thus represented the majority of shares also.

The suggestion of the learned Advocate-General was that the signatures of the shareholders appeared to have been obtained at different times by making unwarranted representations, and the appearance of the signatures of the majority of the shareholders on the minute book does not really prove that a meeting actually took place. In view of the facts that we have given, we think the suggestion has some force. Our finding on this point, therefore, comes to this that no meeting of the shareholders at all took place on 24-4-1952, nor were any notices for the alleged meeting ever issued.

(18) This brings us to the second point argued by the learned counsel. It is well established that no injunction can be issued, which has the effect of forcing the personal services of an employee upon an unwilling employer. As a matter of fact, this proposition of law was not contested by the learned Advocate-General appearing for the plaintiffs. The learned counsel for the defendants further argued that, even if the resolutions were illegal or even 'ultra vires' even then the same principle would apply and no injunction could be issued. He went to the length of arguing that even if no meeting was held, but it appears to the Court that the majority of the shareholders do not want an employee, the Court would not be justified in issuing an injunction, the result of which would be to force the employee upon them. His case is that an injunction is not a proper relief, and the proper relief in all such cases is a decree for damages. We find ourselves unable to agree with the last proposition advanced by the learned counsel.

In a case where no meeting of the company has at all been held, it would not be possible to decree any damages against the company, because the company has not purported to act at all. The company is an incorporated body and it can only act in the manner laid down by the statute. If five or six of the shareholders sit down and write out a number of resolutions and after that obtain the signatures of a number of other shareholders also, so that the total number of the shareholders signing them constitutes the majority, it cannot be said to be an act of the company at all unless this procedure is sanctioned by the Articles of association of the company. It is the individual act or acts of the different shareholders, but not the act of the company. In such a case, the employee would not be entitled to obtain any decree for damages against the company, because the company, as such, has not committed any act, and it certainly cannot be held liable for the individual act of the different shareholders.

It would be quite a different thing if the shareholders or the Directors in a properly constituted meeting pass an illegal resolution, or even a resolution which they had no power to pass, because then the company, as such, has purported to act, though the act may be an illegal or an 'ultra vires' one. In such a case, the wronged party or the employee would have a right to recover damages from the company. But no such damages can be recovered where no meeting has been held and the shareholders, sitting at different places, have appended their signatures to a document which purports to contain the particulars of certain resolutions passed at an alleged meeting.

(19) No case has been cited by the learned counsel for the defendants, in which a relief for injunction was refused, even though the finding was that no meeting of the shareholders or the Directors was actually held. As stated above, the company or the employer in such a case would not be liable for the payment of any damages, and the only relief which the employees can have, under such circumstances, is a relief for injunction. A mere relief for a declaration would not help the employee, and it is very doubtful if a suit for a mere declaration would at all be maintainable because of the provisions of S. 42, Specific Relief Act.

(20) As we have already stated, the learned counsel has not cited any case on the point just mentioned by us, but we propose to discuss briefly the cases cited by him.

(21) The first case cited by the learned counsel is reported in — 'Mair v. Himalaya Tea Co.', (1865) LR 1 Eq 411 (A). This was a case in which Sir W. Pagewood, V. C., observed:

> "Even assuming, in favour of the plaintiff, the construction given by him to the articles that he was to be irremovable, except by the authority of a general meeting, or that his acceptance of shares was conditional on his being retained as agent, the Court cannot act in his favour, as the duties of an agent are in the nature of personal service, and as such incapable of being enforced in equity."

In this case the plaintiff's case was that he was irremovable because of the Articles of Association, except by the authority of a general meeting. But a resolution was passed by the Directors which the plaintiff complained against. The plaintiff had actually tendered his resignation on certain conditions; but the Directors of the company treated him as having resigned, though the conditions had not been fulfilled, and the management of the business of the company vested in the Directors. The act of the Directors, therefore, amounted to an act of the company itself, and the case is clearly distinguishable from the present case.

(22) In the next case cited by the learned counsel reported in — 'Nuserwanji Merwanjee v. Gordon', 6 Bom 266 (B), the plaintiffs complained against a resolution dated 8-8-1881 appointing Messrs. H. C., & L. as solicitors of the company in place of the plaintiffs. The plaintiffs said that the said resolution was 'ultra vires' and prayed for an injunction to restrain the defendants from giving effect to the said resolution. It is not necessary for us in this case to decide whether an injunction should be granted or not in a case where the resolution passed by the company is 'ultra vires,' though this case certainly supports the contention of the learned counsel for the defendants on the point. In the present case there had been no resolution and no meeting and, therefore, it is clearly distinguishable from the case reported in '6 Bom 266 (B)'.

In this Bombay case the plaint was sought to be amended by alleging a cause of action by two of the plaintiffs as shareholders, but this amendment was disallowed because the case was initially a case as between the contracting parties. In the present case also, the case appears to be a case not based on the rights of plaintiff 2 as a shareholder, but simply in his capacity as a Managing Director. So the Bombay case and the present case are similar on this point; and the only distinction is, as we have already indicated above, that in the Bombay case it could be said that the company had acted, whereas the same could not be said in the present case.

(23) In — 'N. C. Sircar & Sons v. Baraboni Coal Concern Ltd.', 16 Cal WN 289 (C), it has been held that a limited liability company cannot be restrained by injunction from dispensing with the services of the Managing Agents, though the Managing Agents could be removed only in the specified manner after a specified period. The remedy of the Managing Agents, in such a case, lies in a suit for damages for wrongful dismissal. In this Calcutta case the plaintiffs were the Managing Agents of the defendant company and they prayed, among other reliefs, for a declaration that it was not competent to the company to dispense with the services of the plaintiff firm as Managing Agents by any resolution, passed at any meeting, held in pursuance of a notice, which had been issued for calling a meeting. They also prayed for an injunction to restrain the defendant company from passing, at the meeting to be held in pursuance of the notice, any resolution purporting to dispense with the services of the plaintiff firm as Managing Agents of the defendant company.

In this case, it appears that a notice for calling a general meeting of the company was duly issued, and the plaintiff brought a suit before the meeting could be held. One of the reliefs was to restrain the defendant company from holding any meeting in pursuance of the resolution, because the said resolution would be against the Articles of Association of the company. The Court refused to grant the injunction on the ground that as the plaintiffs could not enforce the positive contract of service, they clearly could not obtain an injunction to restrain the company from dispensing with their services, except in a given manner or until after a stated period. The learned Judge observed that it was not known if the resolution would be passed, and if it was not passed, the plaintiffs would have no cause of action; and if it was passed, the plaintiffs would have a remedy probably in a suit for damages.

The injunction that was sought in this case, also was an injunction to restrain the defendant company from dispensing with the services of the Managing Agents, who were treated as employees. In this case also it was the act of the company against which an injunction was sought, and the decision would be covered by the general rule that the services of an employee would not be forced on an unwilling employer.

(24) The case reported in — 'Ram Kumar v. Sholapur Spinning & Weaving Co. Ltd', A. I. R. 1934 Bom 427 (D), was a case where the plaintiff had claimed a declaration that certain resolutions, passed by the Directors dismissing the company's agents, were in contravention of the memorandum and the Articles of association of the company, and were, therefore, not binding on the members, and secondly for an injunction to restrain the defendants from acting upon the resolutions. It was held that the Court did not generally interfere with the internal management of the affairs of the company, and, if the majority of the shareholders considered that particular contract of employment should be terminated, the Court would not as a rule consider the matter at the instance of a minority of shareholders.

To get over these difficulties, it was contended on behalf of the plaintiff that the dismissal of these agents was 'ultra vires' the company, and the learned Judges said that, if the act were really 'ultra vires', then the case would be an exception to the general rule that the Court could not interfere with the management of a company. The learned Judges were of the view that the act was not 'ultra vires'. This was also a case where resolutions were duly passed and the complaint was not against the individual acts of the shareholders.

(25) In — 'Gulab Singh v. Punjab Zamindara Bank Ltd.,' A. I. R. 1942 Lah 47 (E), it was held that an injunction would not issue in the case of contracts which could not be specifically enforced, or where breach of the contract could be adequately compensated in damages. It was further held that the principles applicable to the issue of an injunction at the instance of a dismissed servant ought also apply in the case of a dismissed agent, that is the Managing Director, of a company. It would be contrary to public policy to impose upon an unwilling principal an agent whom he did not wish to employ, especially when the agent could bring an action for damages.

The case is an authority for the proposition that a Managing Director also stands in the position of an agent or an employee, and no injunction can be issued in his favour, the effect of which would be to force his services upon the company which really did not want to employ him any more. In this case also, there was a resolution of the company itself at a meeting duly held, and if the plaintiff was illegally dismissed, he could sue for damages. No question in this case was raised about the resolution being 'ultra vires'.

(26) The last case cited by the learned counsel for the defendants is reported in — 'Mothey Krishna Rao v. Grandhi Anjaneyulu', A. I. R. 1954 Mad 113 (1). In this case the plaintiff was appointed as secretary and treasurer of the company by an amendment of the Articles of Association. Subsequently, the Directors of the Company, by a resolution, first suspended the plaintiff, and then removed him from the post of secretary. The suit was merely for a declaration and the learned Judges held that the suit for a mere declaration was not maintainable because of the provisions of Section 42, Specific Relief Act.

Subsequently, the amendment of the plaint was allowed, and a prayer for injunction was also permitted to be added. But this prayer for injunction was refused on the ground that the grant of the injunction would amount to enforcing a contract of personal services. In this case also, there can be no doubt that the company had acted, and there was a resolution of the company, and the case only lays down the general rule that an employee could not be forced on an unwilling employer.

(27) The case relied upon by the learned Advocate General for the plaintiffs is reported in — 'Ram Kissendas Dhanuka v. Satya Charan Law', A. I. R. 1950 PC 81 (G). In this case, their Lordships of the Privy Council have drawn a distinction between a case, where the suit is by the employee, and the case where the suit is by the minority of the shareholders, & they have held that the principles, which apply to the suit by the employee, are not applicable to cases where the suit is by the minority and the minority wants to enforce the terms of the Articles of Association of a company. In the present case, the suit is not, in the capacity of a shareholder, by plaintiff 2, but merely as a Managing Director; and, in our opinion, the position of a Managing Director is the same as that of an ordinary agent of a company. This case is clearly distinguishable.

(28) These are all the relevant cases cited before us, and, in our opinion, none of them applies to the facts of the present case, inasmuch as, in the present case, our opinion is that no notices for convening a meeting were issued, and no meeting appears to have been actually held, as directed by the Companies Act. On the question whether an injunction can be issued, where the resolution is 'ultra vires' the company or the Directors, there appears to be some difference of opinion, but we express no opinion on this point, as the question does not arise in the present case. We have only held that, if no meeting has actually been held, then it will be open to the Court to give a relief of injunction to the employee restraining the defendants from acting on alleged resolutions which were never passed, (though not restraining them from passing any resolutions in future), because in such a case the company or the employer has not acted at all, nor will it be liable for any damages.

(29) We, therefore, agree with the decision of the Court below that plaintiff 2 is prima facie entitled to an injunction, though our reasons for the decision are somewhat different.

(30) Then, there is the question as to whether this is a proper case in which an injunction should be issued. The position is that the company has been managed for the last ten years by plaintiff 2, and it appears that he has managed it quite successfully. If we refuse the injunction, there will be a scramble for possession. By mere refusal of the injunction to the plaintiff, possession will not pass to the defendants; and plaintiff 2 also will not be able to run the factory because the bank will not permit him to operate on the accounts. The condition of the mill, therefore, will become very uncertain and both the parties are likely to suffer, if the injunction was refused.

The learned counsel for the defendants has urged that there are serious allegations against plaintiff 2 and, in case he is allowed to continue as a Managing Director of the company, the loss to the defendants may be irreparable because he would be in a position to falsify the accounts. We cannot presume that any such contingency will arise, nor does the past conduct of plaintiff 2 justify any such apprehension.

(31) On the further point as to whether the company has been wrongly arrayed as a plaintiff and should have been added as a defendant, we propose to express no opinion at this stage. It is not necessary to decide that question in this appeal.

(32) The last point urged before us was that it was not necessary to give an injunction with respect to all the ten resolutions said to have been passed on 24-4-1952. We have gone through these resolutions and, in our opinion, the injunction issued by the Court below should be confined to the resolutions Nos. 2, 3, 4, 5, 6, 7 and 8. It is not necessary to issue any injunction with respect to the resolutions Nos. 1, 9 and 10.

(33) The result, therefore, is that the appeal is partly allowed and the injunction issued by the Court below with respect to the resolutions Nos. 1, 9 and 10 is vacated, but the injunction issued with respect to the resolutions Nos. 2, 3, 4, 5, 6, 7 and 8 is upheld.

(34) As plaintiff 2 has substantially won, he shall be entitled to his costs from the defendants.

B/D.H.Z. Appeal partly allowed.

A.I.R. 1954 ALL. 80 (Vol. 41, C. N. 51)

RAGHUBAR DAYAL AND ASTHANA JJ.

Gopal Das, Applicant v. State.

Criminal Trial No. 1 of 1952, D/- 10-8-1953, from order of Court of Session, Kanpur.

Penal Code (1860), S. 409 — Provisions of — Validity of — (Constitution of India, Arts. 13(1), 14) — (Prevention of Corruption Act (1947), S. 5 (1) (c)).

There is no discrimination against an accused who is proceeded against for an offence under S. 409, I. P. C. and not for an offence under S. 5(1)(c), Prevention of Corruption Act. The provisions of S. 409, I. P. C., therefore, do not go against Art. 14 of the Constitution and are not void in view of Art. 13(1) of the Constitution.

(Para 9)

Anno: Penal Code, S. 409 N. 1.

P. C. Chaturvedi, for Applicant; Advocate General, for the State.

RAGHUBAR DAYAL J.:

Gopal Das Kapoor and another were committed to the Court of Session at Kanpur for trial of offences under Ss. 409 and 120B, Penal Code. The Sessions Judge added a charge under S. 477A, I. P. C., also against them. Both the accused are public servants.

(2) On a petition under Art. 228 of the Constitution this case was transferred to this Court as it involved a substantial question of law as to the interpretation of the Constitution. We have heard the learned counsel for the petitioner and the learned Advocate General on the point and dispose of the constitutional point alone. Further proceedings in the case will be taken in the Court of the Sessions Judge.

(3) Section 409, I. P. C., which punishes "criminal breach of trust" is in these words:

"Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

(4) Section 405, I. P. C., which defines "criminal breach of trust" is as follows:

"Whoever, being in any manner entrusted with property, or with any dominion over property dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust"."

(5) Section 5 (1) (c), Prevention of Corruption Act, 1947 (Act No. 2 of 1947) is—

"A public servant is said to commit the offence of criminal misconduct in the discharge of his duty if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do."

(6) It would appear from the different provisions of the various sections quoted above that the act of a public servant in dishonestly misappropriating or otherwise converting for his own use any property entrusted to him or under his control as a public servant or in allowing any other person so to do will be an offence both under S. 5 (1) (c) of Act 2 of 1947 and also under S. 409, Penal Code.

(7) The offence under S. 5 (1) (c) of Act 2 of 1947 is punishable under S. 5 (2) of the same Act with imprisonment for a term which may extend to seven years, or with fine, or with both while the offence under S. 409, I. P. C., is punishable with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and the offender shall also be liable to fine.

(8) In view of the absence of any provision in either of the two Acts laying the circumstances in which a public servant committing such an act would be triable under one Act or the other, it has been contended that the public servant prosecuted for an offence under S. 409, I. P. C., is in a worse position than another public servant who may just, according to the fancy of the authorities, be prosecuted for the offence under S. 5 (1) (c) of Act 2 of 1947, that therefore S. 409, I. P. C., denies equality before the law to such persons who are prosecuted for an offence under S. 409, I. P. C., and not for an offence under S. 5 (1) (c) of Act 2 of 1947, and that, therefore, the provisions of S. 409 in this respect violate the provisions of Art. 14 of the Constitution and should, therefore, be held void in view of Art. 13 (1) of the Constitution.

The differentiation in the punishment provided for the same conduct in either of the two provisions of law is immaterial in view of S. 71, Penal Code, which provides that where anything which is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the offender shall not be punished with a more severe punishment than the court which tries him could award for any

one of such offences. For such conduct which could lead to a charge both under S. 409, I. P. C., and under S. 5 (1) (c) of Act 2 of 1947 the offender will be punished within the lower limit provided for either of the two offences. A person cannot be convicted twice for the same act in view of S. 26, General Clauses Act, and also Art. 20, Cl. (2) of the Constitution.

(9) In this view of the matter there is no occasion for holding that there is any discrimination against an accused who is proceeded against for an offence under S. 409, I. P. C., and not for an offence under S. 5 (1) (c) of Act 2 of 1947. The provisions of S. 409, I.P.C., therefore, do not go against Art. 14 of the Constitution and are not void in view of Art. 13 (1) of the Constitution.

(10) No other point requiring interpretation of the Constitution has been urged before us.

(11) Having decided the constitutional point raised before us, we order that the case be returned to the court concerned for further proceedings in view of Art. 228 (b).

A/V.R.B. Case returned.

A. I. R. 1954 ALLAHABAD 81 (Vol. 41, C. N. 52)

MALIK C. J. AND AGARWALA J.

Mohar Singh and others, Appellants v. State and another, Opposite Party.

Criminal Misc. Case No. 626 of 1952, D/- 27-2-1953.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 49(2) — Constitution of bench. Cri. Revn. No. 1322 of 1950, (All) overruled.

There is no inherent want of jurisdiction in a bench of five Panches of which more than three come from areas of different Gaon Sabhas, and if no objection has been taken to the constitution of such a bench by either party in accordance with the provisions of Rule 84(b), it is not open to either of them to say that the bench has not been properly constituted under the Act. (Para 9)

(b) U. P. Panchayat Raj Act (26 of 1947) S. 54(2) — Limitation on power to fine.

The Panchayati Adalat is entitled to impose separate fines of Rs. 80/- and Rs. 70/- for the two separate offences committed by each of the two accused. (Para 11)

Gyanendra Kumar, for Appellants; R. B. Pandey, for Opposite Party and Shri Rama Deputy Govt. Advocate, for the State.

CASES REFERRED TO :

(A) ('52) Cri Revn No. 1322 of 1950, D/-15-5-1952 (All)
(B) ('52) AIR 1952 All 489: 1952 All LJ 106: 1952 Cri LJ 900
(C) ('52) Cri Misc Case No. 2756 of 1951, D/- 5-9-1952 (All)
(D) ('53) AIR 1953 All 118: 1952 All LJ 88: 1953 Cri LJ 348
(E) ('53) AIR 1953 All 340: 1953 All LJ 89: 1953 Cri LJ 729

MALIK, C. J. :

This is an application under Art. 227 of the Constitution for an appropriate order setting aside a conviction by the Panchayati Adalat of Mohabbatpur. The complainant was one Sonpal, resident of village Jonthri which is situate within the jurisdiction of the Gaon Sabha Mohabbatpur Labhna. He filed a complaint before the Panchayati Adalat Deohli against three persons, Mohar Singh, Pokhu and Badnu, also residents of the same village. The charges were under Ss. 323 and 447, Penal Code. The Sarpanch constituted a bench of five Panches, of whom only one belonged to Gaon Sabha Mohabbatpur Labhna while the other four belonged to some other Gaon Sabha or Gaon Sabhas. The Panchayati Adalat convicted the three accused under Ss. 323 and 447, Penal Code and imposed fines of Rs. 80/- and Rs. 70/- respectively on each of them. There was a revision application filed before the Sub-Divisional Magistrate under S. 85, U. P. Panchayat Raj Act, but the revision was dismissed and this writ application has been made against that order.

(2) The case came before a learned single Judge, but by reason of some difference of opinion he referred it to a Division Bench for decision. We are concerned in this case mainly with two questions whether the Panchayati Adalat was properly constituted and had, therefore, the jurisdiction to convict the accused persons, and whether the fines imposed were within the limits laid down by law.

(3) The first point arises in this way. Section 49/(1) U. P. Panchayat Raj Act (Act No. 26 of 1947) provides that

"The Sarpanch shall, for the trial of every case, suit or proceeding, form a bench of five panches from the panel; provided that at least one of the panches shall be a person who is able to record evidence and proceedings."

Sub-section (2) is as follows :

"Every such Bench shall include one Panch who resides in the area of the Gaon Sabha in which the plaintiff of a suit or proceeding or the complainant of a case resides and likewise one Panch residing in the area of the Gaon Sabha in which the defendant or the accused resides, and three Panches residing in the area of the Gaon Sabha in which neither party resides; ....."

(4) We have already said that in this case the complainant and the accused came from the same village. The Sarpanch had appointed one Panch from the Gaon Sabha within the jurisdiction of which the complainant and the accused resided. The contention was that it did not matter that the accused and the complainant were from the same village but there should have been two Panches in accordance with the provisions of the sub-section and only three outsiders could be appointed Panches from areas in which neither party resided. Brij Mohan Lall J. had, in — 'Kuleshwar v. The State', Cri Revn No. 1322 of 1950 D/- 15-5-52 (All) (A), in which there were four outsider Panches, if we may use that phrase, while only one Panch was from the common village of the accused and the complainant, held that the bench was not properly constituted. In a similar case, coming up before a Bench. — 'Harihar Tewari v. State', AIR 1952 All 489 (B), it was held that the fact, that there was only one Panch from the common

village of the parties and four Panches were outsiders, was not a fatal defect and such a defect could be waived. This was the opinion expressed by one of us, while the other learned Judge decided the case on the facts that it was not established that there were as a matter of fact four outsiders on the bench of Panches.

In a third case — 'Shanker Lal v. Tuki Ram', Cri Misc Case No. 2756 of 1951, D/- 5-9-1952 (All) (C), a Bench of this Court (Sapru and Bind Basni Prasad JJ.) held that the objection as regards the constitution of the Panchayati Adalat on the ground that there were not two Panches, one from the Gaon Sabha of the area within which the complainant resided and another from the Gaon Sabha of the area within which the accused resided, could not be entertained as no such objection was raised before the Panchayati Adalat or the Sub-Divisional Magistrate. In — 'Musai Bhant v. Ganga Charan', AIR 1953 All 118 (D), a decision to which one of us was a party, it was held that the provision that some of the Panches should be residents of the area in which the complainant and the applicants resided had been deliberately inserted in order to give a domestic colour to the Panchayati Adalat and that there was no power under the U. P. Panchayat Raj Act which would enable this Court to cure the irregularities affecting the jurisdiction of the Panchayati Adalats. The order of the Panchayati Adalat was thereupon quashed.

It would appear from the judgment that the point that has been raised before us and on which we are disposed to decide this writ application was not raised before that Bench. In the last case cited before us — 'Girja Prasad v. Zalim Singh', AIR 1953 All 340 (E), a single Judge decision by one of us — it was held that if both the complainant and the accused resided in one village, the provisions of S. 49 would be sufficiently complied with if a Panch was nominated from that village and it was not necessary to have two such Panches.

(5) The Preamble of the Act shows that it was enacted as it was considered expedient to establish and develop local self-government in the rural areas of the United Provinces and to make better provision for village administration and development. Section 2 cl. (t) defines a village as "any local area, recorded as a village in the revenue records of the district in which it is situate". Section 3 makes it clear that a Gaon Sabha may be established with reference to a village or a group of villages. A Gaon Sabha is a corporate body under S. 4. Section 12 of the Act provides for election of Gaon Panchayats. Sub-section (1) of that section is as follows:

> "As soon as may be after its establishment, every Gaon Sabha shall elect from among its members an Executive Committee called the Gaon Panchayat."

This Gaon Panchayat has been given, under S. 15, all kinds of jurisdiction and cl. (o) of S. 15 gives it judicial functions.

> "The administration of civil and criminal justice and the election of Panches on the panel of the Panchayati Adalat according to the provisions of this Act and rules made thereunder"

are the functions which are to be performed by the Gaon Panchayat.

Section 42 deals with the Panchayati Adalat and provides that

> "The State Government or the prescribed authority shall divide a district into circles, each circle comprising as many areas subject to the jurisdiction of Gaon Sabhas as may be expedient, and establish Panchayati Adalats for each such circle:
>
> Provided that the areas of Gaon Sabhas within each circle shall, as far as possible, be contiguous."

Section 43 deals with the constitution of Panchayati Adalat and lays down that

> "Every Gaon Sabha in a circle shall elect five adults of prescribed qualification permanently residing within its jurisdiction to act as Panches in the Panchayati Adalat of that circle. The Panches so elected by all the Gaon Sabhas in a circle shall form a panel."

Section 44 provides that the Panches shall elect a Sarpanch. Section 52 of the Act then gives a list of offences that would be tried by a Panchayati Adalat. Section 64 deals with the jurisdiction of a Panchayati Adalat in civil matters and S. 55 provides that

> "No Court shall take cognizance of any case or suit which is cognizable under the Act by a Panchayati Adalat unless an order has been passed by a Sub-Divisional Magistrate or Munsif under S. 85."

Section 80 excludes legal practitioners from appearing, pleading or acting on behalf of any party in any suit, case or proceeding before a Panchayati Adalat, the only exception being that a person who is arrested shall have the right to consult and be defended by a legal practitioner of his choice. Section 49 provides that a Sarpanch has to constitute a bench of five Panches from the Panel when a criminal or civil matter is filed before him. Sub-section (2) gives directions to him as to how he has to constitute this panel of five. The subsection provides that one Panch should be from the Gaon Sabha within the jurisdiction of which the complainant or the plaintiff resides, one Panch from the Gaon Sabha within the jurisdiction of which the defendant or the accused resides and three Panches from the Gaon Sabha in which neither party resides. The learned single Judge referring the case has remarked that there is thus both a positive and negative limitation on the power of the Sarpanch. Sub-section (3) of S. 49 disqualifies a Panch or Sarpanch from acting who is personally interested in the parties or in the subject-matter, and sub-s. (4) is of some importance and is as follows:

> "Notwithstanding anything contained in this section the State Government may by rules prescribe the constitution of special Benches for determining any dispute arising between any parties of Gaon Sabhas of different circles or for any other purpose."

Acting under this sub-section the State Government have made certain rules and Rule 84 is the only rule that really concerns us. Rule 84(a)(1) provides for constitution of special benches in certain special cases. Rule 84(a)(2) runs as follows:

> "The Sarpanch shall prepare a list of names of all the panches in alphabetical order and constitute a bench of five panches serially turn by turn from it for the trial of the case, suit or proceeding:

Provided that the surpanch shall exclude from a bench, after recording, his reasons in writing, any panch, if he does not fulfil the provisions of S. 49 or rule made in that behalf or if any party has any reasonable objection against him."

Rule 84(d)(1) is important and gives the parties, i.e., the complainant and the accused, the right to object to the constitution of the bench. It provides that

"If any party to a case, suit or proceeding is dissatisfied with the personnel of a bench constituted for its hearing, he shall immediately on receiving the information about the constitution of bench and before commencement of hearing of the case, suit or proceeding, make an application to the sarpanch stating the grounds of his dissatisfaction and requesting for the reconstitution of the bench."

Rule 84(d)(2) is as follows:

"If the party concerned proves to the satisfaction of the sarpanch that the inclusion of a particular panch or panches in the bench would be prejudicial to fair trial, he shall constitute a fresh bench, but if he finds any difficulty in doing so or the party concerned is not satisfied with the reconstituted bench, the sarpanch shall submit the papers to the prescribed authority who shall take such action as he may deem fit, and his decision subject to revision by the appellate prescribed authority within fifteen days of the decision shall be final."

Rule 84(e) provides that

"The provisions of sub-rules (b) and (d) shall apply 'mutatis mutandis' to the formation of special benches by the prescribed authority."

(6) A large number of cases came up before this Court where it was found that the trial was defective either by reason of the fact that five Panches had not been nominated at all by the Sarpanch or having been nominated by him they had not attended on some dates or on all the dates of the hearing of a case, and this Court took the view that trials in such cases were vitiated by the defect.

(7) The State Legislature added a rule 87-A providing that

"Three panches of a Panchayati Adalat shall constitute the quorum for the meeting of any bench."

This rule was held to be 'ultra vires' as it went beyond the provisions of the Act itself. The Legislature, therefore, amended the Act and added S. 77-A, sub-ss. (1) and (2) of which are as follows:

"(1) If any Panch appointed to a bench constituted under S. 49 for the trial of a case, suit or proceeding is absent at any hearing, the remaining Panches may, notwithstanding anything contained in this Act, try the case, suit or proceeding provided, however, that at least three Panches, including the chairman, are present and provided further that at least one of the Panches present is able to record evidence and proceedings.

(2) No trial as aforesaid shall be invalid by reason merely that all the five Panches forming the bench were not present at any hearing or that the same Panches were not present at all the hearings."

This amendment was made retrospective.

(8) It is not denied that in the case before us no advantage was taken of the provisions of Rule 84(d) and no objection was taken to the personnel of the bench. At the same time it is not denied on behalf of the complainant that there was only one Panch who came from the Gaon Sabha of the parties, while the four Panches were outsiders. In the referring order the learned single Judge has pointed out that it is not for us to try to find out the reason behind the rule that one Panch should be from the Gaon Sabha of the area where the plaintiff or the complainant resides and the other from the Gaon Sabha of the area within which the defendant or the accused resides.

Whatever be the intention, there is the rule and the question before us really is, whether that rule is such, keeping in view the whole scheme of the Act, that it must be deemed to go to the root of the jurisdiction, so that if a bench has not been constituted strictly in accordance with its provisions the whole trial is vitiated, even if no objection to it has been taken on behalf of either the accused or the complainant. In this connection it is permissible to point out that the Act, as its Preamble shows, was passed as it was considered expedient that the establishment and development of Local Self-Government in the villages should be encouraged and the differences which led to criminal and civil cases, suits or proceedings of petty nature should, as far as possible, be decided by the people themselves. It was with the object that complicated questions of law and procedure may not be raised before such bodies that the Act probably excluded legal practitioners from appearing before such bodies.

(9) We are further entitled to take into consideration the fact that there might arise cases where it is not possible to comply with the positive and the negative limitations, to borrow the words of the learned single Judge. There may be cases where there are more than one plaintiff or more than one complainant who may bring a suit or file a complaint on the same cause of action and they may be residents of areas within different Gaon Sabhas and there may be cases where there are more than one accused tried for the same offence being residents of areas within different Gaon Sabhas. In such cases it would not be possible to comply with the provisions of S. 49(2) and have three outsider Panches and two Panches residents one each of the Gaon Sabha of each party. In such a case probably the Sarpanch may be able to refer the matter to the State Government under S. 49(4). Rule 84(b) lays down that—

"If in a suit, case or proceeding the Sarpanch of a Panchayati Adalat ..... finds any difficulty to form a bench according to S. 49 of the Act the Sarpanch, instead of forming a bench under the said section shall immediately after the institution of the suit, case or proceeding, as the case may be, submit the papers to the prescribed authority who shall constitute a bench for its trial, under S. 49(2) or sub-r. (a) of this rule as the case may be."

Learned counsel's contention is that in a case similar to the illustration given above it is for the State Government to constitute a bench. Whether the sub-rule quoted above can apply to such a case is doubtful, because even the State Government has to constitute a bench

under S. 49(2) of the Act and the same restrictions would probably apply to it, but if the contention of learned counsel is accepted, it only means that there is no inherent want of jurisdiction in a bench of five Panches of which more than three come from areas of different Gaon Sabhas. If such a Bench is constituted by the Sarpanch, all that can be said is that such a bench should have been constituted by the "prescribed authority" and not by the Sarpanch. In this connection it is also important to bear in mind that though the Sarpanch has to constitute a bench in accordance with the provisions of S. 49(2), S. 77A now makes it clear that three Panches including the Chairman may proceed to decide the case and all these three Panches who constitute the quorum may thus be outsiders who do not belong to the area within which the Gaon Sabha of either one party or the other functions, the only limitation being that one of the three Panches must be literate and should be able to record evidence and proceedings.

Keeping all these provisions in mind, we are of the opinion that the provisions of S. 49(2) of the Act do not go to the root of the jurisdiction of the Panchayati Adalat constituted for the purpose, and if no objection has been taken to the constitution of such a bench by either party in accordance with the provisions of R. 84(b), it is not open to either of them to say that the bench has not been properly constituted under the Act.

(10) Coming to the next question about the amount of fine imposed on the accused, reliance is placed on S. 54(2) of the Act, which is as follows :

> "A Panchayati Adalat may impose a fine not exceeding one hundred rupees but no imprisonment may be awarded in default of payment."

The argument is that in a case no matter how many accused there may be before the Panchayati Adalat, the sub-section imposes a limitation on the jurisdiction of the Adalat and the total fine imposed cannot exceed one hundred rupees. This argument has only to be stated to be rejected. Each person is responsible for his criminal act and the punishment awarded is to each individual. There is no question of any collective responsibility or a collective fine. The words of this sub-section are very similar to the provisions of S. 32(1), Criminal P. C. which provides that—

> "(a) Courts of presidency Magistrates and of Magistrates of the first class : } Fine not exceeding one thousand rupees ;
>
> (b) Courts of Magistrates of the second class : } Fine not exceeding two hundred rupees ;
>
> (c) Courts of Magistrates of the third class : } Fine not exceeding fifty rupees."

No court has ever held that S. 32, Criminal P. C. limits the powers of the Magistrates and the fine they can impose on each accused must be limited by the total number of accused and the aggregate amount of the fine imposed on them taken together.

(11) In the alternative the argument is that if an accused personally is charged with two separate offences and is convicted on both counts, the total fine must be limited to Rs. 100/-. We do not see any reason to accept this contention. The only limitation on the power of a Court for punishing an accused for two offences is contained in S. 71, Penal Code, which provides that—

> "Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided.
>
> Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or
>
> Where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,
>
> the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

It is not said that the case comes under S. 71, Penal Code, and there is, therefore, no reason to consider that the Panchayati Adalat was not entitled to impose separate fines of Rs. 80/- and Rs. 70/- for the two separate offences committed by each of the accused.

(12) The application has no force and is dismissed.

B/D.H. Application dismissed.

A. I. R. 1954 ALLAHABAD 84 (Vol. 41, C. N. 53)
(FULL BENCH)

MALIK C. J., DESAI AND MUKERJI JJ.

Kesho Datt and others, Accused-Applicants v. Panchayati Adalat and others, Opposite Parties.

Criminal Misc. (Writ) No. 2393 of 1951, D/- 18-8-1953.

U. P. Panchayat Raj Act (26 of 1947), S. 83 — Panchayati Adalat can issue commission for local inspection and report — Panchayati Adalat can consider the report as any other piece of evidence.

The provisions of S. 83 clearly indicate that the Legislature did not intend that the strict rules of procedure laid down for the guidance of courts should be followed by a Panchayati Adalat in the decision of the cases before it. (Para 8)

So far as the Act or the rules thereunder lay down any procedure, the Panchayati Adalat is bound by them and it has to follow that procedure. But there being no detailed instructions issued to the Panchayati Adalat as to how the trial or the hearing of a case is to be conducted and the Civil Procedure Code, the Criminal Procedure Code, the Evidence Act, the Limitation Act and the Court-fees Act having all been made inapplicable, it is open to the Panchayati Adalat to have recourse to any procedure that may be lawful, so long as it cannot be made out that by reason of the procedure followed by the Panchayati Adalat there has been a miscarriage of justice. (Paras 7, 10)

The local investigation contemplated under S. 83 is not the same thing as the issue

of commission for making a report as to some local condition. This provision in S. 83 gives the Panchayati Adalat the right to go to the spot, make local investigation as to the truth or falsity of a case and presumably decide the case on the result of such investigation and such other material that may be placed before it.

(Para 11)

There is nothing in S. 83 which requires that evidence of facts relevant to the inquiry should be ascertained by the Panchayati Adalat itself and that it cannot have facts ascertained through commissioners appointed by it for the purpose. There is nothing in the Act which makes such procedure being adopted by the Panchayati Adalat illegal and the appointment of a commissioner to make a local inspection is not against rules of natural justice.

(Para 13)

It is not therefore illegal for a Panchayati Adalat to issue a commission for the purpose for which commissions are issued by Civil or Criminal Courts and to take the report of the commissioner into consideration along with other matters before it for decision of the case or the proceeding pending before it. Case law referred.

(Para 13)

Jagdish Sahai, for Applicants; N. S. Singhal, for Opposite Parties; K. C. Saxena, for Opposite Party No. 3.

CASES REFERRED TO:

(A) ('52) AIR 1952 All 785: 1951 All LJ 719: 1952 Cri LJ 1273 (Pr 11)

(B) ('53) AIR 1953 All 340: 1953 All LJ 89 (Pr 12)

(C) ('53) Criminal Misc. Writ No. 104 of 1953, D/- 6-8-1953 (All) (Pr 12)

(D) ('53) Criminal Misc. Case No. 907 of 1952, D/- 1-4-1953 (All) (Pr 12)

MALIK C. J.:

This application under Article 226 of the Constitution was referred to a large Bench as the learned Judges wanted an authoritative decision on the point, whether a Panchayati Adalat can under the U. P. Panchayat Raj Act (Act 26 of 1947) appoint a commissioner to make a local investigation and make a report?

(2) The facts, so far as can be ascertained from the papers on the record, are that one Shiam Lal filed a complaint against four persons that they had committed an offence under S. 447, Penal Code, inasmuch as they had broken down a mendh which separated the field of the complainant from their field and had planted mustard seed crop on the land belonging to the complainant. The Panchayati Adalat Bench issued a commission to Sampat Singh the Sarpanch and one Roshan Singh, who though on the panel of panches was not a member of this Bench of the Panchayati Adalat, to make a report as regards the condition of the field after a local inspection. The two commissioners went to the spot and made a report to the effect that the mendh separating the two fields appeared to have been recently dug up and freshly planted with mustard seed, that the mustard plants on the portion where the 'mendh' had existed had not attained the height of the plants on the field of the complainant. The Panchayati Adalat took this report into consideration, along with the other evidence in the case, and recorded a finding that the accused were guilty under S. 447, Penal Code, and sentenced them to pay a fine.

(3) A revision was filed against that order before the Sub-Divisional Magistrate, in which the decision of the Panchayati Adalat was attacked on several grounds, but no point was made of the fact that the Panchayati Adalat had issued a commission. The Sub-Divisional Magistrate went into the points raised before him and held that there was no miscarriage of justice and dismissed the revision.

(4) Thereafter a writ petition was filed in this Court under Art. 226 and in the affidavit in support of the application the point was raised:

> "That the Panchayati Adalat (Opposite Party No. 1) issued a commission consisting of Sampat Singh Sarpanch and an outsider Roshan Singh who made a local inquiry and in convicting the applicants the Opposite party No. 1 (Adalat Panchayat) have relied upon the report of the commission. All the members of the Panchayati Adalat did not make the local inquiry."

Learned counsel for the applicants, on a question from the Court, made it clear that it is not his case that the Panchayati Adalat asked the commissioners Sampat Singh and Roshan Singh to decide the case or any part thereof on behalf of the Panchayati Adalat, but his argument was that Panchayati Adalat has no right to issue a commission for any purpose though a court of law may be entitled to issue a commission for local inspection or for ascertainment of facts and direct the commissioner to make a report.

(5) The whole argument is based on the language of S. 83 Panchayat Raj Act and it is said that S. 83 clearly indicates that the Panchayati Adalat has no power to issue a commission for the purpose of ascertaining facts and that if any local inspection is necessary, all the members of the bench must make the local inspection themselves and not have the work done through a commissioner.

The relevant portion of S. 83, relied on by learned counsel for the applicants, is as follows:

> "..... It shall be the duty of the Panchayati Adalat to ascertain the facts of every suit, case or proceeding before it by every lawful means in its power ..... It may make local investigation in the village to which the dispute relates ..... It shall follow the procedure prescribed by or under this Act."

Learned counsel's contention is that the words that the Panchayati Adalat has been enjoined to ascertain the facts of every suit, case or proceeding before it by every lawful means in its power, mean that the panchayati Adalat has itself to do all that may be necessary to ascertain the facts and the Adalat has not been given any power to have facts ascertained through any other agency.

Reliance was also placed on the words:

> "It may make local investigation in the village to which the dispute relates,"

and it was argued that the local investigation if any has, therefore, to be made by the Panchayati Adalat itself. And lastly, reliance was placed on the words,

> "It shall follow the procedure prescribed by or under this Act,"

and the argument is that it can only do what the Act has enjoined and nothing else.

(6) In interpreting S. 83, however, we have to bear in mind that the Panchayat Raj Act, as its preamble shows, was enacted to establish and develop local self-government in the rural areas and

to make better provision for village administration and development. The idea underlying the Act is that the village people should in all minor cases be able to settle their own disputes through a local tribunal which is expected to be in touch with local conditions and without any elaborate or complicated procedure. There is, therefore, a bar to a lawyer appearing before a Panchayati Adalat (Vide S. 80), and S. 83 provides that the Code of Civil Procedure, the Code of Criminal Procedure, the Indian Evidence Act and the Indian Limitation Act shall not apply to any suit, case or proceeding before a Panchayati Adalat except to the extent that it may have been made applicable by the Panchayati Raj Act. No elaborate procedure, like the procedure given in the Criminal Procedure Code and the Civil Procedure Code, for trial of cases is laid down in the Panchayat Raj Act.

There are, however, certain sections which give certain directions as to how the work is to be done; for example, S. 75 provides that a suit, case or proceeding may be instituted before the Sarpanch of the Panchayati Adalat and in his absence before some other Panch appointed in that behalf; the Court-Fees Act is not applicable and the petitioner may orally or in writing set out what relief he requires and on what terms. Section 76 specifies that where an application is not in writing, the person receiving the particulars has to make a note in writing and then fix a date. Section 78 gives the Panchayati Adalat the power to dismiss a case in the absence of the plaintiff or the complainant or the petitioner, and also gives the power to proceed 'ex parte' against the other side.

Certain rules have been framed which also contain certain directions, for example R. 95 provides in what order the evidence is to be recorded, etc. Rule 97 directs that the Panchayati Adalat is to make a summary inquiry and in cases involving intricate questions of title and in case of any doubt or difficulty it may refer the matter to the Sub-Divisional Officer. Rule 99 provides for examination of women on commission and requires that the Sarpanch or a Panch nominated by him shall record such evidence. Rule 127 makes the entry of the Adalat or any member thereof, upon any land or building for ascertaining facts relevant to the proper disposal of the case after giving notice to the occupier of the land or the building between sunrise and sunset legal. These are, therefore, specific directions in certain specific matters.

But there are no elaborate directions, as are contained in the Civil Procedure Code or the Criminal Procedure Code, for the conduct of a case in a court of law. On the other hand, S. 83 makes it legal for the Panchayati Adalat to go to the village and make local investigation into the facts for ascertaining the truth or falsity of a case which a court either under the Civil Procedure Code or the Criminal Procedure Code is not entitled to do, as it has to decide the case on the evidence on the record.

(7) In the referring order of one of the learned Judges, reliance was placed on the word 'It' in S. 83 and the learned Judge seems to have thought that the word "It" refers only to the Panchayati Adalat and, therefore, the Panchayati Adalat was authorised to make local investigations in the village to which the dispute relates but had no power to delegate that function to a commissioner appointed by it. It was probably not brought to the notice of the learned Judge that the local investigation contemplated under this section is not the same thing as the issue of a commission for making a report as to some local condition. This provision in S. 83 gives the Panchayati Adalat the right to go to the spot, make local investigation as to the truth or falsity of a case and presumably decide the case on the result of such investigation and such other material that may be placed before it. We have already mentioned that in this case the learned counsel for the applicants has admitted that the Panchayati Adalat did not leave the decision of the case or any part thereof to the commissioners appointed by it. The Panchayati Adalat had merely appointed the commission for ascertaining certain facts which were considered relevant to the decision of the case pending before it and the report was merely a piece of evidence in the case.

(8) We do not think, therefore, that the words "It may make local investigation in the village to which the dispute relates" in S. 83 help either party in the decision of the point before us. The provisions of section 83 clearly indicate that the Legislature did not intend that the strict rules of procedure laid down for the guidance of courts should be followed by a Panchayati Adalat in the decision of the cases before it.

(9) The other portion of the section, on which reliance is placed, viz., "by every lawful means in its power", to our minds, does not help the applicants. Learned counsel has urged that these words clearly indicate that the Panchayati Adalat can only act in accordance with the rules of procedure laid down in the Act itself. All that was probably intended to be conveyed was that a Panchayati Adalat can ascertain the facts of every suit, case or proceeding before it and in ascertaining the facts it is open to it to do whatever is legal or lawful, that is it cannot take recourse to any unlawful means for the purpose of ascertaining the truth.

(10) The only other portion relied on are the words:

> "It shall follow the procedure prescribed by or under this Act."

There can be no doubt or difficulty that so far as the Act or the rules thereunder lay down any procedure, the Panchayati Adalat is bound by them and it has to follow that procedure. But we have already said that there being no detailed instructions issued to the Panchayati Adalat as to how the trial or the hearing of a case is to be conducted and the Civil Procedure Code, the Criminal Procedure Code, the Indian Evidence Act, the Limitation Act and the Court-fees Act having all been made inapplicable, it is open to the Panchayati Adalat to have recourse to any procedure that may be lawful, so long as it cannot be made out that by reason of the procedure followed by the Panchayati Adalat there has been a miscarriage of justice. If that result follows then the Sub-Divisional Magistrate or the Munsif or the Sub-Divisional Officer, as the case may be, has to quash the decree or order passed by the Panchayati Adalat and quash the jurisdiction. The case becomes thereafter cognisable in an ordinary court of law in accordance with the provisions of sub-sections (2), (3) and (4) of S. 85.

(11) Only four cases have been cited before us, two of which are reported and the other two are unreported decisions. In the first case, — 'Sant Prasad v. State', AIR 1952 All 785 (A), Bhargava J. held that the Panchayati Adalat had no jurisdiction to have local investigation made by others.

According to the learned Judge, the local investigation in the case was not made by the Panchayati Adalat itself, but it was made by the Panchayati Adalat in collaboration with certain outsiders. From other parts of the judgment, it appears that these outsiders had practically been co-opted as members of the Panchayati Adalat and they had also signed the judgment. As we have already said, the local investigation mentioned in S. 83 in the village where the dispute arose for the purpose of ascertaining the truth or falsity of the case of one party or the other can be made by the Panchayati Adalat as provided for in the Act.

But there is nothing in S. 83 which requires that evidence of facts relevant to the inquiry should be ascertained by the Panchayati Adalat itself and that it cannot have facts ascertained through commissioners appointed by it for the purpose; such commissioners would, in a case before the civil or the criminal court, be liable to be cross-examined on the report made by them, the court will then be able to judge the evidentiary value of the report and either accept it or reject it. So far, as we can see, there is nothing in the Act which makes the procedure adopted by the Panchayati Adalat illegal and the appointment of a commissioner to make a local inspection does not appear to be against rules of natural justice.

It must in this connection be remembered that the Panchayat Raj Act was intended to administer rough and ready justice, if we may use that phrase, and unless it appears that there has been clear miscarriage of justice this Court should not interfere under Article 226 on a technical objection when the Act itself seems to rule out all technicalities.

(12) The next case is also a reported decision, — 'Girja Prasad v. Zalim Singh', AIR 1953 All 340 (B) in which Agarwala J. distinguished the case of — 'Sant Prasad v. State (A)' (ante) and pointed out that in that case the decision of the case itself had been left to the outsiders who were associated with the members of the Panchayati Adalat for the decision of the case. The learned Judge was of the opinion that there was nothing in the Panchayat Raj Act which disentitled a Panchayati Adalat from appointing commissioners to make a local inspection and report.

This decision was followed by another learned single Judge of this Court in — 'Sm. Champa v. State', Criminal Misc. Writ Case No. 104 of 1953, D/- 6-8-1953 (All) (C). The learned Judge held that in the Code of Criminal Procedure a Magistrate is authorised to have an inquiry made by the police or by another Magistrate after a complaint has been filed and there was nothing in the Panchayat Raj Act which disentitled a Panchayati Adalat from issuing a commission and then taking the report of the commissioner into consideration along with other evidence on the record for the decision of the case. In — 'Ram Lal v. Panchayati Adalat Karav', Criminal Misc. Case No. 907 of 1952, D/- 1-4-1953 (All) (D), however, the decision of Agarwala J. was not cited. The learned Judge followed the decision in — 'Sant Prasad's case (A)' (supra).

(13) After having considered the cases and the arguments advanced by learned counsel we are of the opinion that it is not illegal for a Panchayati Adalat to issue a commission for the purpose for which commissions are issued by civil or criminal courts and to take the report of the commissioner into consideration along with other matters before it for the decision of the case or the proceeding pending before it.

(14) This application has, therefore, no force and is dismissed with costs.

A/R.G.D. Application dismissed.

A. I. R. 1954 ALLAHABAD 87 (Vol. 41, C. N. 54)

MALIK C. J. AND CHATURVEDI J.

Mst. Nanhi Nabbi, Defendant-Appellant v. Mst. Bunyadi Begam Ghani Raza, Plaintiff-Respondent.

Second Appeal No. 398 of 1949, D/- 26-8-1953, against Civil J., Budaun, D/- 18-12-1948.

Muhammadan Law — Pre-emption — Second demand (Talab-i-ishhad) by touching walls of premises to be pre-empted, in presence of witnesses is enough.

According to the Muhammadan Law of Pre-emption the second demand, that is talab-i-ishhad, must be performed, if it is not performed in the presence of the buyer or the seller, "on the premises" which are the subject of pre-emption in the presence of at least two witnesses. (Para 5)

It is not necessary for the pre-emptor to enter the house and make a demand. It is enough if he goes near the house and touching the walls, makes the demand. This is enough compliance with the Muhammadan Law of Pre-emption. (Para 12)

J. Sahai, for Appellant; M. A. Kazmi, for Respondent.

CASES REFERRED TO: Paras

(A) ('96) 18 All 298: 1896 All WN 71 7
(B) ('12) 34 All 1 : 11 Ind Cas 319 8
(C) ('05) 32 Cal 982: 9 Cal WN 826 9
(D) ('27) AIR 1927 All 548: 49 All 716 11

MALIK, C. J.:

This second appeal has been referred to a bench for the decision of the question whether the second demand, 'talab-i-ishhad', was performed by the plaintiff in accordance with the provisions of the Mohammadan law of Pre-emption.

(2) The plaintiff Bunyadi Begam filed a suit against the defendants Mst. Nanhi and Mst. Shakila Begam claiming pre-emption of a house on the ground that the vendee was a stranger and the plaintiff pre-emptor was entitled to claim pre-emption under the Mohammedan law. The plaintiff alleged that she had performed the first demand, 'talab-i-mowasibat', immediately on coming to know of the sale, and the second demand by going to the house to be pre-empted in the company of witnesses and declaring her intention to pre-empt by touching the wall of the house and also after mentioning that the 'talab-i-mowasibat', had been performed.

(3) The plaintiff's evidence was believed and the suit was decreed by the lower appellate court.

(4) Mst. Nanhi, defendant, has filed this appeal and a question was raised by learned counsel for the appellant before the learned single Judge that a 'talab-i-ishhad' must be performed "on the premises" and that the mere fact that the plaintiff went to the house, remained outside, and touched the wall with

her hand while performing the 'talab' was not enough. The learned Judge was of the opinion that the case raised an important point of Mohammedan law of pre-emption and, therefore, referred it to a bench for decision.

(5) Reliance is placed by learned counsel on Mulla's Mohammedan Law, Chapter XIII, S. 236 (1950 edition) where dealing with the question "Demands for pre-emption" the learned author has said

"No person is entitled to the right to pre-emption unless

(1) ....

(2) he has with least practicable delay affirmed the intention, referring expressly to the fact that the 'talab-i-mowasibat' had already been made, and had made a formal demand

(a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale, and

(b) in the presence at least of two witnesses. This formality is called 'talab-i-ishhad' (demand with invocation of witnesses)."

It was pointed out that according to Mohammedan Law if it is a second 'talab' and if it is not performed in the presence of the buyer or the seller it must be performed 'on the premises' which are the subject of pre-emption.

(6) The point for decision, therefore, is, what the words "on the premises" mean on which reliance has been placed by learned counsel. In Hamilton's Hidaya, Vol. III. Book 38, Chap. II, page 571 the law is thus quoted :

"It is therefore necessary afterwards to make the 'talab ishhad wa takree' which is done by the 'shafee' taking some person to witness, either against the seller, if the ground sold be still in his possession or against the purchaser, or upon the spot regarding which the dispute has arisen....."

(7) The question of the validity of second 'talab' has arisen in many cases but the exact point that has been raised before us does not seem to have been discussed in any of the reported cases. In — 'Kulsum Bibi v. Faqir Muhammad Khan', 18 All 298 (A), the question was of pre-emption of a zamindari share in an undivided village and the plaintiff, who was a co-sharer in the village, had made the second demand within the area of the zamindari, the two annas' share in which was sold, and it was held that it was a valid demand. That decision is not very helpful.

(8) In — 'Muhammad Usman v. Muhammad Abdul Ghafur', 34 All 1 (B), which was again a case of pre-emption of a zamindari share, the plaintiff made the second demand on his own 'chabutra' in the 'abadi' which was inside the village the share of which was being sold and that too was held to be a valid demand as it was made "on the premises".

(9) The point was not discussed but the decision which is nearer to the case before us is the decision in the case of — 'Jog Deb Singh v. Mahomed Afzal', 32 Cal 982 (C), where the second demand was made in the presence of two of the purchasers and 'at the empty doors of the other three' and it was held that it was a valid demand.

(10) In many of the text books on Mohammedan Law the words used are "on the premises" and the question that we have to consider is whether the words "on the premises" mean at or near the premises, or they mean that the pre-emptor must actually enter the premises before he can make the second demand. If the latter interpretation is accepted, in a case where the second demand cannot be made in the presence of the vendor or the vendee, the pre-emptor will be in some difficulty as he would not be entitled to enter the premises without the risk of being prosecuted for trespass.

(11) As we were not able to get much assistance from the reported cases, we looked up the original Arabic words, which have been translated by various authors as "on the premises" or "upon the spot" etc. and found that the words are "Andal Akar" (and) means in Urdu 'nazdik ya karib' i.e. near, while, ('akar') means 'ghair mankula jaidad' i.e. immoveable property (see **Firozul Loghat by** Maulvi Firoz Uddin Saheb). In Abbasi's Law of Pre-emption, Ist edition, published in 1899 the words 'Andal akar' have been translated in Urdu as meaning 'akar ke nazdeek'. Though the point did not arise in — 'Muhammad Askari v. Rahmat Ullah', AIR 1927 All 548 at p. 549 (D), a decision by Lindsay and Sulaiman JJ.. Lindsay, J. who knew Arabic said that it was not suggested that the pre-emptor had made any second demand "in the presence of the property sold". The learned Judge probably gave a literal translation of the words 'Andal akar'.

(12) The object why, if the second demand could not be made in the presence of the vendor if he was still in possession of the property, or against the purchaser, the demand had to be made 'upon the spot' was for the purposes of identification of the property and, in our view, it was not necessary for the pre-emptor in this case to actually enter the house and her making the second demand near the house touching the wall of the house was enough compliance with the Mohammedan law of pre-emption.

(13) The result, therefore, is that this appeal has no force and is dismissed with costs.

A/R.G.D. Appeal dismissed.

A. I. R. 1954 ALLAHABAD 88 (Vol. 41, C. N. 55)

(LUCKNOW BENCH)

CHATURVEDI AND RANDHIR SINGH JJ.

Sunni Central Board of Waqf, U. P., Appellant v. Sirajul Haq Khan and others, Respondents.

First Civil Appeal No. 50 of 1947, D/- 22-4-1953, against decree of Civil J., Bahraich, D/- 15-4-1947.

(a) U. P. Muslim Waqfs Act (13 of 1936) — Waqf — Definition, scope of — Dedication by user.

Definition of waqf given by Muhamedan authors of commentary is enlarged by the Act and covers permanent dedications and grants recognised not only by the Musalman law but also by usage, as religious, pious or charitable — Dedication for purposes of tomb — Shrine held in veneration by public and Urs held since time immemorial — Object of dedication held pious and covered by definition of waqf given by Act. (Paras 14, 15)

(b) Civil P. C. (1908), S. 92 — Suit under — Scope — (Evidence Act (1872), S. 41).

A suit under S. 92 (formerly S. 539) can be maintained only in respect of a public trust of a permanent character and the judgment in such a suit would be a judgment in rem and not a judgment in personam. After the decision given by the District Judge holding the property to be a public trust and laying down a scheme for its administration it is not open to any party to challenge the permanent public nature of the trust. (Para 16A)

Anno: Civil P. C., S. 92 N. 41; Evidence Act, S. 41 N. 1.

(c) Muhammedan Law — Waqf — Conditional grant.

Where the condition was attached only to the user of the profits of the waqf by the person to whom a right to apply the usufruct of the property was given and the condition was that if the person to whom the right to utilise the usufruct of the property was given did not put the usufruct to the use for which it was given his rights so to use the profits would come to an end, the condition has nothing to do with the dedication of the property and the grant does not become conditional. (Para 16B)

(d) U. P. Muslim Waqfs Act (13 of 1936), S. 2(2) (ii) (a) — Applicability.

Offerings of Shrine for benefit of Shrine and not khadims — Properties pertaining to waqf dedicated to waqf and not to any individual — S. 2(2) (ii) (a) has no application and waqf is not excluded from purview of Act. (Para 16C)

(e) U. P. Muslim Waqfs Act (13 of 1936), S. 2(2) (ii) (c) — Construction.

Waqfs for maintenance of private imambaras, tombs and graveyards are excluded — "Private" qualifies both "imambaras" and "tombs and graveyards." AIR 1946 All 256, Relied on. (Para 16D)

(f) U. P. Muslim Waqfs Act (13 of 1936), S. 5 — Notification under, scope of.

It is not necessary under the law that all the property appertaining to a waqf should also be notified in the Gazette under the provisions of S. 5. All that is necessary is that the waqf which is sought to be claimed as a Muslim waqf should be clearly indicated in the notification.

In the instance case the notification regarding the property did not make a mention of all the items of the property and the word "waghaira" was put at the end to cover items of such property as were omitted.

Held that a waqf property would not cease to be a waqf property, if there is no notification in respect of it, and if any item of property was left out either by an oversight or due to the impression that the word "waghaira" would include all such property, the items of property not clearly mentioned would not cease to be waqf property.

That the disputed properties were included in the expression "waghaira". (Para 16E)

(g) Limitation Act (1908), S. 14 — Applicability.

Subsequent suit must be against defendant in previous suit — In the two proceedings there should be the same cause of action and the Court in which the earlier suit was being prosecuted should be unable to entertain it from defect of jurisdiction or other cause of a like nature. (Para 18)

Anno: Limit. Act, S. 14 N. 16.

(h) Limitation Act (1908), S. 15 — Applicability — (U. P. Muslim Waqfs Act (13 of 1936), S. 5).

Trustees of wakf properties removed by decree of Court — Court issuing notice on removed trustees not to interfere "in any way" in the affairs of waqf — Held that the notice did not restrain the removed trustees from bringing a suit for a declaration that the properties comprised in the waqf were not to be governed by the provisions of the Muslim Waqfs Act, and that it was, therefore, open to them to bring a suit within the time prescribed by law (S. 5, Muslim Waqfs Act) and they could not take advantage of the provisions of S. 15 for extending the prescribed period of limitation. (Para 19)

Anno: Limit. Act, S. 15 N. 6.

(i) U. P. Muslim Waqfs Act (13 of 1936), S. 53 — Scope.

Provisions are analogous with those of S. 80, Civil P. C. — Subject matter of dispute, waqf property — Notice under S. 53 held essential before institution of suit. (Para 20)

Niamatuallah, Mohd. Ayub, Naimullah and Inayatullah, for Appellant; Akhtar Husain, R. K. Agnohotri, (for No. 1); R. B. Lal and R. B. Chaudhri, (for Nos. 1 to 8), for Respondents.

CASES REFERRED TO:

(A) ('38) ILR (1938) Bom 184 (Pr 15)

(B) ('50) AIR 1950 All 62: 1949 All LJ 453 (Pr 16B)

(C) ('22) AIR 1922 All 519: 77 Ind Cas 97 (Pr 16B)

(D) ('46) AIR 1946 All 256: ILR (1946) All 352 (Pr 16D)

RANDHIR SINGH J.:

This is a defendant's appeal from the judgment and decree of the Civil Judge of Bahraich and the subject of dispute in this case is an endowment described as waqf Syed Salaar Masood Ghazi.

(2) The facts of this case are a trifle complicated and the endowment has been the subject of litigation for a long time. In order, therefore, to understand the nature of the controversy between the parties it is necessary to set out in brief a history of the institution, various proceedings, and the prolonged litigation extending almost over three quarters of a century. The origin of the shrine is shrouded in antiquity but a record, more or less authentic, is to be found in the Gazetteer of the Bahraich district, as also in the judgment of the Chief Court in an appeal case.

(3) Syed Salaar Masood Ghazi was said to be a nephew of Mohammad Ghazi and while on a visit to Bahraich met his death at the hands of a local chieftain. His remains were buried in village Singha Parasi by his devoted followers and a tomb was subsequently constructed, which became, in course of time, an object of pilgrimage and veneration. An annual mela or Urs is held at the shrine and is attended by a large number of persons who make offerings at the shrine. The tomb is maintained out of the income from the offer-

ings and from the receipts of certain properties partly endowed by the charitably disposed emperors of Delhi and partly acquired out of the savings from the income of the property and the offerings at the shrine.

(4) A body of persons known as the Khuddam of Dargah has been looking after and performing ceremonies and other services at the shrine generation after generation. They had been receiving income from the properties attached to the shrine as also the charhawa or offerings. The annexation of Oudh in 1856 was followed by a War of Independence, described by the British Rulers as Mutiny of 1857. As a sequel to this revolt, Lord Canning issued a proclamation confiscating all private property, which put an end to all previous titles. Fresh settlements were then made by the Government and rights which existed previously were, in most cases, revived by fresh grants or decrees of Settlement Courts. The property appertaining to the Dargah in this case also met the same fate.

(5) In the year 1859 or 1860 a sanad is said to have been granted to one Faqirullah, who was the head of the Khadims of rent free tenure of village Singha Parasi and he was given the right to collect the usufruct of the village to be appropriated to the maintenance of the Dargah. Not satisfied with this limited grant, Inayatullah son of Faqirullah filed a suit in 1865 in the court of the Settlement Officer for a declaration of his proprietary rights in the village. This suit was, in effect, dismissed and Inayatullah was held entitled only to the usufruct of the village under the terms of the Sanad. Some of the Khadims also filed similar suits claiming proprietary rights in various other plots of land surrounding the shrine but all these suits were also dismissed.

(6) Some years later in 1872, it was brought to the notice of the Chief Commissioner that the Khadims at the Dargah had been mismanaging the affairs of the Dargah and had not been maintaining the Dargah properly and a committee of Musalmans was appointed to examine the affairs and make a report. This committee submitted its report on 20-2-1877, and made certain recommendations. The committee suggested the appointment of a jury of five persons including two khadims to manage the Dargah and its properties.

(7) Once again in 1892 Inayatullah and two others instituted a suit for the possession of the Dargah together with the buildings appertaining thereto and village Singha Parasi and also for certain other reliefs. This suit was decreed by the Subordinate Judge but was ultimately dismissed by the Court of the Judicial Commissioners, which also held that the property was waqf and it was neither proper nor open to the Government to interfere in the management of any land or other property belonging to this waqf and that this prohibition also extended to the Government of Oudh. In the opinion of the Judicial Commissioners, the Dargah was a religious establishment within the meaning of Act 20 of 1863 and the Government acted without authority in interfering in the management of the waqf property.

As a sequel to this judgment, in the year 1902 a suit was instituted by the Legal Remembrancer to the Government of the United Provinces of Agra and Oudh under S. 539 (now S. 92), Civil P. C. for settling the management of the waqf, and a scheme for the administration of the trust was sanctioned by the District Judge of Gonda. Under the terms of the decree, a committee of management of ten members was appointed and the property was vested in a board of two trustees, one of whom was the president of the committee of management. The functions of the committee and the limitation under which they were to work were clearly indicated in the decree passed by the District Judge in the suit instituted by the Legal Remembrancer. It was also clearly mentioned that the property would vest in the two trustees and that cases shall be instituted and defended and investments made in their names. They were prohibited from incurring any expenditure in instituting or defending a case without the sanction of the committee.

(8) Rot seems to have set in again in the management, and an application was made by Ashraf Ali and others in 1934 to the District Judge of Gonda, which was registered as Regular Suit No. 1 of 1934, praying for the issue of an interim injunction restraining certain persons from taking part in the affairs of the Dargah or in any way interfering with its management on the ground that they were not duly elected members and were guilty of misfeasance of the trust. It was also prayed that the defendants in that suit be prohibited from spending money belonging to the waqf on frivolous litigation due to party feelings. The District Judge issued an order directing the committee that no money out of the Dargah funds be spent in litigation without the sanction of the District Judge.

(9) No other suit of importance was filed till we come to the year 1940 when a suit No. 1 of 1940 was instituted with the sanction of the Advocate General by five Musalmans against the managing committee and the trustees for their removal and for the settlement of a fresh scheme. This suit was decreed on 16-10-1941. The losing party, viz., the managing committee and the trustees, then went in appeal to the Chief Court and the decree was set aside on 7-3-1946 and some minor amendments of little consequence were made in the already existing scheme of management.

(10) The Muslims Waqfs Act was passed in 1936 for the better governance, administration and supervision of certain classes of Muslim Waqfs in U. P. It was provided in S. 4 of this Act that within three months of the commencement of this Act the State Government shall by notification in the Official Gazette appoint for each district a gazetted officer, either by name or by official designation, for the purpose of making a survey of all waqfs in such district, "whether subject to this Act or not". Such officer was to be called the 'Commissioner of Waqfs'. It was the function of the Commissioner of Waqfs to make enquiries ascertaining (a) the number of all Shia and Sunni waqfs in the district, (b) the nature of such waqfs, (c) the gross income of the property comprised in the waqf; and certain other particulars.

In addition to these Commissioners of Waqfs, there were to be Provincial Commissioners of waqfs and the Chief Provincial Commissioner of Waqfs. The Act also constituted two Central Boards known as the Sunni Central Board and the Shia Central Board and these boards were required to notify in the official Gazette the waqfs relating to the particular sect to which, according to the report of the Commissioners, the provisions of the Muslim Waqfs Act applied. In pursuance of the enquiry required to be done under the Muslim Waqfs Act the Sunni Central Board notified the waqfs in the official Gazette of 26-2-1944, and the waqf which is the subject of dispute in this case was also mentioned in the list of Sunni waqfs. Most of the property appertaining to the waqf was also notified in the relevant column against this waqf. After this notification had been made, the Sunni

Central Board asked the committee of management of the waqf to submit the annual budget to the Sunni Central Board for approval and also to get the accounts audited by the auditors of the Board. It also levied the usual contributions to be made by waqfs under S. 54, Muslim Waqfs Act.

The management was dissatisfied with these directions and probably felt that any contribution asked for by the Sunni Central Board was unauthorised. The management was further of opinion that the waqf in the dispute in this case could not come within the purview of the Muslim Waqfs Act. The members of the Committee of management and the trustees, barring two of them who were joined as 'pro forma' defendants, then instituted a suit against the Sunni Central Board of Waqfs, U. P., which has given rise to this appeal. It was alleged by the plaintiffs, after a brief history of the shrine had been given in the plaint, that the publication made in the Government Gazette of 26-2-1944, according to S. 5 of the Waqfs Act in which village Singha Parasi and other property were also mentioned, was improper and contrary to law and that the shrine and its property were not affected by Act 13 of 1936. It was also alleged that the Dargah waqf was of such a nature as made it safe from the purview of the said Act in view of the provisions of S. 2 thereof. The plaintiffs, therefore, claimed that

(a) it be declared that the shrine (Dargah Sharif) and village Singha Parasi and the property in suit noted in list (a) annexed to the plaint and the offerings presented at the shrine, mentioned in para. 1 of the plaint, was not such property as may be covered by the provisions of Act 13 of 1936,

(b) the defendant, the Sunni Central Board of Waqf, had no right to sanction the budget or check the accounts of the said waqf in the suit,

(c) a sum of Rs. 5,177/- be ordered to be repaid by defendant 1, and

(d) the defendant be perpetually restrained from taking any proceedings which may result in the suspension or termination of the membership of the plaintiffs.

The suit was resisted by the Sunni Central Board of Waqfs and various pleas were raised. It was contended that the property claimed by the plaintiffs was waqf property and that it could not be excluded from the purview of the Muslim Waqfs Act. It was further contended that the suit was barred by limitation, as also by the provisions of S. 53, Muslim Waqfs Act inasmuch as no notice, as required by S. 53 of the Act, was served upon the Board before the suit was instituted. The other allegations regarding the recovery of Rs. 5,177/- were also traversed.

(11) As many as 16 issues were framed by the learned Civil Judge and he has given his findings on all those issues. The main issues, however, related to the fact whether village Singha Parasi & the other properties mentioned in the plaint were waqf properties & whether they came within the purview of the Muslim Waqfs Act. The points of law raised were whether the suit was barred by limitation and whether the suit was maintainable without a notice having been served under S. 53, Muslim Waqfs Act.

(12) The lower Courts found that village Singha Parasi was not the subject of waqf and that it was only the usufruct of the property which was sought to be endowed to the shrine and that such an endowment of the usufruct only did not constitute a valid waqf. The learned Civil Judge also held that the muafi of village Singha Parasi was held under conditions of resumption and there being no permanent dedication, it could not be said to be a valid waqf under the Mohammedan law. He, however, held that the suit was within time and that the properties which had not been expressly mentioned in the notification of 26-2-1944, could not be subject to the Muslim Waqfs Act inasmuch as they were not notified as such. The learned Civil Judge brushed aside the objection raised by the defendant with regard to S. 53, Muslim Waqfs Act. and came to the conclusion that no notice was necessary and that if a notice was at all necessary, it had been served though during the pendency of the suit, dissatisfied with the decree of the Civil Judge, the Sunni Central Board of Waqfs has come up in appeal.

(13) The first point which has been urged in arguments on behalf of the appellant is that the lower Court's finding that the Dargah property, viz., the village of Singha Parasi, was not waqf, was incorrect and should be set aside. For a correct appreciation as to whether the property comprised in the suit is or is not waqf property, a reference to the plaint may be necessary. The plaintiffs came to the Court with clear allegations that the shrine and the properties appertaining to the shrine were waqf properties and their only contention was that they were not of such a nature as brought them within the purview of the Muslim Waqfs Act. In essence, their objection was that the waqf in this case was excluded from the operation of the Muslim Waqfs Act under the provisions of S. 2. It was not definitely mentioned as to which of the several clauses of S. 2 was applicable to the plaintiffs' case but in arguments it has been conceded that the plaintiffs claimed that the waqf in dispute was excluded under the provisions of S. 2 (2) (ii) (a) and (c).

The stand taken up in the plaint seems to have been modified by the replication made by the plaintiffs' Counsel presumably under O. 10, Civil P. C. The replication read with the statement made under O. 10 shows that the plaintiffs latterly took up the position that the endowment described by them as waqf in the plaint was in fact a trust and not strictly speaking a waqf within the Muslim law and as such no question of the application of the Muslim Waqfs Act to the endowment arose. It has been pointed out by the learned Counsel for the respondents that the replication and the subsequent statement made under O. 10 were only a clarification of the points in dispute in the case, but to us it appears that it was much more than a clarification. The plaintiffs in fact seem to have taken up almost a new case inasmuch as the point which was never raised in the plaint was taken up in the replication and the alleged clarification. Nevertheless, the lower Court seems to have discussed both points of view and has come to the conclusion mentioned above. The main point, therefore, for decision is whether the property in dispute in this case is waqf property or not.

(14) A waqf has been defined in the various books on Muslim law as a permanent dedication by a Muslim of any property for charity or for religious objects or purposes and for an object of public utility. The definition of a Muslim Waqf, as given by the various authors of commentaries on Muslim law, has been enlarged to some extent in the Muslim Waqfs Act, where a waqf has been defined to mean "the permanent dedication or grant of any property for any purposes recognised by the Musalman law or usage as religious, pious or charitable and, where no deed of waqf is traceable, includes waqf by user." It would thus appear that the definition of 'waqf' given in the Muslim Waqfs Act would cover permanent dedications

and grants recognised not only by the Musalman law but also by usage as religious, pious or charitable. The plaintiffs, in para. 1 of the plaint, described the Dargah as a place of veneration and devotion by the general public. They also admit that a fair and Urs are held at the shrine and they are and have been attended by a large number of devotees since times immemorial.

(15) The learned Counsel for the respondents has argued that dedication for the purposes of a tomb would not constitute a valid waqf and he has referred to Tyabji's Muhammadan Law (1940 edition) at page 584 where a list of what could be valid objects of waqf is given. This list is evidently not exhaustive and only main heads and instances have been given. In the present case it is admitted that the shrine is held in reverence by a large number of devotees and people flock to it for pilgrimage and make offerings to the shrine. This object is evidently pious and such an object would be covered within the wide definition of "waqf" under the Muslim Waqfs Act. It is, therefore, not necessary to discuss the implications of a purely Muslim Waqf as interpreted before the Muslim Waqfs Act was passed.

Reference was made on behalf of the appellant to a ruling in — 'Mahomed Oosman v. Essak Salemahomed Vanjara', I. L. R. (1938) Bom 184 at p. 191 (A) where an observation has been made that

> "in spite of traditions, beliefs have grown up in India and the Courts have recognised these beliefs as having binding force, that great religious reverence may customarily be shown to the burial place of a person sufficiently holy to be styled a saint; insomuch as to raise his tomb to the standing of a religious object: so that property may validly be dedicated for its upkeep and preservation."

The definition of waqf under the Muslim Waqfs Act being much wider, objects held in reverence and veneration by usage will also be covered as valid objects of waqf. There is, therefore, no force in the contention of the learned Counsel for the respondents that the Dargah or shrine in this case could not be an object of a valid waqf.

(16) It has further been argued on behalf of the respondents in support of the judgment of the lower Court that the waqf in this case could not be a valid waqf inasmuch as there was only a conditional grant of the usufruct of the property and the corpus of the property continued to belong to the Government.

It is not disputed that all private property in Oudh was confiscated by the proclamation of Lord Canning in 1858 and properties were regranted or settled by settlement Courts on the applications of persons, whose properties had been confiscated. Although the properties had been confiscated, it was perhaps not the intention of the Government to retain such properties to itself and, as a matter of fact, a large bulk of these properties was given back to the previous owners on the same terms on which they held it previously. In the present case the property appertaining to the waqf was also dealt with by the settlement Court in the year 1870. A 'sanad' was originally granted in 1859 to Faqirullah, father of Inayatullah, of the rent free tenure of village Singha Parasi and he was given the right to appropriate the usufruct of the village subject to the conditions of the 'sanad' granted to him. Inayatullah, son of Faqirullah, was however not satisfied with this limited grant and he filed a suit in the Court of the Settlement Officer claiming proprietary rights in the property of Singha Parasi.

The judgment and decree of the Settlement Court is an important document and reliance has been placed by both parties on this document as the origin of the rights to the property of the waqf after the confiscation. The word "decree" used at the end of the judgment only indicates the operative part of the judgment and is not to be interpreted in the sense of a separate decree following the judgment. In this claim of Inayatullah, the learned Settlement Officer came to a definite conclusion that it was clear beyond all doubts that the proprietary right in the endowed property rested neither in the appropriator nor in the trustee.

He also came to the conclusion that the grant of village Singha Parasi which had been made to the Dargah was dedicated to the service of God and that the Government of the day which made the grant had divested itself of all proprietary rights for ever but it exercised a power of management as representative of the divine power of God Almighty. The Settlement Officer, therefore, came to the conclusion that the proprietary rights in the village had been granted by the Government to the shrine or to God Almighty and that it did not vest in the Government in that form. The decree, which is the operative part of the judgment, however, is so worded that if it is read quite apart from the rest of the judgment, it may be construed to mean that the Settlement Court declared the proprietary right in village Singha Parasi to vest in the Government.

If the whole of the judgment is read together, it is clear beyond a shadow of doubt that the Settlement Officer clearly came to the conclusion that the village being waqf property the Government was entitled to hold it as waqf property in trust for God Almighty. The claim of Inayatullah to the proprietary right of the Singha Parasi village was rejected by the Settlement Officer. The plaintiffs also do not dispute that village Singha Parasi was granted for the use and benefit of the Dargah by the Emperors of Delhi. The Settlement Court, in a very large majority of cases, granted to the original proprietors the same rights as they held before the confiscation and in this case also the Settlement Officer did not adopt a different course. The Settlement Officer held that the property in village Singha Parasi was waqf property and that could be the only construction which could be validly put upon the judgment and decree of the Settlement Officer.

(16A) Apart from this judgment, another very important document is the judgment of the Court of the Judicial Commissioner passed in the year 1897. In this judgment the history of the disputes which arose from time to time till the case came up before the Judicial Commissioner's Court in appeal has been traced, and the Judicial Commissioners came to a definite conclusion that the property in dispute was waqf property. It is not necessary to refer to the various passages and observations made in the course of the judgment and it would suffice to state that the Judicial Commissioners came to a definite finding that the property was waqf property. In their judgment they also made an observation that as the property was waqf property dedicated to religious or pious purposes, it was not lawful for the Government to interfere in the management or supervision of this property. Acting upon the findings and observations made in this judgment in appeal, of the Court of the Judicial Commissioners, a suit was instituted by the Legal Remembrancer of U. P., Agra and Oudh in 1902.

It has been contended by the learned Counsel for the appellant that institution of a suit under Section 92, C. P. C., in itself is a proof of the fact that the property in this case is waqf property and is a permanent dedication. A suit under Section

92 (formerly Section 539), Civil P. C. could be maintained only in respect of a public trust of a permanent character and the judgment in such a suit would be a judgment in rem and not a judgment in personam. Nobody raised any objection in this suit with regard to the public or permanent nature of the trust of Dargah Syed Salaar Masood Ghazi and after the decision given by the District Judge holding the property to be a public trust and laying down a scheme for its administration it was not open to any party to challenge the permanent public nature of the trust.

(16B) The main argument of the learned Counsel for the respondents in this case was that the grant given to the mutawalli or to the Dargah of village Singha Parasi was a conditional grant. We are unable to agree with this contention for the simple reason that it was only the usufruct of the property which was to be utilised for the benefit of the Dargah. The corpus of the property of village Singha Parasi had been tied up with God Almighty and the mere fact that a 'sanad' was granted to Faqirullah or to his son Inayatullah permitting him to utilise the usufruct of the property on certain conditions would not make the entire trust conditional.

The condition was attached only to the user of the profits of the waqf by the person to whom a right to apply the usufruct of the property was given and the condition was that if the person to whom the right to utilise the usufruct of the property was given did not put the usufruct to the use for which it was given his rights so to use the profits would come to an end. This condition had nothing to do with the dedication of the property which had been made much earlier. The learned Counsel for the appellant has cited — 'Farman Ali Khan v. Mohammad Raza Khan', A. I. R. 1950 All 62 (B) and — 'Ram Das v. Mst. Basanti', AIR 1922 All 519 (C) in support of his contention that it was not open to parties to question the permanent character of the trust after the decree under Section 92, Civil P. C. had been passed. In view of what has been stated above, it is not necessary to discuss these rulings in this case. We have, therefore, no doubt that the property in this case was waqf property.

(16C) It remains now to be seen if the property could be excluded from the purview of the Muslim Waqfs Act in view of the provisions of Section 2 relied upon by the respondents. Exemption is claimed by the respondents under clauses (2) (ii) (a) and (2) (ii) (c). Clause (2) (ii) (a) excludes waqfs from the purview of the Act if the same is for the maintenance and support of any person other than the waqif or his descendants or any member of his family. In all the various judgments passed in connection with disputes relating to the waqf of the Dargah Salaar Masood Chazi it has been held that the offerings of the shrine were for the benefit of the shrine and not for the benefit of the Khadims. All other properties pertaining to the waqf were also dedications to the waqf and not to any private individual. The respondents have not, therefore, been able to establish that the property, moveable or immoveable, appertaining to the waqf was for the maintenance and support of any person.

All these dedications were for the benefit of the shrine or the Dargah and as such clause (2) (ii) (a) has no application to the facts of the case.

(16D) The other provision of Section 2 relied upon by the respondents is the one which excludes waqfs for the maintenance of private Imambaras, tombs and graveyards. It has been argued on behalf of the respondents that the word "private" appearing before "Imambaras" governs only the word "Imambaras" and is not an adjective of the words "tombs and grave-yards". We are unable to agree with this contention and we are fortified in our view by a ruling of the Allahabad High Court in — 'Sunni Central Board of Wakfs v. Sardar Khan', A. I. R. 1946 All 256 (D). Apart from any ruling also a plain reading of the words of the section clearly indicates that the word "private" qualifies both "tombs" and grave-yards". It has already been found that the tomb in dispute in this case was not a private tomb. The respondents could not, therefore, rely on this provision of law also for their contention that the property in this case is excluded from the purview of Act 13 of 1936.

(16E) Another point pressed in arguments on behalf of the respondents was that the property, which was not mentioned in the notification of 26-2-1944, could not be subject to the Muslim Waqfs Act even if it was originally waqf property. This contention is evidently unsound. Firstly, it does not appear to us to be necessary under the law that all the property appertaining to a waqf should also be notified in the Gazette under the provisions of Section 5, Muslim Waqfs Act. All that is necessary is that the waqf which is sought to be claimed as a Muslim waqf should be clearly indicated in the notification. In the present case the notification regarding the property did not make a mention of all the items of the property and the word "waghaira" was put at the end to cover items of such property as were omitted. The learned Civil Judge has come to the conclusion that properties which were not mentioned in the notification would go out of the purview of the Muslim Waqfs Act because of that omission. A waqf property would not cease to be a waqf property, if there is no notification in respect of it, and if any item of property was left out either by an oversight or due to the impression that the word "waghaira" would include all such property, the items of property not clearly mentioned would not cease to be waqf property.

The distinction drawn by the learned Civil Judge does not appear to be correct. He has held that Singha Parasi was not the subject of endowment and the usufruct of the village could not be the subject of a valid endowment and has, therefore, come to the conclusion that none of these could be waqf property. We are wholly unable to agree with the learned Civil Judge on this point and we are clearly of opinion that village Singha Parasi or the usufruct thereof was waqf property.

(17) It may not be necessary to discuss the other points of law involved in this case in view of our findings on questions of fact. It has been held by the lower Court that the suit was not barred by limitation and that the plaintiffs could avail themselves of Section 14 for extending the limitation for institution of a suit in this case. It is not disputed that a suit for a declaration under Section 5, Muslim Waqfs Act, has to be brought within one year of the date of publication of the waqf or trust in the notification. The notification of the waqf in this case was made on 26-2-1944, and a suit for a declaration that a certain property was or was not waqf property could be brought within a year of this date of notification.

(18) The present suit was, however, filed in October 1946 more than a year after the expiry of the normal period of limitation prescribed by Section 5 and the plaintiffs sought to take advantage of Sections 14, 15 and 18, Limitation Act, to put the case within limitation. The learned Counsel for the respondents has given up Section 18 and has confined his arguments only to Ss 14 and 15, Limitation Act. Section 14, Limitation Act, runs as follows:

"(1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

In order, therefore, to attract the application of Section 14, Limitation Act, the subsequent suit must be against the defendant in the previous case. In the two proceedings there should be the same cause of action and the Court in which the earlier suit was being prosecuted should be unable to entertain it from defect of jurisdiction or other cause of a like nature. It has been argued on behalf of the appellant that none of these conditions had been fulfilled in the present case and Section 14, Limitation Act, was inapplicable. The previous suit was not in respect of the same cause of action on which the present suit was based nor was the previous suit thrown out on the ground of jurisdiction or on any other ground of a like nature. It would also be difficult to say that the defendants in the previous suit were the same as the plaintiffs in the present suit. Section 14 would not, therefore, come to the rescue of the plaintiffs in this case. We are, therefore, unable to endorse the view taken by the lower Court that the plaintiffs were entitled to maintain the suit and the suit was within time.

(19) The other provision of the Limitation Act on which reliance has been placed on behalf of the plaintiffs is Section 15 of the Act. Section 15 provides that

"in computing the period of limitation prescribed for any suit ..... the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded."

It is alleged on behalf of the plaintiffs that the plaintiffs were unable to institute the present suit, as notices had been served on them not to interfere 'in any way' in the affairs of the Dargah as a result of the decree passed on 16-10-1941, removing the trustees and the members of the committee of management from their offices. The learned counsel for the respondents has laid great stress on the words "in any way" and has argued that these words were wide enough to prohibit the trustees from bringing the present suit till the judgment of the Civil Judge dated 16-10-1941, had been set aside by the Chief Court in 1946.

The notices are Exs. 8 to 10 printed in the paper book at pages 89, 90 and 91. After the decree had been passed on 16-10-1941, by the Civil Judge the successful party asked the Court for the issue of notices to the trustees who had been removed to restrain them from interfering in any way in the affairs of the Dargah. This evidently did not mean that the present plaintiffs were debarred from bringing the present suit and the construction sought to be put by the learned Counsel for the respondents does not appear to us to be sound. It could never be the intention of the notices to restrain the defendants from bringing a suit for a declaration that the properties comprised in the waqf were not to be governed by the provisions of the Muslim Waqfs Act. It was, therefore, open to the plaintiffs to bring a suit within the time prescribed by law and they could not take advantage of the provisions of S. 15 for extending the prescribed period of limitation. The suit was, therefore, barred by limitation and S. 15 also did not extend the period of limitation.

(20) The only other point which arises for consideration is whether a notice under S. 53, Muslim Waqfs Act, was necessary before the present suit could be instituted. Section 53, Muslim Waqfs Act, provides that

"no suit shall be instituted against a Central Board in respect of any act purporting to be done by such Central Board under colour of this Act or for any relief in respect of any waqf, until the expiration of two months next after notice in writing has been delivered to the Secretary, or left at the office of such Central Board stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims."

These provisions are almost analogous to the provisions of S. 80, Civil P. C. In view of the fact that it has been found that the subject matter of dispute in this case was waqf property it was necessary for the plaintiffs to serve the statutory notice provided under S. 53, Muslim Waqfs Act, before the institution of the suit. It is admitted that no such notice was served on the defendant and a suit would be barred in the absence of the prescribed notice. The lower Court held that a notice was not necessary in view of the fact that the subject matter of the suit was not waqf property. We have already come to the definite conclusion that the property is waqf property and any suit claiming relief in respect of the waqf property should have been preceded by the statutory notice provided under S. 53, Muslim Waqfs Act.

(21) One other small point which was raised in arguments on behalf of the respondents is that that committee of management and the board of trustees was not a committee of supervision and it was not open to the defendant to threaten their removal. It is not necessary to express any opinion on this point in view of the finding that the property in this case was waqf property.

(22) No other point has been pressed in arguments.

(23) As a result, the appeal is allowed and the decree passed by the lower Court is set aside. The suit stands dismissed with costs in both the Courts.

B/R.G.D. Appeal allowed.

A. I. R. 1954 ALLAHABAD 94 (Vol. 41, C. N. 56)

MALIK C. J. AND CHATURVEDI J.

Badri Datt and others, Appellants v. Shrikishan and others, Respondents.

Letters Patent Appeal No. 22 of 1950, D/- 10-8-1953. from judgment of Bind Basni Prasad J., D/- 3-4-1950.

Pre-emption — Parties — Joining of strangers — (Civil P. C. (1908), O. 1 Rr. 9 and 10).

The law of pre-emption is technical and has got its rules according to which the law has to be applied. It is a weak right and any infringement of those rules takes away the right and defeats the claim. (Para 12)

A pre-emptor, therefore, loses his right of enforcing pre-emption by joining in his claim persons who are strangers and the fact that the latter get their names removed from the record by an amendment of the plaint does not make any difference, nor can O. 1, R. 9 or 10 help the pre-emptor. 5 All 197, Foll., Case law discussed. (Paras 11 and 17)

Anno: C. P. C., O. 1 R. 9 N. 4, R. 10 N. 33.

L. M. Pant, for Appellants; D. P. Uniyal, for Respondents.

CASES REFERRED TO: Paras

(A) ('82) 5 All 197: 1882 All WN 217 11, 12, 13, 17
(B) ('97) 19 All 324: 1897 All WN 72 11, 13
(C) ('98) 1 Oudh Cas 308 11, 12, 13
(D) ('25) AIR 1925 All 355: 47 All 450 13
(E) ('24) AIR 1924 All 81: 77 Ind Cas 144 14
(F) ('33) AIR 1933 All 788: 1933 All LJ 1625 15
(G) ('85) 7 All 860: 1885 All WN 247 16
(H) ('84) 7 All 79: 1884 All WN 303 (FB) 16

MALIK, C. J.:

This is a Letters Patent appeal against a judgment of a learned single Judge who dismissed the appeal but granted leave to file an appeal before a Division Bench.

(2) According to the allegations in the plaint the property in suit belonged to one Madhwa Nand who died about 24 or 25 years back leaving a widow Srimati Madhav Sundari who was impleaded as defendant 2. On 17-12-1943, Srimati Madhav Sundari sold certain shares in three villages, 'mauza' Bamanpuri, 'mauza' Bamanpuri Genth and 'mauza' Har to defendant 1, Sri Krishan Upadhyay for Rs. 1,500/-. It was alleged in the plaint that no amount was paid but the plaintiffs were willing to pre-empt the property on payment of Rs. 1,500/- or such other sum as the Court might find reasonable. The suit was filed by six plaintiffs, Badri Dutt, Hansa Dutt Upadhyay, Shambhu Dutt, Jai Krishn, Durga and Tika Ram.

(3) The suit was contested on several points, one of the points raised being that three of the plaintiffs were strangers and had no right to claim pre-emption those three being Hansa Dutt, Durga Dutt and Tika Ram and the whole suit must therefore fail.

(4) The learned Munsif framed two issues, the first issue being "whether the plaintiffs are co-sharers in the village in which the land is situated". After the evidence in the case had been recorded, arguments heard and judgment reserved three of the plaintiffs, Hansa Dutt, Durga Dutt and Tika Ram, filed an application on 4-5-1945, for permission to withdraw from the suit. According to the applicants they wanted to withdraw to obviate all difficulty raised on behalf of the defendants by their plea that the other three plaintiffs having joined three strangers as plaintiffs to the suit they had forfeited their right to claim pre-emption. This application was granted. The three remaining plaintiffs Jai Krishn, Badri Dutt and Shambhu Dutt were recorded co-sharers in the three villages and there could be no dispute that they were co-sharers.

(5) The learned Munsif did not go into the question of the effect of joining three strangers to the suit and decreed the suit on payment of Rs. 1,500/-.

(6) The defendant, vendee, appealed. The lower appellate Court dismissed the suit on the finding that the three remaining plaintiffs having joined in the suit three strangers their right to claim pre-emption was extinguished. The same view was accepted by the learned single Judge.

(7) Two points have been raised by learned counsel. The first is that there should have been an enquiry and a finding whether Hansa Dutt, Durga Dutt and Tika Ram were strangers or were co-sharers. No such plea appears to have been raised before the lower Courts or before the learned single Judge and we do not think it will be proper at this late stage to allow a point of fact to be raised which might not have been raised before as there was no substance in it. The suit for pre-emption was filed in 1945 and eight years have now elapsed since then.

(8) The other point raised by learned counsel is that when Hansa Dutt, Durga Dutt and Tika Ram got their names removed from the record by an amendment of the plaint there was no bar to the remaining plaintiffs getting a decree for pre-emption. Learned counsel has urged that some of the decisions of this Court on the point either do not lay down the correct law or that the point now raised by him did not directly arise in those cases.

(9) The argument in fact is that at the worst by joining three strangers the co-sharer plaintiffs may be said to have made a mistake or an error in a matter of procedure which the Court was entitled to rectify under O. 1, R. 9 or 10, Civil P. C. and, as soon as the rectification was made, the substantive right of the co-sharer-plaintiffs to claim pre-emption could not be taken away and a decree should have been passed in their favour.

(10) The consistent view, however, of this Court has been that a pre-emptor must have a right of pre-emption on three dates; firstly, the date of sale, secondly, the date of suit and, thirdly, the date of decree. It is also well-settled that pre-emption is a weak right and the rules have therefore, to be strictly enforced. Both under Mohammedan Law as well as under customary rules regulating pre-emption the rules were always strictly followed.

(11) In — 'Bhawani Prasad v. Damru', 5 All 197 (A), the question first arose as to the effect of a plaintiff joining a stranger in a suit for pre-emption and the rule was thus laid down by Mahmood J. to which Tyrrell J. also agreed. The rule is that

> "a person cannot claim a right which he has himself violated, nor can he be allowed to complain of an injury in which he has himself acquiesced."

The learned Judge went on to hold that

> "as a co-sharer entitled to pre-emption forfeits the benefit of the right by joining a stranger in purchasing the property, so a pre-emptor loses his right of enforcing pre-emption by joining in his claim persons who are as much strangers as the vendee."

So far as we know this view has been consistently followed in this Court and in a decision by Banerji J. and Aikman J. in — 'Bhupal Singh v. Mohan Singh', 19 All 324 (B), it was observed that:

> "If these ladies, who had not the right of pre-emption by reason of their not being co-sharers in the village, were granted a decree in this case, the result would be that a share of the village would pass into the hands of the personal heirs of these ladies, who might be entire strangers to the village. As to the argument that the defect in the plaint could be remedied by an amendment, we may observe, as held in the cases above referred to, that the very fact of a person having the right of pre-em tion joining with himself strangers, i.e. persons who have not a right of pre-emption, is in itself sufficient to estop him from asserting his claim. An amendment of the plaint therefore would not be of any avail to the other plaintiffs."

The very next year, however, the point arose before a Division Bench of the Judicial Commissioner's Court at Lucknow in — 'Abdulla v. Mt. Wahidunnisa', 1 Oudh Cas 308 (C). In that case Chamier A. J. C. discussed the decision of Mahmood J. in 'Bhawani Prasad's case, (A)', cited above and, though the learned Judge agreed with the enunciation of the principles, he thought that its ap-

plication to the case was not correct. The reason given by the learned Judge was that while in the case of a vendee associating with himself a stranger the act of associating a stranger as a party to the sale was an act which was incapable of being undone, an error in the array of parties by including a stranger as a plaintiff to the suit could be remedied under an order of the Court.

The learned Judge also went on to say that a plaintiff may make a 'bona fide' mistake without realising that the co-plaintiff is a stranger. The same argument of a 'bona fide' mistake can, however, be advanced in favour of a vendee who may have in ignorance of the real position allowed a stranger to join as co-vendee with him. The other learned Judge dealt at some length with the law as regards estoppel and the law as regards acquiescence and held that the doctrine of estoppel and acquiescence did not apply.

(12) The rule, however, is not based on the doctrine of either estoppel or acquiescence. If the reasoning in — 'Abdulla v. Mt. Wahidunnisa', (C), is to be applied then there can be no difficulty in the Courts decreeing the suit of a plaintiff who was a co-sharer and dismissing the suit of a plaintiff who was a stranger. As we have already said above, the law of pre-emption is technical and has got its rules according to which the law has to be applied. It is a weak right and any infringement of those rules takes away the right and defeats the claim. No doubt the rule enunciated by Mahmood J. in 'Bhawani Prasad's case, (A)', was based on equity, justice and good conscience on the ground that a plaintiff pre-emptor should be in the same position as a co-sharer vendee who had purchased the property along with a stranger. This rule of justice, equity and good conscience has not only been observed in a series of decisions of this Court but has also been recognised by the Legislature in the Agra Pre-emption Act (No. 11 of 1922). Section 21 of that Act provides that:

> "Where a person having a right of pre-emption sues jointly with a person not having such right, he shall lose his right; and where a pre-emptor of a higher class sues jointly with a pre-emptor of a lower class, he shall have no higher right than the person with whom he so sues."

From the wording of S. 21 it is clear that the right is lost by the fact of the person having joined a stranger.

(13) The view in 'Bhawani Prasad's case, (A)', has been followed in several decisions of this court. We have already referred to — '19 All 824 (B)'. The other cases to which reference has been made are: — 'Umar Daraz v. Sri Ram Das', AIR 1925 All 355 (D), a judgment of Lindsay and Kanhaiya Lal JJ. where it was held that

> "It is fatal for a plaintiff in a pre-emption suit to associate with him in that suit any person who is not entitled to pre-emption."

And again

> "We do not think we are entitled to resort to any powers of amendment which we have under the Code of Civil Procedure in order to allow an amendment in a case of this kind."

No doubt in that case the amendment was asked for at a late stage, that is, in the High Court, but the observations are general and the Oudh case of —'Abdulla v. Mt. Wahidunnisa', (C) was cited but was not followed.

(14) In — 'Shanker Lal v. Kirari Mal', AIR 1924 All 81 (E), Lindsay and Sulaiman JJ. took the same view and held that by joining in the suit persons who are strangers to the property situated in Mahal Bagi Manda these plaintiffs disqualified themselves from suing for pre-emption of the property in that mahal.

(15) The last case on the point is — 'Sheo Balak v. Ram Saran', AIR 1933 All 788 (F), but as that case was after the Agra Pre-emption Act had come into force the decision cannot be of much assistance.

(16) Some reliance has been placed on the observations of the learned Chief Justice in — 'Karan Singh v. Muhammad Ismail Khan', 7 All 860 (G). There also certain persons were joined as strangers and the suit had failed. The appeal was dismissed and the learned Chief Justice Sir Comer Petheram observed:

> "One of them, Musammat Lado, is not entitled to claim pre-emption, and the other plaintiff therefore cannot claim pre-emption entirely on his own account without amending the plaint. Under a Full Bench ruling of this Court — 'Damodar Das v. Gokal Chand', 7 All 79 (FB) (H), the plaint cannot be amended at this time of day; with the petition of plaint as it now stands, the plaintiffs cannot succeed."

It is urged by learned counsel that these observations should be interpreted to mean that in case the plaint could have been amended, the learned Judge's decision would have been different. We are not prepared to accept that interpretation. That was only one reason given by the learned Chief Justice for the dismissal of the appeal and it does not necessarily follow from the observation that he had applied his mind to the question and has held that if the plaint had been amended the suit could be decreed.

(17) Reliance is also placed on the provisions of O. 1, Rr. 9 and 10, Civil P. C. Rule 9 of this Order provides that:

> "No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

and R. 10 gives the Court the power to correct an error in the array of parties or to allow a fresh party to be added or the name of a person already on the record to be removed if that is necessary for the determination of the real matter in dispute. The only limitation, it is said, is contained in cl. (5) of R. 10 that such amendment will be made subject to the provisions of the Indian Limitation Act, 1908, S. 22, the proceedings as against any person added as defendant being deemed from the date of the service of the summons. We do not think O. 1, Rr. 9 or 10 can help the appellant. It is not a case here of the suit being dismissed for mis-joinder or non-joinder of parties. The reason for the dismissal is different.

Here on the date of the suit the plaintiffs should have a cause of action to claim pre-emption. By joining with them certain strangers to the suit they had forfeited that right. By reason of the subsequent amendment by removal of the strangers impleaded as co-plaintiffs that right cannot be revived and there is no reason why a plaintiff who joined a stranger should be in a better position than a vendee who has joined a stranger as a vendee in the transfer deed in his favour. In any case the view of this Court has consistently been in favour of 'Bhawani Prasad's case, (A)', being followed and on the ground of 'stare decisis' also it is not desirable that we should make a change.

(18) The result, therefore, is that this appeal fails and is dismissed but as no one appears on the other side we make no order as to costs.

C/V.R.B. Appeal dismissed.

A.I.R. 1954 ALL. 97 (Vol. 41, C. N. 57)

MALIK C. J. AND CHATURVEDI J.

State v. Bal Makund, Respondent.

Govt. Appeals Nos. 143, 144, 146 & 420 of 1951, D/- 5-8-1953, from order of Addl. Magistrate 1st Class, Naini Tal, D/- 10-3-1950.

(a) U. P. Prevention of Adulteration Act (6 of 1912), S. 6, Proviso (a) — Invoice is not warranty — (U. P. Pure Food Act (32 of 1950), S. 6).

An invoice is merely a description of the articles sold and cannot be said to be a warranty given in accordance with the provisions of proviso (a) to S. 6. (Para 6)

(b) U. P. Prevention of Adulteration Act, (6 of 1912), S. 2—(U. P. Pure Food Act (32 of 1950), S. 2 (e)) — — Mustrad and linseed oils are articles of food. AIR 1951 All 595, Foll. (Para 7)

(c) U. P. Prevention of Adulteration Act (6 of 1912), S. 4 — Adulteration of vegetable ghee — (U. P. Pure Food Act (32 of 1950), S. 4).

Unless it is shown that there is a rule or regulation under the Act which requires that the vegetable ghee should contain sesame oil in a certain proportion an accused cannot be convicted under S, 4. (Para 9)

Sri Ram, Deputy Govt. Advocate, for the State; N. D. Pant, Bishambhar Dayal and B. D. Gupta, for Respondent.

CASE REFERRED TO:

(A) ('51) AIR 1951 All 595: 52 Cri LJ 879

MALIK, C. J.:

These are four Government appeals against the orders of acquittals passed in four cases for prosecution under the United Provinces Prevention of Adulteration Act, Act No. 6 of 1912.

(2) It would be convenient to take up the three cases, Criminal Appeal No. 143 of 1951, Criminal Appeal No. 144 of 1951 and Criminal Appeal No. 146 of 1951 together, and Criminal Appeal No. 420 of 1951 separately. In Criminal Appeal No. 143 of 1951 and Criminal Appeal No. 146 of 1951 the accused Balmakand and Amar Nath respectively were charged with having sold adulterated Lahi oil, while in Criminal Appeal No. 144 of 1951 Amar Nath was prosecuted for having sold adulterated Alsi oil.

(3) The accused are wholesale dealers. The Sanitary Inspector suspected that the Lahi and Alsi oils sold by the accused were adulterated and he thereupon went and purchased some quantity of oils. These he sent to the Public Analyst, U. P. Government, for analysis and report. The Analyst found that the samples sent were all adulterated and thereupon the accused were prosecuted before Sri R. D. Pande, Additional Magistrate, 1st class, Naini Tal. The learned Magistrate tried the cases summarily and acquitted the accused on the ground that the accused were protected by Section 6 of the Act. It is against these orders of acquittal passed by the learned Magistrate that these appeals have been filed. It has been urged on behalf of the State that the view taken by the learned Magistrate that the accused were entitled to rely on S. 6 was erroneous.

(4) Section 4 of the Act provides that-

"Whoever sells to the prejudice of the purchaser any article of food, or any drug which is not of the nature, substance, or quality of the article or drug demanded by such purchaser, or sells or offers or exposes for sale or manufactures for sale any article of food or any drug which is not of the nature, substance, or quality which it purports to be ..... shall be punished for the first offence with fine which may extend to two hundred rupees and for a second or any subsequent offence with fine which may extend to one thousand rupees or imprisonment of either description not exceeding three months or both."

It is not necessary to quote the proviso. The case for the prosecution was that the accused sold or offered or exposed for sale an article of food which was not of the nature, substance, or quality which it purported to be.

(5) The fact that the Alsi oil and the Lahi oil were adulterated has been found by the Public Analyst on an analysis of the samples sent to him, and the learned counsel for the accused have not challenged the Analyst's report. It has, however, been urged on behalf of the accused that the accused had offered for sale only such article as had been supplied to them from the mills that were manufacturing it, not knowing that the articles were adulterated. In other words, the plea is a plea of want of 'mens rea', or that the articles were sold in good faith by the accused believing them to be unadulterated articles. It is, however, open to the Legislature to enact that sale of adulterated foodstuffs would per se be punishable. Section 6, Prevention of Adulteration Act, provides that

"In any prosecution under S. 4 it shall be no defence to allege that the vendor was ignorant of the nature, substance, or quality of the article or drug sold by him, or that the purchaser having bought only for analysis was not prejudiced by the sale."

There is, however, a proviso to the section, and if the vendor can come under the proviso, he must be held to be not guilty. The proviso makes it clear that the vendor must have taken from the person, who supplied him with the article, a written warranty to the effect that the articles sold were of the nature, substance or quality which they purported to be, that the vendor had no reason to believe at the time when the articles were sold that the articles were adulterated and, lastly, that the adulteration was not done when the articles were in his possession. In the case before us the accused were able to prove the second and the third requirements, that is, that they sold in good faith what they had been supplied by the mills and had no reason to think that the Alsi oil or Lahi oil were adulterated. The learned Magistrate also believed their statements that they sold the Alsi oil and the Lahi oil in the same state in which the accused had purchased them. It was admitted by the Sanitary Inspector that he purchased the samples from sealed tins.

(6) The only question was whether the accused had also obtained a written warranty to the effect that the Alsi oil and the Lahi oil were not adulterated. The learned Magistrate thought that the invoices of purchase which were in writing and were on the record went to satisfy the first requirement. We are not satisfied that the invoice of purchase, in which the mills selling the articles to the accused had mentioned what they were selling, was the type of written warranty which the Legislature had

contemplated under proviso (a) to S. 6. It is in public interest that the vendors of articles of food should sell to the public unadulterated food-stuffs, & it is with that object that this Act was passed. Generally it is not the manufacturer who directly comes into the market to sell his articles to the consumer, but there are many middle men who intervene. It would be easy in such cases for the shop keepers to evade responsibility by pleading that they did not know that the article of food purchased by them for sale was adulterated. It is on that account that the section has provided that ignorance of the fact of adulteration will be no excuse, and the vendor will only be protected if, apart from other things, he had obtained a written warranty as regards quality from the person from whom he had purchased the articles for sale. An invoice is merely a description of the articles sold and cannot be said to be a warranty given in accordance with the provisions of proviso (a) to S. 6.

(7) Learned counsel has urged that Alsi oil is not edible, and as regards Lahi oil his argument is that there is no evidence to show that it is edible. Learned counsel has, however, admitted that Lahi is a type of black mustard seed which is more pungent than the ordinary mustard seed and is used by people who prefer more pungent oil than ordinary mustard oil. We think we can take judicial notice of the fact that mustard oil is edible at least in this State. As regards Alsi oil learned counsel said that Alsi oil is the same thing as linseed oil. The question is whether linseed oil is an article of food under S. 4 of the Act. "Food" has been defined in S. 2 as including

> "every article used for food or drink by man other than drugs or water and all material used or admixed in the composition or preparation of such article, and shall also include flavouring matters and condiments."

The definition, therefore, is very general and any article used for food or drink by man would come under this section. The matter came up before a learned single Judge of this Court in — 'Kamla Kant v. State', AIR 1951 All 595 (A), and the learned Judge held that linseed oil was an article of food. We see no reason to differ from that conclusion.

(8) In our view, therefore, the learned Magistrate erred in relying on the proviso to S. 6 and acquitting the accused.

(9) As regards the fourth case (Criminal Appeal No. 420 of 1951) in which Purna Nand was acquitted, a sample of vegetable ghee, Swastika Trade Brand, was taken from him by the Sanitary Inspector. The sample was sent to the Public Analyst who reported that the sample was adulterated and sesame oil in the sample was less than the required minimum of 5 per cent. As regards adulteration, no questions were asked to the accused, but he was asked whether it was not a fact that the Swastika Trade Mark vegetable ghee, the sample of which was sent to the Public Analyst, contained less than 5 per cent. of sesame oil. The accused admitted that the sample was taken from his sealed tin and pleaded that he was innocent. We take it that the Swastika Trade Mark is a registered trade mark under the Patents Designs Act. Learned counsel for the State has admitted that there is no rule or regulation made by the State Government under S. 14, Prevention of Adulteration Act, requiring that all vegetable ghee should contain at least 5 per cent. of sesame oil. Section 5A of the Act, therefore, does not apply to the case, and unless it can be shown that there is a rule or regulation under this Act which requires that the vegetable ghee should contain sesame oil in a certain proportion, we fail to see how the accused can be convicted under S. 4 of the Act. We are not satisfied that the case against Purna Nand has been made out beyond all doubt.

(10) The result, therefore, is that Government Appeals Nos. 143, 144 and 146 of 1951 are allowed. The accused are convicted under S. 4, U. P. Prevention of Adulteration Act, and sentenced to pay a fine of Rs. 10/- each. Criminal Appeal No. 420 of 1951 is dismissed.

A/V.S.B. Ordered accordingly.

A.I.R. 1954 ALL. 98 (Vol. 41, C. N. 58)
(LUCKNOW BENCH)

P. L. BHARGAVA AND BEG JJ.

Mst. Ram Dulari, Judgment-debtor Applicant v. B. Udai Bhan Pratap Singh, Decree-holder, Opposite Party.

Appln. No. 149 of 1945, D/- 17-10-1951, to revise order of Sale officer, Fyzabad, D/-21-6-1945.

Civil P. C. (1908), S. 151 and O.-9—Execution dismissed for default.

Where the Court in ignorance of the fact that notice of the date of hearing was not actually served on the decree-holder or his agent dismisses the execution for default it has inherent jurisdiction to restore the application, even though fresh application is barred. (Para 8)

Anno: C. P. C., S. 151 N. 2 Pts. 27, 28; O. 9 Gen N. 1.

K. N. Tondon, for Applicant; Hyder Husain, for Opposite Party.

CASE REFERRED:
(A) ('45) AIR 1945 Oudh 210: 20 Luck 317 (Pr 7)

P. L. BHARGAVA J.:

We see no force in this revision which is directed against an order restoring an application for execution, which was dismissed for default in prosecution in the following circumstances:

(2) It appears that the decree passed in Suit No. 28 of 1929 was put in execution. The decree-holder had obtained another decree in Suit No. 42 of 1933 and in order to realize the amount due thereunder he applied for rateable distribution out of the proceeds which were to be realised in execution of the earlier decree. The execution of the earlier decree had been transferred to the Collector, and a 'robkar' in connection with the second application was sent to the Collector requesting that the decree-holder, for satisfaction of the second decree, may be allowed rateable distribution.

(3) While execution proceedings were pending before the Sales Officer, an objection was filed on behalf of the judgment-debtor to the effect that the execution of the second decree had become time-barred. This objection along with execution case was adjourned from time to time. On 25-7-1944, the objection was heard and orders were reserved. The cases were next

set down for hearing on 28-7-1944. On the last mentioned date the orders were not ready and the cases were postponed to 1-8-1944. On that date the objection was allowed and the second execution was held to be barred by time. In the main execution case 16-9-1944 was fixed and the decree-holder was directed to pay process fee etc. for the issue of a sale proclamation. The decree-holder or his general agent was not present on that date and the Court directed that the decree-holder's agent be informed of the date fixed and the steps to be taken.

(4) When the case was taken up on 16-9-1944, neither the decree-holder nor the judgment-debtor was present and the Court, without looking into the record to see whether the decree-holder had been informed of the date fixed for hearing dismissed the application for execution for default in prosecution.

(5) Later on, the decree-holder filed an application supported by an affidavit in which he alleged that he had no intimation of the date fixed in the execution case and for that reason he was absent on the date fixed. He prayed for the restoration of the main execution case. The Court, acting under S. 151, Civil P. C. restored the execution case.

(6) The judgment-debtor has now come up to this Court in revision. It has been contended on his behalf that the decree-holder was bound to appear on 1-8-1944, and to acquaint himself with the next date for hearing and that the Court was not bound to give notice of the date fixed for hearing. In our opinion the decree-holder or his agent was not bound to appear on 1-8-1944, which was fixed only for pronouncing orders in the objection case, and that position was realised by the Court when it directed that a notice of the next date fixed for hearing be given to the decree-holder. The Court should have satisfied itself whether in pursuance of the direction issued on 1-8-1944, the notice for the next date of hearing had been served upon the decree-holder or his agent.

(7) It has been next contended on behalf of the applicant that the Court had no jurisdiction to set aside the dismissal acting under S. 151, Civil P. C. In support of his argument the learned counsel has invited our attention to a number of rulings of other Courts but we find that the late Chief Court of Avadh in — 'Bajrang Bahadur v. Suraj Narain', AIR 1945 Oudh 210 (A) had laid down that although O. 9 Civil P. C. does not govern execution proceedings, the Court has jurisdiction to restore an execution application dismissed for default under the inherent powers even though a fresh application has become time-barred and we hold the same view.

(8) As far as the facts of the present case are concerned, as pointed out above the order of dismissal was passed by the Court in ignorance of the fact that the notice which was ordered to be served upon the decree-holder was not actually served upon him or his agent and he had no notice of the date fixed for hearing. The order of dismissal having been passed in such circumstances, the Court in our opinion, had the jurisdiction to make the order under S. 151, Civil P. C., and there is no reason whatsoever to interfere with that order in revision.

(9) The application is accordingly dismissed with costs.

C/K.S. Application dismissed.

A.I.R. 1954 ALL. 99 (Vol. 41, C. N. 59)

RAGHUBAR DAYAL AND ASTHANA JJ.

Jagdeo, Appellant v. State.

Appeal No. 1174 of 1949 connected with Revn. No. 1517 of 1951, D/- 27-7-1953, from order of Sessions J., Banda, D/- 16-11-1949.

(a) Penal Code (1860), S. 460 — Person actually committing offence of causing grievous hurt cannot be convicted under S. 460.

Section 460 makes those, who join the person who voluntarily causes or attempts to cause death or grievous hurt while committing lurking house trespass or house-breaking at night, liable to enhanced punishment for their own conduct of simply committing such lurking house-trespass by night or house-breaking by night. The person who actually acts in that manner will not be liable for that conduct of his under S. 460, I. P. C. but will be liable under other sections making that conduct an offence. (Para 4)

(Accused while committing lurking house-trespass by night along with others causing death — Retrial under S. 302 ordered. AIR 1952 All 369 (FB), Relied on.) (Paras 9, 10)

Anno: Penal Code, S. 460 N. 1, 2.

(b) Penal Code (1860), S. 460 — Scope.

Section will not apply to the case of a single individual who alone commits lurking house-trespass and during such commission causes or attempts to cause death or grievous hurt to any person. (Para 6)

Anno: Penal Code, S. 460 N. 1.

Jagdish Narain Agarwala and Radha Krishna, for Appellant; Sri Ram, Deputy Govt. Advocate, for Respondent.

CASES REFERRED TO:

(A) ('65) 2 WR Cr 52
(B) ('36) AIR 1936 Lah 911: 38 Cri LJ 30
(C) ('47) AIR 1947 Lah 188: 48 Cri LJ 269
(D) ('86) 1886 All WN 253: 8 All 649
(E) ('11) 12 Cri LJ 395: 8 All LJ 574
(F) ('52) AIR 1952 All 369: 1952 Cri LJ 751 (FB)

RAGHUBAR DAYAL J:

Jagdeo appeals against his conviction under S. 460, I. P. C. A notice was issued to him to show cause why the sentence passed against him be not enhanced.

(2) Srimati Lalji was found murdered inside her house at 11 a. m. on 27-4-1949. Her ornaments had been removed. On investigation, Jagdeo appellant was sent up for trial of the offence under S. 460, I. P. C. He was convicted of this offence and sentenced to five years' rigorous imprisonment.

(3) The evidence in the case against the appellant was of two kinds: one kind of evidence consisted of his alleged extra-judicial confession to Baij Nath, and the other type of evidence was about the alleged recovery of certain ornaments of the deceased at his instance. In view of the opinion, we have formed during the hearing of the arguments of

the learned counsel for the appellant, that the case should be retried, we did not hear him fully on the merits and have consequently formed no opinion about the merits of the case.

(4) We are of opinion that the offence made out against the accused, if what is alleged against him be correct and satisfactorily established, would be an offence under S. 302, I. P. C. and not under S. 460, I. P. C.

Section 460, I. P. C., is in these words:

"If, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

It is clear from the provisions of the section that it makes those, who join the person who voluntarily causes or attempts to cause death or grievous hurt while committing lurking house trespass or house-breaking at night, liable to enhanced punishment for their own conduct of simply committing such lurking house-trespass by night or house-breaking by night. The person who actually acts in that manner will not be liable for that conduct of his under S. 460, I. P. C. but will be liable under other sections making that conduct an offence. His actions are mentioned in the first part of the section as the circumstances in which the persons mentioned in the latter part will be punishable with enhanced punishment and the expression "every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night" must mean every other person who was jointly concerned with him in committing the lurking house-trespass or house-breaking by night.

A comparison of the provisions of sections 459 and 460, I. P. C. tends to support this interpretation. Section 459, I. P. C., which provides the same punishment as S. 460, I. P. C. does, covers the case of a person who while committing lurking house-trespass or house-breaking causes grievous hurt or attempts to cause death or grievous hurt to any person. It was, therefore, not necessary to provide for punishment of such a person under S. 460 as well. Section 459, I. P. C. did not cover the case of a person who while committing lurking house-trespass or house-breaking caused the death of any person. It was not necessary as the case of such a person will come under either S. 304 or 302, I. P. C. according to the circumstances of the case.

(5) Reference may be made to the observations of Gaur in his Penal Law of India, Vol. II. In paragraph 5547 following S. 460 he notes:

"This section defines the constructive liability of the actual offender's associates in a case which is, otherwise, little distinguishable from the last section."

He again notes in paragraph 5555:

"But though this phrase (all persons jointly concerned) is wide, it is not wide enough to include the actual offender, assuming that he is known. In one case this appears to have been taken for granted — 'Queen v. Lukhun Doss', 2 WR Cr 52 (A), but it is by no means the necessary deduction from the section, which is enacted solely with the object of defining the constructive liability of persons other than the actual offender, whose liability is left to be defined by the general law. For instance a person who voluntarily causes death may be guilty of murder, and in that case the penalty prescribed here would be wholly inadequate to his case."

We have been referred to S. 149, Penal Code, in support of the contention that a person who actually does lurking house-trespass, and during such commission actually causes the death of any person could be convicted under S. 460, I. P. C. There are two points for distinction: One is that the provision of S. 149 makes every person who is a member of an unlawful assembly at the time of the commission of any particular offence guilty of that offence when that particular offence is committed by any member of that unlawful assembly in certain circumstances. It does not say that every person jointly concerned with that member who actually committed that offence would be liable for that offence. The second point for distinction is that that particular offence is committed by any member of that assembly either in prosecution of the common object of that assembly or is such as the members of that assembly knew to be likely to be committed in prosecution of that object, and consequently the offence of which each member of the unlawful assembly is made liable is one and the same, while in case of an offender who commits lurking house-trespass and actually causes death the offence made out against him can also be different from the offence which can be made out against the other persons who are jointly concerned in committing lurking house-trespass. There is, therefore, a good reason why the case of the actual offender should not fall under S. 460 but should fall under the particular section fully applicable to his individual conduct.

(6) On the facts of this particular case, the provisions of S. 460 are not applicable for another reason. It is not disputed that S. 460, I. P. C. will not apply to the case of a single individual who alone commits lurking house-trespass and during such commission causes or attempts to cause death or grievous hurt to any person, and there is very little evidence led about others joining the accused in the commission of this offence.

(7) There may arise a case in which several persons commit lurking house-trespass and someone among them causes or attempts to cause death or grievous hurt. In such a case it cannot be said that any particular person committed those acts and it might be possible, as held in — 'Mohammada v. Emperor', A I R 1936 Lah 911 (B), that all of them be liable to conviction under S. 460, I. P. C.

(8) Of the cases referred to, the actual person, who while committing lurking house-trespass also caused or attempted to cause death or grievous hurt, was convicted in — '2 WR Cr 52 (A)' and in — 'Faiz Bakhsh v. Emperor', AIR 1947 Lah 188 (C), without any discussion as to whether his case really came within that section or not. In the case reported in — 'Queen Empress v. Ismail Khan', 8 All

649 (D) an observation has been made without any discussion to the effect:

"Sections 459 and 460 provide for a compound offence, the governing incident of which is that either 'a lurking house-trespass' or 'house-breaking' must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections."

It was actually decided in that case that the accused had not committed lurking house-trespass or house breaking and, therefore, their conviction under Ss. 459 and 460, I. P. C. could not be maintained.

(9) The case reported in — 'Chatur v. Emperor', 8 All LJ 574 (E) is very apposite to the present case. One person had entered a house, attempted to rob a girl of a 'hansli' and stabbed her father to death when he seized the thief. He was convicted by the sessions court of an offence under S. 460, I. P. C., and was sentenced to transportation for life. On appeal his conviction was altered to S. 302, I. P. C., and in the exercise of revisional jurisdiction the sentence of transportation for life was enhanced to a sentence of death. Richards, J., who delivered the judgment, observed while interpreting S. 460, I. P. C.:

"In our opinion this section was intended to provide for the punishment of persons who are jointly concerned in the committing of the house-trespass or house-breaking altogether irrespective whether they were the persons who caused or attempted to cause death or grievous hurt."

This may be interpreted to mean that S. 460 provided for the punishment of the person who actually caused or attempted to cause death or grievous hurt while committing lurking house-trespass or house-breaking.

But the observation just following the aforesaid quoted remarks makes it clear that the section would apply to the associates of such actual offender, it being

"In the present case if Chatur had other comrades committing the house-trespass with him, they could be punished under S. 460."

We cannot now alter the conviction of the appellant to S. 302, I. P. C., and enhance sentence in the exercise of revisional jurisdiction, in case we come to the conclusion on hearing full arguments that the appellant did murder her in view of the Full Bench decision in — 'Taj Khan v. Rex', AIR 1952 All 369 (FB) (F).

(10) In view of the above, we are of opinion that the case as put in court does not fall under S. 460, I. P. C. and that the appellant should, therefore, be tried for an offence under S. 302, I. P. C. We, therefore, allow the appeal, set aside the conviction of the appellant under S. 460, I. P. C. and send back the case to the court below for the retrial of the appellant for the offences under S. 302, I. P. C. and under S. 457, I. P. C. after framing proper charges. Intimation be sent to the jail authorities that hence-forth the appellant will be treated as an undertrial prisoner till further orders.

(11) We discharge the notice issued for the enhancement of the sentence.

B/R.G.D. Retrial ordered.

A.I.R. 1954 ALL. 101 (Vol. 41, C. N. 60)

(LUCKNOW BENCH)

SAPRU AND MUKERJI JJ.

Deputy Commissioner Kheri, Decree-holder-Appellant v. Kamta Prasad and others, Judgment-debtors-Respondents.

First Exn. Decree Appeals Nos. 31 to 35 of 1946, D/- 2-2-1953, against order of Civil Judge, Kheri, D/- 8-2-1946.

(a) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), Preamble — Object of Act.

The Encumbered Estates Act was passed by the Legislature to give relief to a certain class of debtors. It was also the intention of that Act to place the entire indebtedness and the entire property of debtor available in the hands of the Special Judge and the Collector for purposes of liquidation. (Para 11)

(b) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 7(1)(b) — Held on facts that period during which Encumbered Estates Act proceedings were pending should be excluded in computing period of limitation for execution application: AIR 1938 All 8, Distinguished. (Paras 10 and 14)

B. N. Roy and B. K. Dhoan, for Appellant; M. L. Tilhari, for Respondents.

CASES REFERRED TO:

(A) ('43) AIR 1943 All 291: ILR (1943) All 569 (Pr 9)

(B) ('48) AIR 1948 All 317: ILR (1948) All 183 (Pr 11)

(C) ('38) AIR 1938 All 8: ILR (1938) All 71 (Pr 12)

(D) ('38) AIR 1938 All 86: ILR (1938) All 153 (Pr 12)

MUKERJI J.:

These are five connected execution first appeals. All the five appeals have been preferred by the decree-holders and the judgment-debtors are the respondents in all the five appeals. The point for determination in these appeals is the same. Consequently we propose to decide all the appeals by this common judgment.

(2) The facts giving rise to these appeals briefly put are these: On 22-12-1932, a decree was passed on a compromise in favour of the appellants, Ahmadi Begam and Muzaffar Husain against six judgment-debtors namely, 1. Rup Kuer, 2. Kamta Prasad, 3. Ambika Prasad, 4. Sunder Lal, 5. Kashi Prasad and 6. Beni Madho. The compromise decree was in respect of a debt due under mortgage deed dated 16-9-1919. The main terms of the compromise decree were (1) that the entire money would be payable in twelve equal instalments—the instalments were to be paid annually, the first being payable in December 1933. The second term of the compromise was that in default of two consecutive instalments the decree-holders would be entitled to get the proprietary possession over the property in execution of the decree. The first instalment apparently was paid in time but there was a default in respect of the second instalment. Consequently the decree-holders put their decree into execution in order to obtain possession over the property.

(3) While this second execution application was pending, a kind of second compromise was entered into and this was done on 25-7-1935. This compromise was in the nature of an extension of time granted to the judgment-debtors to make the payment which they had

failed to make under the terms of the first compromise. By this compromise time for the payment of the second instalment in respect of which there had been a delay was extended up to 21-12-1935, and it was also provided for, that in the event of this instalment not being paid within that time, the decree-holders were to be entitled to get proprietary possession.

(4) On 21-12-1935, it appears that Mst. Rup Kuer, one of the judgment-debtors, applied under S. 4, Encumbered Estates Act. In the schedule of the properties she showed the property in respect of which execution had been sought as her property. On 9-1-1936, the Collector made an order under S. 6, Encumbered Estates Act on the application of Mst. Rup Kuer and the application was thereafter forwarded to the Special Judge for disposal. On 5-2-1937, the decree-holder, Ahmadi Begam, who had put the decree into execution on her behalf and also on behalf of her co-decree-holder, preferred objections and she claimed that the property which was the subject-matter of the compromise decree could not be treated as the property of the judgment-debtor applicant. On 1-8-1938, these objections of Ahmadi Begam were dismissed by the Special Judge. The Special Judge held that the decree-holder could not claim the property in dispute as his property under the compromise decree.

An appeal was preferred against this decision. The appeal was allowed 'ex parte'. The point that was agitated before the appellate Court was that the objections in respect of the property were time-barred. The learned District Judge who heard the appeal expressed the opinion that the appeal succeeded since limitation commenced to run from 22-12-1934 the date when there was a default in respect of two consecutive instalments. Whether this decision of the learned Judge is right or wrong is not for our consideration nor do we think that this decision in any manner affects the question which has arisen for determination before us. An application for rehearing of the appeal was made on 18-1-1940, but the learned District Judge dismissed that application on the 18-10-1940. An appeal was preferred on 19-12-1940, against that order and that too was dismissed on 1-3-1945.

(5) On 11-1-1943 the Collector made an award under the Encumbered Estates Act. On 11-5-1945, Ahmadi Begam made a fresh application for execution — Execution Case No. 35 of 1945 and another application was made on 14-8-1945 Execution Case No. 56 of 1945. This second application was necessitated because in the original application the names of all the judgment-debtors had not been included. Objections were preferred to this execution application on the ground that this execution application was barred by time, having been made more than 3 years after the last step-in-aid of execution. The execution Court took the view that the application was barred by time and that the decree-holders were not entitled to exclude any period under S. 15, Limitation Act. It further held that S. 7(b), Encumbered Estates Act did not apply to the case and consequently the time taken by the proceedings in the Court of the Collector and the Special Judge could not be excluded.

(6) The only question which was argued by the learned counsel for the parties, at length, in these appeals was whether by virtue of S. 7, Encumbered Estates Act the decree-holders could claim an exclusion of the time taken by the Encumbered Estates Act proceedings having in view the provisions of S. 44(3), Encumbered Estates Act.

(7) Section 44(3) is in these words:

"Notwithstanding anything contained in the Limitation Act or in any other law for the time being in force, in computing the period of limitation prescribed for any application for execution of any decree stayed under sub-ss. (2) and (3) of S. 7 the period from the date of decree referred to in those sub-sections up to the date of the declaration under sub-s. (1) of this section or the order of the Special Judge referred to in sub-s. (2) shall be excluded."

(8) It was argued on behalf of the appellants that the period from 9-1-1936, the date when the Collector passed an order under S. 6, to 11-1-1943, when the Encumbered Estates Act proceedings terminated, should be excluded under S. 15, Limitation Act read with S. 7(b), Encumbered Estates Act. It was argued on behalf of the respondents that S. 7 had no application to the present case. The executing Court was also of the same opinion. It, therefore, becomes necessary for us to see whether S. 7 applies to the facts and circumstances of this case or not.

(9) The material portion of S. 7 runs as follows:

7(1) "When the Collector has passed an order under S. 6, the following consequences shall ensue:

(a) "All proceedings pending at the date of the said order in any civil or revenue Court in the United Provinces in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered ..... shall be stayed, all attachments and other execution process issued by any such Court and then in force in respect of any such debt shall become null and void, and no fresh process in execution shall, except as hereinafter provided, be issued."

(b) "No fresh suit or other proceedings other than an appeal, review or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided, be instituted in any civil or revenue Court in the United Provinces in respect of any debts incurred before the passing of the said order ....."

The learned Judge was of the view that S. 7 (1)(a) did not apply to the case because that section prohibited institution of suits or proceedings in respect of "debts" and that the execution application in his view was not a proceeding in respect of a "debt". In support of the applicant the decision in — 'Hulas Singh v. Data Ram', AIR 1943 All 291 (A) was also cited before the learned Judge but in his view that decision did not apply to the facts and circumstances of the case before him. In this case Iqbal Ahmad C. J. and Dar J. held that S. 15, Limitation Act applied to cases in which institution of a suit had been directly or indirectly stayed by an order of a Court. Further they held that S. 15, Limitation Act would be applicable to cases where a creditor was debarred from instituting suits against his debtor because an order under S. 6, Encumbered Estates Act had been made on an application filed by that debtor under S. 4 of the Act.

(10) In our judgment the question which really arises for determination in this case is whether S. 7, Encumbered Estates Act was applicable to this case or not. The property in respect of which execution had been sought was a property which undoubtedly was encumbered in respect of a debt incurred before the passing of an order under S. 6. Rup Kuer who was one of the co-judgment-debtors had applied under the Encumbered Estates Act, as we have noticed earlier. An order under S. 6 had been made on 9-1-1936. Therefore, in our judgment after 9-1-1936 no fresh process in execution could be taken against her immovable property. Under the compromise decree of 22-12-1932 and also under the compromise of 25-7-1935 the debt due from Rup Kuer and her co-judgment-debtors which was secured by mortgage could only be recovered from the property against which execution had been sought by delivery of possession by the decree-holders.

Therefore, in our judgment, it could not be argued that the immovable property of the landlord was not encumbered in respect of a debt and that execution was not being sought in respect of such a debt. It was further argued by learned Counsel for the respondents that on the terms of the compromise it must be held that when the decree-holders get the right to possess the property, on account of the default clause, the debt was wiped off. In our view this contention was not sound for the simple reason that so long as the decree-holders did not get the property which had been earmarked for the satisfaction of the debt the debt remained.

(11) The Encumbered Estates Act was passed by the Legislature to give relief to a certain class of debtors. It was also the intention of that Act to place the entire indebtedness and the entire property of debtor available in the hands of the Special Judge and the Collector for purposes of liquidation. Other Courts were debarred from dealing either with the question of the indebtedness or the question of the liquidation of the debts of such a debtor. A Bench of this Court in — 'Mt. Chandeshwari Kuar v. Vireshwar Banerji', AIR 1948 All 317 (B) held that if the fate of a suit or proceeding in respect of which the stay is sought is linked with and determined or affected by the proceedings before the Special Judge, it is incumbent on the Court to stay them.

The suit out of which the aforementioned revision arose for decision before the High Court was instituted by the sons of one Panchanan Banerji on 5-10-1938, for possession of certain properties and for the recovery of a certain amount as damages. The cause of action of the suit was the alleged act of dispossession caused by Chandeshwari Kuar who had usufructuarily mortgaged the properties to Panchanan Banerji. Before the suit by Panchanan Banerji's heirs an application under S. 4, Encumbered Estates Act had been presented by Mst. Chandeshwari Kuar. Chandeshwari Kuar, therefore, made an application before the learned Civil Judge for the stay of the suit under S. 7(1)(b), U. P. Encumbered Estates Act but the learned Judge was of the opinion that the section did not apply to the circumstances of the case before him and he, therefore, refused to stay the suit.

It was contended on behalf of the applicants before the High Court that the suit which was instituted by the sons of Panchanan Banerji was in respect of a debt which 'inter alia' was the subject-matter of the application presented under S. 4, Encumbered Estates Act. The Bench held that S. 7(1)(b) was general in its terms and that having in view the fact that the U. P. Encumbered Estates Act was a remedial statute providing for the relief of a particular class it should be construed so far as they reasonably admit so as to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved. They, therefore, were of the opinion that the suit filed by the sons of Panchanan Banerji should have been stayed under the provisions of S. 7(1)(b).

(12) Reliance was placed by learned counsel for the respondents on a decision in — 'Mt. Champa Devi v. Mt. Asa Devi', AIR 1938 All 8 (C). In that case Iqbal Ahmad and Allsop JJ. held that S. 7(1)(b) is confined in its operation to suits in respect of any debts incurred before the passing of the order by the Collector under S. 6 of the Act and has no application to suits for possession of immovable property. They further held that a claim for mesne profits was not a claim in respect of a debt within the meaning of S. 7(1)(b). We are in respectful agreement with the view expressed in that case. In that case the learned Judges found that Asa Devi claimed possession of immovable properties and that her claim to such possession was in no way connected with any debt as defined within the meaning of the Encumbered Estates Act and consequently they were of the opinion that such a suit could not be stayed under the provisions of S. 7(1)(b) of that Act.

In our judgment, therefore, this case has no application to the facts of the case before us. Reliance was also placed on a decision in — 'Mukand Sarup v. Krishna Chandra', AIR 1938 All 86 (D). This case arose out of a suit filed for possession and for mesne profits as also in respect of the recovery of a debt. So far as the reliefs in respect to the suit for possession and mesne profits were concerned the Bench held that a stay could not be granted. In respect to those reliefs which were in respect to the claim for the debt the Bench held that relief could be granted under S. 7 qua that relief and the suit in respect to that relief was stayed. This case, if anything, supports the view that we have taken.

(13) Learned Counsel for the respondents drew our attention to several other cases, but we do not consider it necessary to notice them for in our opinion those cases were of no assistance in determining the question before us.

(14) In our opinion, therefore, the decree-holder could not by virtue of S. 7, Encumbered Estates Act make an application for execution during the period that the Encumbered Estates Act proceedings were pending, that is, between the period commencing from 9-1-1936, to 11-1-1943, and that this period had to be excluded in computing the period of limitation. That being the position the execution application which was made by the decree-holder on 11-5-1945, was not beyond time.

(15) We therefore allow these appeals, set aside the order of the execution Court and send back the cases for the determination of the other objections which there may still remain for decision. We direct that the appellants shall have their costs of the appeal from the respondents in each case.

B/V.R.B. Appeals allowed.

A.I.R. 1954 ALL. 104 (Vol. 41, C. N. 61)

BEG J.

Baldeo, Applicant v. Deo Narain and others, Opposite Party.

Criminal Revn. No. 1301 of 1951, D/- 17-11-1952, against order of Bench Magistrates, Gangapar, Allahabad, D/- 30-5-1951.

(a) Criminal P. C. (1898), S. 367 — 'Reasons for the decision', importance of.

The third requirement laid down in S. 367 viz., the reasons for the decision, is an important ingredient of a judgment. Compliance with law in this regard should not be merely formal but substantial and real. Where the statement of reasons turns out to be a mere hollow pretension of a baseless claim of application of mind by the Court, the judgment is robbed of one of its most essential ingredients and forfeits its claim to be termed a judgment in the eye of law. (Para 14)

Where the reasons given by the trial Court are such as cannot be supported by the evidence on record, they are not reasons for the decision, but reasons against the decision. To constitute a legal appreciation of evidence, the judgment should be such as to indicate that the Court has applied its mind to it. (Para 14)

The mere 'ipse dixit' of the Court to the effect that a case is full of improbabilities or contradictions is not enough unless it is backed by reasons. The improbability of a case or its contradictory nature is merely a conclusion from certain specific set of facts and unless these facts are disclosed the reasons for judgment must be considered to be wanting. (Para 11)

Anno: Cr. P. C., S. 367 N. 7.

(b) Criminal P. C. (1898), Ss. 367 and 439 — Revision against acquittal.

A High Court is no doubt reluctant to interfere with an order of acquittal but where the judgment of acquittal by the trial Court is full of errors which indicate that the Court had deliberately shut its eyes to patent facts on record and provides an instance of flagrant breach of fundamental principles regarding judgment, the judgment is vitiated and cannot be sustained. (The High Court set aside the acquittal and ordered a retrial). (Paras 15, 16)

Anno: Cr. P. C., S. 367 N. 18; S. 439 N. 12.

Hasin Ahmad, for Applicant; R. B. Misra, for Opposite Party No. 1.

CASE REFERRED TO:

(A) ('51) AIR 1951 SC 316: 1951 All LJ 603: 52 Cri LJ 1248 (SC) (Pr 14)

ORDER: This is a revision against acquittal. It has been filed on behalf of one Baldeo who was the complainant in the case out of which these proceedings have arisen. The prosecution case, as stated by Baldeo, was as follows: On 15-9-1949, at about 8 or 9 o'clock in the morning his brothers, Chini Prasad, Maldhi, Bansi and Panch Ratan, were repairing the boundary wall of their grove when six persons, named Deo Narain Singh, Lal Bahadur Singh, Lal Saheb, Jagannath, Indrapal Singh and Amarnath Singh came to the spot armed with lathis. They tried to stop his brothers from repairing the said boundary wall. His brothers insisted on doing it. Then Deo Narain Singh abused them and shouted out to his companions to beat them. Thereupon all the accused persons started beating Maldhi and others. Maldhi's arm was fractured. Panch Ratan received lathi injuries. Bansi and Chini Prasad also got injuries. On hearing the alarm Jokhan came on the scene. He was also beaten by the accused and received injuries including one on his head. Nirpat, Dangar and other persons came to the scene and saw the incident. He went to the thana to make the report. He found the accused present there and talking to the 'daroga ji'. Panch Ratan asked the 'daroga' to take down the report. 'Daroga Ji' refused to do it. In the evening when the complainant's party was about to return from the thana then a report was taken down by the 'daroga'.

(2) The injured persons were examined by the doctor on the next day by the Medical Officer, Handia Dispensary. (After a description of the various injuries on the bodies of Maldhi, Jokhan and Panch Ratan the judgment proceeded.) All the above injuries were caused by some blunt weapon.

(3) Baldeo appeared in Court and stated the prosecution case mentioned above. In support of the said case four other witnesses, named Maldhi, Nirpat, Jokhan and Sat Narain were examined. These witnesses corroborated the story narrated by Baldeo. The prosecution also examined the Medical Officer who proved the injury report prepared by him. This injury is Ex. P. 1 in the case. On the above facts all the afore-mentioned six accused were charged under Ss. 147 and 325, Penal Code.

(4) The accused pleaded not guilty and alleged that their prosecution was the result of enmity with the complainant.

(5) The case was tried by a Court of Bench Magistrates, Allahabad. The trial Court pronounced its judgment on 30-5-1951, giving the benefit of doubt to the accused and acquitting them of all the charges. The complainant went up in revision against the said order of acquittal. His revision having been dismissed by the District Magistrate this revision application was filed by him in the High Court.

(6) Having heard the learned counsel for the parties, I have come to the conclusion that this revision must be allowed. The most important ground given for acquitting the accused by the trial Court is that the prosecution has failed to prove the first information report and has, in fact, made no effort to get it proved. On this point the observation of the trial Court is as follows:

"The absence of the F. I. R. therefore from the original records of the police and the failure of the prosecution to make genuine efforts for its whereabouts is really material factor in the case which cannot be easily overlooked. This thing has given a fatal blow to the prosecution case and we are not willing to minimise its importance especially when the other aspects of the case also do not materially help the prosecution."

(7) A reference to the file, however, discloses that there is absolutely no foundation whatsoever for the above remarks. The carbon copy of the first information report was produced on behalf of the prosecution by Maldhi who stated that the first information report was made at the police station. His statement was not challenged in cross-examination. It was further stated by the complainant that the police were trying to create difficulties in his way. This first information report was made at the police station Sarai Mamrez. It would appear that at first the prosecution by

mistake summoned the head moharrir of police station, Handia instead of head moharrir, Sarai Mamrez. When, however, the head moharrir appeared in the witness-box, the mistake was realised by the prosecution. Accordingly, on 28-12-1950, an application was given on behalf of the prosecution for summoning the head moharrir of Sarai Mamrez which was the police station where the first information report of the case was actually lodged. This witness was summoned with the original records for proving the first information report. The note at the back of the application shows that the summons were ordered to be issued as prayed. On 2-2-1951 another application was made for summoning the head moharrir of police station Sarai Mamrez with the Roznamcha and Register of cognizable and non-cognizable offences for 8-2-1951 the next date for the hearing of the case. The note at the back of this application also indicates that summons were ordered to be issued as prayed in the application.

On 8-2-1951 this witness appeared in Court in response to the summons issued by the Court and the prosecution filed an application in which it was stated that the head moharrir of Sarai Mamrez had already been summoned by the Court for the purpose of proving the first information report, that he was present in the Court room in person and that the witness might be examined by the Court. This application was opposed on behalf of the accused. The Court did not reject this application but merely passed on it an order "File'. It is, therefore, obvious that in spite of the fact that the head moharrir was present in Court, his evidence was not taken by the Court for reasons not disclosed by it in its order. Not satisfied with this state of affairs the complainant again put in a third application on 16-2-1951 stating that he did not want to close his case until the head moharrir of Sarai Mamrez was examined and that the evidence of the said witness was essential for the purpose of proving the first information report. On this application also the Court merely passed an order "File". The above facts clearly indicate that the complainant was making repeated efforts to prove the first information report and yet the Court did not allow it to be done even though the Court had issued summons to the witness and the said witness was actually present in Court with relevant papers to prove it. It is difficult to understand how in the face of the above facts it was open to the trial Court to make a remark to the effect that the complainant did not make any effort to prove the first information report and that this conduct on the part of the complainant was fatal to the prosecution case.

(8) Apart from the above fact, the judgment of the trial Court seems to be full of errors which indicate that when writing the judgment either the trial Court had forgotten the evidence on the record or had deliberately shut its eyes to patent facts. The judgment of the trial Court states that:

> "The complainant has examined besides himself three witnesses namely Maldhi, Nirpat and Dangar to prove the actual story of marpit excluding of course that formal witness like the Doctor and the Head Constable."

A reference to the file shows that this statement is also incorrect as it omits to mention the names of two eye-witnesses, namely Jokhan and Sat Narain, who were also examined as eye-witnesses by the prosecution. Out of them Jokhan was an injured person and had received two injuries. His injuries were examined by the doctor and proved by him. He was, therefore, an important witness. Thus there can be no justification whatsoever for the omission by the Court to mention the names of the aforesaid witnesses. This omission can only lead to the conclusion that their evidence was completely overlooked or ignored by the trial Court.

(9) Similarly, the trial Court again seems to have fallen into a serious error when dealing with the medical evidence produced on behalf of the prosecution. As mentioned above the prosecution produced the Medical Officer in-charge Handia Dispensary to prove that Maldhi, Jokhan and Panch Ratan had received injuries at the hands of the accused. Maldhi had received four injuries out of which one was grievous. Jokhan had received two injuries and Panch Ratan had received five injuries. The duration of these injuries given by the doctor indicated that they were caused about the date and time which is alleged to be the date and time of the incident by the complainant. This important evidence was summarily brushed aside by the trial Court with the remark that "there are no identifying marks to fix the identity of the persons examined". This observation of the trial Court is also unwarranted in view of the fact that the doctor had noted the names, the percentage as well as the addresses of the injured persons in the report and he was not cross-examined on the point at all.

(10) The criticism of evidence by the trial Court also discloses serious misapprehension of evidence on its part. With reference to prosecution evidence it observes that:

> "All the prosecution witnesses are of one family and they are admittedly inimical with the accused."

No part of this statement in the judgment of the trial Court is borne out by the record. Neither all the witnesses for the prosecution are "of one family" nor are all of them "admittedly inimical". The learned counsel appearing for the applicant characterised it as incorrect and the learned counsel appearing for the opposite parties was constrained to admit that this part of the judgment could not be supported as correct.

(11) Next, the learned Magistrates go on to observe that all the prosecution witnesses were tutored to tell lies. They have not given a single reason for these severe strictures on prosecution evidence. They have not even cared to examine the statement of any of these witnesses individually. They have further in their judgment branded the prosecution case as highly improbable yet they have not cared to point out a single improbability which they had in their minds. The learned Magistrates have also observed that the prosecution case was full of material discrepancies and contradictions which shattered the prosecution case . The entire judgment of the learned Magistrates has been read out to me and I find that they have not pointed out a single contradiction or discrepancy in it. The mere 'ipse dixit' of the Court to the effect that a case is full of improbabilities or contradictions is not enough unless it is backed by reasons. The improbability of a case or its contradictory nature is merely a conclusion from certain specific set of facts and unless these facts are disclosed the reasons for judgment must be considered to be wanting. It would appear that the Court has in its judgment built a massive structure of sweeping remarks without laying any foundation for the same.

(12) Lastly, it may be mentioned that an affidavit has been filed by the complainant stating that he had filed an application for the transfer of the case before the District Magistrate who had passed an order summoning the file of the case. This order of the District Magistrate was communicated to the trial Court by his counsel. On receipt of

this information the trial Court instead of staying the proceedings took out the judgment from its pocket and pronounced an order acquitting the accused. This is the order sought to be impugned in these proceedings.

(13) Whatever the insinuation behind this affidavit might be, I feel that a judgment full of such palpable defects and serious mistakes cannot be allowed to stand, and must fall by the unsupportable weight of its own errors and irregularities Whilst setting aside the order of acquittal, I should not be taken to have expressed any opinion on the merits of the case.

(14) The learned counsel appearing for the opposite parties has cited a ruling of the Supreme Court reported in — 'Logendranath v. Poai Lal'. AIR 1951 SC 316 (A). That case merely lays down that in the absence of a legal error, it is not open to a revisional Court to re-appraise evidence and reverse pure findings of fact based on the appreciation of evidence of the case by the trial Court. In this case, however, the revisional Court has not re-appraised the evidence nor has it reversed any findings of fact. The question is whether the trial Court has itself appraised the evidence at all in the manner laid down by law. The case raises to my mind a serious question of law. Under S. 367, Criminal P. C. every judgment must contain:

(1) the points for determination;

(2) the decision thereon; and

(3) the reasons for such decision.

Where the reasons given by the trial Court are such as cannot be supported by the evidence on record, they are not reasons for the decision, but reasons against the decision. To constitute a legal appreciation of evidence, the judgment should be such as to indicate that the Court has applied its mind to it. Every portion of the judgment of the trial Court seems to indicate non-application of mind by the Court to the evidence on record. The third requirement laid down in S. 367, Criminal P. C.. viz., the reasons for the decision, is an important ingredient of a judgment. Compliance with law in this regard should not be merely formal but substantial and real, for it is this part of the judgment alone which enables the higher Court to appreciate the correctness of the decision, the parties to feel that the Court has fully and impartially considered their respective cases and the public to realise that a genuine and sincere attempt has been made to mete out even-handed justice. It is in the way the Court discharges its duty in this regard that it is able to instil confidence in its justice and to inspire that respect and reverence in public mind which is its due. Reasons form the substratum of the decision and their factual accuracy is a guarantee that the Court has applied its mind to the evidence in the case. Where the statement of reasons turn out to be a mere hollow pretension of a baseless claim of application of mind by the Court, the judgment is robbed of one of its most essential ingredients and forfeits its claim to be termed a judgment in the eye of law.

(15) Lastly, the learned counsel for the opposite parties has argued that the order of acquittal having been once passed by the trial Court it should not be set aside. There is no doubt that once an accused is acquitted a certain amount of sanctity is attached to an order of acquittal, and the higher Courts should be most reluctant to interfere with such an order. But under the garb of this sanctity it is not open to the trial Court to violate those salutary and fundamental principles of strict adherence to the evidence on record and scrupulous accuracy in the presentation of facts which constitute vital criteria of judicial honesty and truth and lie at the root of the entire system of judicial administration in our country. The judgment pronounced by the trial Court provides an instructive instance of a flagrant breach of the aforesaid principles.

(16) The circumstances disclosed in this case have a constraining force, and, to my mind, the order of acquittal cannot be sustained. I accordingly allow this revision, set aside the order of acquittal and direct a fresh trial of the case by some other Court competent to try it according to law.

B/K.S. Retrial ordered.

A.I.R. 1954 ALL. 106 (Vol. 41, C. N. 62)

(LUCKNOW BENCH)

AGARWALA J.

Dwarka and another, Appellants v. State.

Criminal Appeals Nos. 284, 349 and 476 to 479 of 1952, D/- 8-8-1953, against order of 1st Civil & Sess. J., Lucknow, D/- 30-8-1952.

(a) Criminal P. C. (1898), S. 154 — "Relating to the commission of a cognizable offence."

A mere confidential information which informs the police of the assembling of certain bad characters at a particular place and not the commission of an offence need not be recorded under S. 154. (Para 5)

Anno: Cr. P. C., S. 154 N. 4.

(b) Criminal P. C. (1898), S. 51 — Manner of search — (U. P. Police Regulations, Para 154).

Law does not require search of the person of the accused to be made in the presence of any witness — Para 154 of Police Regulations which however requires two witnesses when search is made under S. 51, Criminal P. C. is technically satisfied, when there are witnesses, who are unconnected with the police in the sense that they are not the servants of the police, even though, they as persons bound over under S. 110, Criminal P. C., do not inspire confidence. It would however be advisable to take respectable witnesses about whose independence there can be no suspicion. (Para 6)

Anno: Cr. P. C., S. 51 N. 4.

(c) Evidence Act (1872), Ss. 1 and 114 — Credibility of witnesses — Police officials.

The testimony of police officials should be treated in the same manner as the testimony of any other witness and the view that their testimony without corroboration by independent witnesses is unworthy of belief cannot be supported. There is no presumption that police officials are liars. (Para 7)

Anno: Evi. Act, S. 1 N. 9; S. 114 N. 18.

Ram Asre Misra, for Appellants; R. B. Bisaria, for Addl. Govt. Advocate, for the State.

JUDGMENT: Eight persons Dwarka, Bhuiya Din, Inderpal, Ram Gopal, Mahadin, Gharibe, Chhanga and Sarju have appealed against their

conviction under S. 402, I. P. C. and a sentence of two years' rigorous imprisonment. Of these Inderpal, Ram Gopal, Sarju, Chhanga and Dwarka were further convicted under S. 19(f), Arms Act and sentenced to rigorous imprisonment for one year and they have appealed against their conviction under that section as well. The charge under S. 19(f), Arms Act was tried by a jury, which returned a verdict of guilty.

(2) The prosecution case was that Mohammad Alam, Sub-Inspector, belonging to the investigation squad of the C.I.D., Lucknow, had gone in the morning of 7-10-1951, to Mohanlalganj for investigation of a case under S. 457, I. P. C. At about 6 p.m. he received information that some bad characters had assembled near the railway station. Immediately he went up along with a police party consisting of three Sub-Inspectors, 4 constables and three or four other people of the town. The railway station is at a distance of about two furlongs from the police station and in between the two, about a furlong and a half from the police station, there is an old dilapidated building called the 'Bardasht Khana'. As the party approached the Bardasht Khana, they heard whispering sound. The police party surrounded the place and challenged the inmates.

About 18 or 20 persons came out and fled in various directions. Eight of them were, however, arrested by the police party and these were the appellants. From the possession of Ram Gopal one country made pistol and some cartridges were recovered and from the possession of Inderpal also a country made pistol and some cartridges were recovered. From the possession of Sarju, Chhanga and Dwarka some cartridges were recovered. The police prosecuted the appellants on the allegation that they had collected at that place with the intention of committing a dacoity.

(3) The appellants denied the commission of the offences and gave various places as the place of their arrest, but admitted that all of them were arrested in the afternoon of the same day.

(4) In proof of the prosecution case five persons were produced: Babu, Narain and Sarda Bux Singh, Sub-Inspector Mohammad Alam and Sub-Inspector Mohammad Faruq.

(5) I have heard learned counsel in support of their appeals and gone through the record. It was urged that besides the two Sub-Inspectors, the other three witnesses were not at all independent witnesses. They were, as one could call them, 'police witnesses', because they had been previously convicted of some offence. Babu had been bound over under S. 110, Cr. P. C. Some discrepancies in the statements of these witnesses were also pointed out to me. It was further alleged that the first information report was not produced in this case.

To my mind none of these arguments has any validity in the present case. The arrest was made by a police party, because of a confidential information received by them that some bad characters had assembled. This was not an information of the commission of an offence and, therefore, it was not necessary that it should have been recorded under S. 154, Criminal P. C. When the persons were arrested and were found to be in possession of fire-arms, the case made out against them was one under S. 402, Penal Code. When the information was received in the first instance, it was merely a case under S. 109, Cr. P. C. In such a contingency the first information report was written out by the Sub-Inspector on his return after arresting them. This was tendered by the prosecution in evidence but it was not brought on the record because it was considered inadmissible.

(6) It was said that independent witnesses should have been taken by the police for the search of the persons of the appellants and that the witnesses Babu, Narain and Sarda Bux not being independent, the search was invalid. So far as the search of the person of an accused is concerned, the law does not require that it should be made in the presence of any witness. Where the search of a place has to be made the law requires that it should be made in the presence of two respectable witnesses of the locality vide S. 103, Criminal P. C. Even though the law does not require a search of the person of an accused to be made in the presence of respectable witnesses, para. 154 of the Police Regulations does require that when the search of an arrested person under S. 51, Criminal P. C. is made, it should be made in the presence of two witnesses unconnected with the police, whenever such witnesses are available.

The search in the present case was made in the presence of Babu, Narain and Sarda Bux. They are unconnected with the police in the sense that they are not the servants of the police and, therefore, technically the requirements of para. 154 of the Police Regulations were fulfilled. But it should be commented that witnesses like Babu, Narain and Sarda Bux do not inspire confidence and it would have been advisable to take respectable witnesses about whose independence no suspicion could be raised. It is in the interest of fair trial and the fair name of the police itself that searches should be made in the presence of respectable and independent witnesses. It is regrettable that this was not done in the present case.

However, this factor alone does not render the search legally invalid or unreliable. Sub-Inspector Mohammad Alam and Sub-Inspector Mohammad Faruq are police officials of status. There has been no suggestion that they entertained any animus against the appellants. It is admitted that all the appellants were arrested in the evening of 7-10-1951. No reason whatsoever has been suggested why these high officials should take into their head to arrest all these persons at about the same time. I have no reason whatever to disbelieve the sworn testimony of Sub-Inspector Mohammad Alam and Sub-Inspector Mohammad Faruq. Even if I were to discard the statements of Babu, Narain and Sarda Bux, I would be prepared to base my judgment upon the sworn testimony of Sub-Inspector Mohammad Alam and Sub-Inspector Mohammad Faruq.

(7) It was urged that the testimony of police officials without corroboration by independent witnesses is not worthy of belief. I do not subscribe to this view. There is no presumption that police officials are liars. Unless the circumstances of the case throw a doubt on the veracity of their statements, there is no reason whatsoever why their testimony should not be treated in the same manner as the testimony of any other witness.

(8) Upon the evidence on the record, I am convinced that the appellants were all arrested in the manner stated by the prosecution and that the fire-arms said to have been recovered from their possession were in fact so recovered from them. The conviction of the appellants under S. 402, I. P. C. was, therefore, warranted and of those who were convicted under S. 19(f), Arms Act was similarly justified.

(9) As regards the sentence, it has been urged that the sentences already undergone should be held to be enough. The appellants have been in

jail, it would appear, since 30-8-1952, the date of the judgment of the Court below, that is to say for nearly about a year. I consider that with the exception of Ram Gopal and Inderpal, who were found in possession of pistols, the sentences may safely be reduced to the sentences already undergone. I order accordingly. Dwarka, Bhuiya Din, Mahadin, Gharibe, Chhanga and Sarju will, therefore, be set at liberty, unless required in connection with some other case. The appeal of Ram Gopal and Inderpal is, however, dismissed.

C/M.K.S. Order accordingly.

A.I.R. 1954 ALL. 108 (Vol. 41, C. N. 63)

(LUCKNOW BENCH)

AGARWALA AND RANDHIR SINGH JJ.

Sm. Chand Rani, Defendant-Applicant v. Chaitram Mukhi, Plaintiff, Opposite Party.

Application No. 165 of 1950, D/- 14-8-1953, to revise order of Munsif, North Lucknow, D/- 18-4-1950.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5(4) — Suit for fair rent — Value for jurisdiction — (Suits Valuation Act (1887), S. 8).

The word 'payable' in S. 5(4) indicates that it has reference to the rent which a tenant claims to be payable and not the rent which is the agreed rent. The other word "claimed" used before the words "or payable" would also mean the rent which the landlord or tenant claims should be payable.

The forum is usually determined by the allegations of the plaintiff and if the plaintiff claims that he should be required to pay a certain amount of rent and not the agreed rent or the annual reasonable rent according to the Municipal assessment, this should be taken to be the basis for determining the forum. AIR 1951 All 562 and AIR 1953 All 593, Approved. (Para 4)

Anno: Suits Valu. Act, S. 8 N. 2.

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) — Fair rent — Procedure to be followed by Court.

Where the plaintiff tenant comes to the Court on the allegation that a certain sum was the agreed year rent the only question which the Court should then has to decide is whether the transaction entered into between the parties with regard to the rent was unfair, and if he comes to the conclusion that the transaction was unfair, he should fix the fair rent.

The court cannot go into the question whether there was an agreed rent or not. (Para 6)

Iqbal Ahmad and Kashi Prasad Saksena, for Applicant; R. N. Shukla and Bijai Shankar, for Opposite Party.

CASES REFERRED TO: Para

(A) ('51) AIR 1951 All 562: 1952 All LJ 90 3

(B) ('51) AIR 1953 All 593: 1951 All LJ 648 4

RANDHIR SINGH, J.:

This is an application in revision against the order of the Munsif, Lucknow fixing Rs. 19/- p. m. as the fair rent of the premises belonging to the applicant.

(2) It appears that the defendant owned a house in Aminabad and it was let out to the plaintiff. The plaintiff paid Rs. 1500/- to the defendant & the defendant informed the plaintiff that this rent had been received by him for one year. Subsequently the plaintiff sent a notice to the defendant asking him as to what the rent of the premises was & what was the period towards which the amount sent was appropriated. No reply was sent to this notice. He then instituted a suit under the Control of Rent and Eviction Act for the fixation of fair rent. The lower Court found that there was no agreed rent and that Rs. 19/- was the fair rent and decreed the claim. A plea of jurisdiction had also been raised by the defendant in the lower Court and it was contended that inasmuch as the agreed rent was in excess of Rs. 500/- the Munsif had no jurisdiction to entertain the suit. The learned Munsif, however, framed no issue on the point and has given no finding as to whether he had or had not jurisdiction to entertain the suit. The defendant has now come up in revision.

(3) This application in revision originally came up for hearing before a Single Judge of this Court and the first point which was urged on behalf of the applicant before him was that the suit should have been instituted in the Court of the Civil Judge inasmuch as the agreed rent of the premises was Rs. 1500/- per year. The learned Judge doubted the correctness of the decision of another single Judge of this Court reported in — 'Prayag Narain v. Dr. Mangha Ram', AIR 1951 All 562 (A). He, therefore, referred the case to a Division Bench.

(4) The first point which has been canvassed before us on behalf of the applicant, therefore, is that this suit should not have been instituted in the Court of the Munsif and reliance is placed on the provisions of S. 5(4), Control of Rent and Eviction Act. The words 'claimed' or "payable" which are found in S. 5(4) have been interpreted to mean that, what should determine the forum should be the rent which the plaintiff claims to be required to pay and not the rent which was agreed upon or which was the annual reasonable rent. We have gone through the judgment in the reported case. The view taken by Misra J. was also followed by another single Judge in a later case vide — 'Raj Bahadur v. Babu Ram', AIR 1953 All 593 (B). It appears to us that the view expressed by the learned Judges in the two cases was the correct view. The forum is usually determined by the allegations of the plaintiff and if the plaintiff claims that he should be required to pay a certain amount of rent and not the agreed rent or the annual reasonable rent according to the Municipal assessment, this should be taken to be the basis for determining the forum.

Section 5(4), Control of Rent and Eviction Act is as follows:-

"If the landlord or the tenant, as the case may be, claims that annual reasonable rent of any accommodation to which the Act applies, is inadequate or excessive, or if the tenant claims that the agreed rent is higher than the annual reasonable rent he may institute a suit for fixation of rent in the Court of the Munsif

having territorial jurisdiction, if the annual rent claimed or payable is Rs. 500/- or less; and in the Court of the Civil Judge having territorial jurisdiction, if it exceeds Rs. 500/- ...."

A perusal of the section, therefore, shows, that a landlord can maintain a suit if he claims that the annual reasonable rent of any accommodation to which the Act applied was inadequate. The tenant, on the other hand, is entitled to maintain a suit if he claims-

(1) that the annual reasonable rent of any accommodation was excessive; and

(2) that the agreed rent was higher than the annual reasonable rent.

The suit has to be instituted in the Court of the Munsif if the annual rent 'claimed or payable' is Rs. 500/- or less. It has been argued that the word 'payable' should be interpreted to mean rent which the tenant is liable to pay under the agreement. We are unable to agree with this contention. The word 'payable' indicates that it has reference to the rent which a tenant claims to be payable and not the rent which is the agreed rent. There is no difficulty in interpreting the other word 'claimed' used before the words "or payable". This would also mean the rent which the landlord or tenant claims should be payable.

(5) It also appears to us that the legislature wanted to give relief to tenants wanting to take advantage of this provision of the law. If a very high rent is agreed upon between the tenant and the landlord and the tenant feels that the transaction was unfair, he may be deprived of getting his remedy in the law Courts if he is made to pay a very high court-fee which he would have to pay if the agreed rent was made the basis for payment of court-fee. In view of the above circumstances we feel that the view taken in the two earlier cases referred to above was the correct view.

(6) The other point which has been urged on behalf of the applicant is that the learned Munsif should not have gone into the question as to whether there was or was not an greed rent. A perusal of paras. 2 and 3 of the plaint clearly shows that the plaintiff had come to the Court on the allegation that Rs. 1500/- was the agreed year rent and in fact it has been conceded in this Court by the learned Counsel for the plaintiff opposite party that Rs. 125/- per month was the agreed rent of the premises. The only question which the learned Munsif should then have decided was whether the transaction entered into between the parties with regard to the rent was unfair, and if he came to the conclusion that the transaction was unfair, he should have fixed the fair rent. The learned Munsif, therefore, did not proceed on the right lines and has given no finding as to whether the transaction between the parties was fair or unfair. It is only if it is found that the transaction between the parties was unfair that the Court has jurisdiction to fix the fair rent.

The learned Munsif has not given a finding on this point and the application for revision must be allowed. The application in revision is allowed and the order passed by the learned Munsif fixing the rent at Rs. 19/- p. m. is set aside and the case is remanded to the Court below. The learned Munsif will frame an issue on the point whether the transaction was unfair. He should allow the parties to adduce fresh evidence on this issue and then proceed according to law. Costs here and in the Court below shall abide the result.

C/R.G.D. Application allowed & Case remanded.

A.I.R. 1954 ALL. 109 (Vol. 41, C. N. 64)

(LUCKNOW BENCH)

RANDHIR SINGH J.

Ram Naresh and others, Applicants v. Deo Narain and others, Opposite Party.

Application No. 91 of 1948, D/- 7-8-1953, to revise order of Munsif, Kunda, Pratapgarh, D/- 22-4-1948.

Specific Relief Act (1877), S. 9 — Jurisdiction and power of Court — (Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 180, 183 and 242).

A suit under S. 180, U.P. Tenancy Act can be maintained only by a person who is the owner or the landlord of the land claimed, and a suit under S. 183 can be maintained by a person holding tenancy rights in the land which is the subject of the suit. Where, therefore, no averment was made by the plaintiffs about their own title to the land and it was simply a case on the basis of possession and no question of title was raised, the plaintiffs could not maintain a suit under S. 180 or S. 183, U. P. Tenancy Act. It was one which was cognizable by the Civil Court under S. 9, Specific Relief Act. AIR 1950 All 407, Foll. AIR 1949 All 510, Rel. on.

(Paras 2, 3)

Anno: Specific Relief Act, S. 9 N. 17.

N. N. Misra, for Applicants; S. N. Srivastava, for Opposite Party.

CASES REFERRED TO :

(A) ('50) AIR 1950 All 407: 1951 All LJ 290 (Pr 3)

(B) ('49) AIR 1949 All 510: 1949 All LJ 24 (Pr 4)

ORDER : This is an application in revision under S. 115, Civil P. C. against a decree passed under S. 9, Specific Relief Act by the Munsif of Kunda, Partabgarn.

(2) The opposite party filed a suit under S. 9, Specific Relief Act in the Court of the Munsif of Kunda, Partabgarh, on the allegation that he was in peaceful possession of two plots and was dispossessed forcibly by the defendants within six months of the institution of the suit. The Munsif decreed the claim and the defendants have now come up in revision.

The only point which arises for determination in this application for revision is whether the suit instituted by the plaintiffs in the Court of the Munsif could be instituted in the revenue Court and as such the jurisdiction of the Munsif was barred under the provisions of S. 242, U.P. Tenancy Act. It is alleged on behalf of the applicants that the plaintiffs could have maintained a suit under S. 180 or S. 183, U.P. Tenancy Act and as such the suit could not be instituted in the civil Court. A perusal of S 180 shows that a person taking or retainin

possession of a plot of land without the consent of the person entitled to admit him to occupy such plot shall be liable to ejectment under S. 180 'on the suit of the person so entitled'. It would thus appear that a suit under S. 180 can be maintained only by a person who is the owner or the landlord of the land claimed. A suit under S. 183, U. P. Tenancy Act can be maintained by a person holding tenancy rights in the land which is the subject of the suit. In the present case no averment was made by the plaintiffs about their own title to the land. It was simply a case on the basis of possession and no question of title was raised on behalf of the plaintiffs. Even on facts as were presented subsequently to the Court, it appears that the plaintiffs could not maintain a suit under S. 180 or S. 183, U. P. Tenancy Act. The admitted facts of the case were that the two plots in respect of which the plaintiffs had sued for possession formed part of the tenancy khata of the defendants but happened to be in the possession of the plaintiffs for quite a long time. The plaintiffs never claimed any tenancy rights in these plots and did not sue for possession on the basis of any tenancy rights. Such a suit could not have been instituted under S. 183, Tenancy Act. Even, therefore, on facts the jurisdiction of the Civil Court could not be said to be barred.

(3) It has been held by a Division Bench of this Court in — 'Ganga Din v. Gokul Prasad', AIR 1950 All 407 (A) that if upon a reading of the plaint it is made out that the plaintiff claims a relief on the basis merely of his previous possession and dispossession by the defendant, the suit is one which is cognizable by the Civil Court under S. 9, Specific Relief Act. The present suit was based entirely on possession which had been disturbed by the defendants. The case was, therefore, clearly within the cognizance of the Civil Court.

(4) Learned counsel for the applicants has cited a ruling, — 'Beni Madho Singh v. Prag', AIR 1949 All 510 (B). A perusal of the judgment in this reported case also leads to the conclusion that it is only that suit which is cognizable by a Revenue Court which is barred under S. 9, Specific Relief Act. The ruling, therefore, does not support the point pressed on behalf of the applicants.

(5) The application for revision is dismissed with costs.

B/H.G.P. Revision dismissed.

A.I.R. 1954 ALL. 110 (Vol. 41, C. N. 65)

MALIK C. J. AND V. BHARGAVA J.

New Victoria Mills Co. Ltd., Kanpur, Applicant v. Commr. of Income-tax, U. P., Lucknow, Respondent.

I. T. Misc. Case No. 141 of 1950, D/- 10-4-1953.

Income-tax Act (1922), S. 34 — Definite information.

If the Income-tax Officer has made a mistake with full knowledge of the facts, the mistake cannot be rectified by him by issuing a notice under S. 34 — Income-tax Officer holding certain item not to be income of assessee on ground that in another connected case this item was disallowed as expenditure — Former assessment becoming final — In latter case item allowed as expenditure in appeal and credit for it allowed under S. 10(2)(XV) — Income-tax Officer in former case cannot issue notice under S. 34 for assessing the item — It is not a case of definite information.

(Para 2)

Anno: Income-tax, S. 34 N. 2, 3.

G. S. Pathak, for Applicant; S. C. Das, for Respondent.

MALIK C. J.:

There were two applications for reference before the Income-tax Appellate Tribunal, one arising out of income-tax proceedings and the other arising out of Excess Profits Tax proceedings. The Tribunal has made one combined reference under S. 66(1), Income-tax Act and S. 66(1), Income-tax Act read with S. 21, Excess Profits Tax Act. The question arising in both was identical and has been framed as follows:

"Whether, in the circumstances of the case, and on the facts stated, the order of the Tribunal dated 21-2-1945, passed in the appeal of Kanpur Dyeing and Cloth Printing Co. Ltd. constituted a definite piece of information which came into the possession of the Income-tax Officer in consequence of which he discovered that the appellant's income had escaped assessment within the meaning of S. 34, I. T. Act and justified the revision of the original assessment which had been completed on 15-7-1943?"

(2) The facts of the case, as they appear from the statement, are as follows. The assessee in its return for the assessment year 1942-43 included a sum of Rs. 2,06,695/- as an item of income received by the assessee company from the Kanpur Dyeing and Cloth Printing Co. Ltd. towards the deferred price of 'dusuti' cloth. The Income-tax Officer, however, held that this was not income of the assessee and made the assessment on the balance of the income returned after deducting this amount. The reason given by him for excluding this amount from the return was that during the course of assessment of the Kanpur Dyeing and Cloth Printing Co. Ltd. this item had been claimed as an expenditure but it was disallowed by the Income-tax Officer. The assessment became final as no party appealed against it. Against the assessment order of the Income-tax Officer in the case of the Kanpur Dyeing and Cloth Printing Co. Ltd. there was an appeal and the case ultimately reached the Income-tax Appellate Tribunal which disagreed with the Income-tax Officer and allowed the sum of Rs. 2,06,695/- as expenditure incurred by the Kanpur Dyeing and Cloth Printing Co. Ltd., and gave them credit for it under S. 10(2)(XV), Income-tax Act.

After the decision of the Tribunal in the case of the Kanpur Dyeing and Cloth Printing Co. Ltd., on 21-2-1945, the Income-tax Officer on 16-5-1945, issued a notice to the assessee under S. 34, Income-tax Act. The Income-tax Officer claimed that the definite information that he had received was the order of the Tribunal dated 21-2-1945, that it was an expenditure of the Kanpur Dyeing and Cloth Printing Co. Ltd., and consequently must be the income of the assessee.

It is not denied that all the facts were known to the Income-tax Officer. If the Income-tax Officer had made a mistake in deducting the sum of Rs. 2,06,695/- from the assessable income of the assessee, it was open to the Department to take the matter up in appeal before the Appellate

Assistant Commissioner and the Appellate Tribunal. It cannot be said that as a result of the order of the Appellate Tribunal any new facts came to the knowledge of the Income-tax Officer which were not in his possession at the time when he made the assessment. If the Income-tax Officer had made a mistake with full knowledge of the facts, the mistake could not be rectified by him by issuing a notice under S. 34, Income-tax Act. The fact that the Appellate Tribunal had held that the sum of Rs. 2,06,695/- was allowable expenditure of the Kanpur Dyeing and Cloth Printing Co. Ltd., under S. 10(2)(xv), Income-tax Act could not be said to be a definite information which led to the discovery that the assessee's income had escaped assessment. The facts were fully known to the Income-tax Officer and if he had made a mistake at the time of the assessment there were other methods of correcting that error.

(3) We, therefore, answer the reference in the negative. The assessee is entitled to its costs which we assess at Rs. 500/-.

B/R.G.D. Answer accordingly.

A.I.R. 1954 ALL. 111 (Vol. 41, C. N. 66)

MALIK C. J. AND CHATURVEDI J.

Sunder Lal and another, Appellants v. Mohammad Ishaq, Respondent.

Ex. Second Appeal No. 1814 of 1947, D/- 28-8-1953, against judgment and decree of Mushtaq Ahmad J., D/- 13-9-1950.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 15 and 3 — Permission of District Magistrate is to be treated as additional ground for passing decree. AIR 1951 All 383, Held wrongly decided.

In S. 15 of the Act the words "except on one or more of the grounds mentioned in S. 3" must be interpreted to include not only grounds (a) to (f) mentioned in S. 3, but also the additional ground that the suit for ejectment had been filed with the permission of the District Magistrate.

(Para 13)

Under S. 3 a suit for ejectment could be filed with the permission of the District Magistrate or if grounds (a) to (f) existed. Section 15 must be interpreted to mean that a decree shall not be passed unless grounds (a) to (f) existed or permission of the District Magistrate had been obtained, which is to be treated as an additional ground and S. 14 must be interpreted in like manner. AIR 1952 All 584, Foll.; AIR 1951 All 383, Held wrongly decided.

(Para 15)

Satish Chandra, for Appellants; A. Banerji, for Respondent.

CASES REFERRED TO:

(A) ('52) AIR 1952 All 584: 1952 All LJ 3 (Prs 9, 10, 16)

(B) ('51) AIR 1951 All 383: 1950 All LJ 695 (Prs 11, 16)

MALIK C. J.:

These are four special appeals arising out of four suits. But they can be disposed of by one judgment as the point for decision is the same in all the four cases.

(2) The plaintiffs, who are the landlords, filed four suits for ejectment, arrears of rent and also for mesne profits on 2-4-1946. These suits were decreed on 30-9-1946. Before filing the suits, notices for ejectment were given on 11-8-1945, and the tenants were required to vacate by 31-8-1945. The plaintiffs had also applied for permission to the District Magistrate and the permission to file the suits had been granted on 28-2-1946.

(3) After the decrees, the defendants filed appeals. During the pendency of the appeals, an Ordinance known as U. P. (Temporary) Control of Rent and Eviction Ordinance, 1946, (Ordinance No. 3 of 1946), was passed which came into force from 1-10-1946. The Ordinance was replaced by the U. P. Control of Rent and Eviction Act, 1947 (Act No. 3 of 1947), which Act was passed on 31-3-1947, and was made retrospective and was to be deemed to come into force from 1-10-1946. The appeals came up for hearing on 24-1-1947, and though certain objections were taken in the Court of appeal based on the Ordinance, the appeals failed and were dismissed and the decrees for ejectment passed by the trial Court were affirmed.

(4) The plaintiffs filed applications for execution of the decrees and in the executing Court the defendants raised objections relying on S. 14 of the Act that the decrees were not executable. The objections were dismissed on 10-3-1947. The defendants filed execution appeals which were dismissed on 30-3-1947. Thereafter there were four execution second appeals filed in this Court, which were all allowed by a learned single Judge on 13-9-1950. The learned Judge, however, gave leave to file special appeals and these appeals were filed on behalf of the plaintiffs decree-holders.

(5) The only point for decision in these appeals is whether, by reason of the provisions of Ss. 14 and 15 of the Act, the decrees have now become unexecutable and the defendants cannot be ejected from the premises in their occupation.

(6) On behalf of the decree-holders-appellants reliance is placed on S. 15 and it is urged that the cases are governed by S. 15 and decrees having been passed in favour of the appellants no objection can be raised now to the execution of the decrees. It is urged that the defendants had taken the plea in the Court of first appeal that no decree should be passed and had relied on the provisions of Ss. 7 and 8 of the Ordinance, but those objections were overruled or withdrawn and the defendants could not in the executing Court raise objections to the execution of the decrees.

(7) Section 15 of Act 3 of 1947 is as follows:

"In all suits for eviction of a tenant from any accommodation pending on the date of the commencement of this Act, no decree for eviction shall be passed except on one or more of the grounds mentioned in S. 3".

Act 3 of 1947 as has been already said, was made retrospective and S. 1(3) provides that the Act shall be deemed to have come into force on 1-10-1946. It is urged by learned counsel for the appellants that an appeal is a continuation of a suit and as on 1-10-1946, or soon thereafter appeals were filed, the suits having been decided on 30-9-1946, S. 15 was applicable and no reliance can be placed by the judgment-debtors on S. 14. On behalf of the judgment-debtors, however, it is urged that the suits having been decided on 30-9-1946, the section applicable is S. 14 of the Act.

(8) Section 14 is as follows:

"No decree for the eviction of a tenant from any accommodation passed before the date of com-

mencement of this Act shall in so far as it relates to the eviction of such tenant, be executed against him as long as this Act remains in force, except on any of the grounds mentioned in S. 3:

Provided that the tenant agrees to pay to the landlord 'reasonable annual rent' or the rent payable by him before the passing of the decree, whichever is higher."

(9) In — 'Raj Narain v. Sita Ram', AIR 1952 All 584 (A), it was held by a Bench of this Court, of which one of us was a member, that S. 15 was intended to apply not only to suits pending in the trial Court but also to a suit in its later stages right up to the Court of final appeal. It is not necessary for us in these cases to go into that question as, in our view, whether S. 14 or S. 15 is applied the result is the same.

(10) Learned counsel for the judgment-debtors-respondents has urged that the words "except on any of the grounds mentioned in S. 3" in S. 14 of the Act mean grounds (a) to (f) of S. 3. Section 3 of the Act lays down, as has been held in the case of 'Raj Narain, (A)', cited above, that if the grounds mentioned in S. 3 exist or any of them the landlord can file a suit for ejectment of a tenant without the permission of the District Magistrate. These grounds are set out in cls. (a) to (f) of S. 3. If, on the other hand, grounds (a) to (f) do not exist, a landlord has no right to file a suit for ejectment unless he has obtained the permission of the District Magistrate. It is said that under Ss. 14 and 15 the fact that a suit has been filed after the permission of the District Magistrate would not entitle the landlord to eject the tenant, or to obtain a decree for ejectment. He can obtain a decree or claim ejectment only if grounds (a) to (f) exist. The Legislature has made it now clear, and it was also decided in 'Raj Narain's case, (A)', that if a landlord has obtained the permission of the District Magistrate, he has a right to eject the tenant even if grounds (a) to (f) do not exist. If he has not obtained the permission of the District Magistrate, then he can file a suit for ejectment only on grounds (a) to (f) mentioned in S. 3.

(11) In — 'Chand Shankar v. Sukh Lal', AIR 1951 All 383 (B) a learned single Judge of this Court held that the words "on any of the grounds mentioned in S. 3" mean and are confined to grounds (a) to (f) of S. 3. This interpretation, however, leads to this absurdity, and we say that with great respect, that while S. 3 allows a landlord to file a suit for ejectment, in a case where grounds (a) to (f) do not exist, if he has obtained the permission of the District Magistrate S. 15 provides that even if he has obtained the permission of the District Magistrate, no decree for ejectment shall be passed.

In other words, while in one section of the Act the landlord has been authorised to file a suit for ejectment provided he has obtained the District Magistrate's permission, in another section of the same Act there is a complete bar that in spite of such permission no decree shall be passed for ejectment. We fail to see what object there could be in allowing a suit for ejectment to be filed with the permission of the District Magistrate, if S. 15 is so interpreted as to mean that there was a complete bar against a decree for ejectment being passed.

(12) No doubt the Act was passed for the protection of the tenants as there was a great dearth of housing accommodation, and there was a possibility that the tenants would be harassed by the landlords who would try to eject them and get higher rent from others who may be in such need of accommodation that they may be compelled to submit to the terms imposed by the landlords. The legal right of a landlord to give notice for ejectment under S. 106, Transfer of Property Act and then to file a suit for ejectment of a tenant was restricted by providing in S. 3 of the Act that the landlord will have the right to file a suit for ejectment in cases coming under cls. (a) to (f) and if a case does not come under cls. (a) to (f), the Legislature left the discretion to the District Magistrate to grant permission in a proper case. This was done as it was not possible for the Legislature to foresee and provide for all possible contingencies. The District Magistrate was excepted to safeguard the interests of both landlords and tenants and grant permission to file a suit where he was satisfied that the landlord wanted to eject the tenant for some good cause.

(13) In our view, in S. 15 of the Act the words "except on one or more of the grounds mentioned in S. 3" must be interpreted to include not only grounds (a) to (f) mentioned in S. 3, but also the additional ground that the suit for ejectment had been filed with the permission of the District Magistrate. No difficulty would have arisen as regards the interpretation of this section if after cls. (a) to (f) the Legislature had added a cl. (g) to the effect that "a suit can, however, be filed for ejectment with the previous permission of the District Magistrate." The mere fact, that it was not done by a separate clause, and the provision for filing a suit with the permission of the District Magistrate occurs at the beginning of the section, should not make any difference in the interpretation of the section.

(14) It must also be remembered that Ss. 3, 14 and 15 were intended to cover all possible cases. Section 14 was confined to cases where decrees had been obtained before 1-10-1946, and the decree was put into execution for ejectment of the tenant after 1-10-1946; S. 15 was intended to cover all pending cases, that is, all suits or appeals pending at the time when the Act came into force, i.e., 1-10-1946; and S. 3 covers all suits which were to be filed after the commencement of the Act. The whole field was thus covered and there is no reason to suppose that the Legislature intended to treat the landlords and the tenants differently at the three stages under these three sections. It would be reasonable to expect that the rights and liabilities of landlords and tenants were intended to be the same under these three sections.

(15) Under S. 3 a suit for ejectment could be filed with the permission of the District Magistrate or if grounds (a) to (f) existed. Section 15 must be interpreted to mean that a decree shall not be passed unless grounds (a) to (f) existed or permission of the District Magistrate had been obtained, which is to be treated as an additional ground; and S. 14 must be interpreted in like manner.

(16) With great respect to the learned single Judge, we are not satisfied that 'Chand Shanker's case, (B)' was rightly decided. As a matter of fact, a contrary view was taken by a Division Bench of this Court in 'Raj Narain's case, (A)', which is binding on us.

(17) The appeals are, therefore, allowed, the orders passed by the learned single Judge are set aside and the orders passed by the lower appellate Court are restored.

(18) Learned Counsel for the appellants does not ask for costs and we, therefore, do not pass any order as to costs in these appeals.

B/R.G.D. Appeals allowed.

A. I. R. 1954 ALL. 113 (Vol. 41, C. N. 67)

AGARWALA AND CHATURVEDI JJ.

G. D. Gandhi and another, Appellants v. Sri Jyoti Bhusan Gupta and others, Respondents.

F. A. F. O. Nos. 243 and 250 of 1952, D/- 9-12-1952, against order of 1st Class Addl. Civil J., Banaras, D/- 18-9-1952.

(a) Civil P. C. (1908), S. 151 — Court has inherent powers to make such order as it considers just — To protect interest of plaintiff during pendency of suit, court has jurisdiction to make order directing defendant to furnish security and submit accounts in suit which is essentially for possession and not for damages. (Civil P. C. (1908), O. 39 Rr. 1 and 2). (Para 6)

Anno: Civil P. C., S. 151 N. 4; O. 39 R. 1 N. 3.

(b) Civil P. C. (1908), S. 151 and O. 39 Rr. 1 and 2 — Order directing defendant to furnish security, passed under inherent powers — No appeal lies. 17 Ind Cas 361 (Cal), Relied on. (Para 7)

Anno: C. P. C., S. 151 N. 4, 9; O. 39 R. 1 N. 3, 20.

(c) Civil P. C. (1908), Ss. 94 (e) and 151 — Interlocutory order under S. 94(e) can be made only if it is so prescribed by the rules — This does not prevent Court from making order under inherent powers. (Para 7)

Anno: Civil P. C., S. 94 N. 7; S. 151 N. 4.

Harnandan Prasad, for Appellants; P. C. Chaturvedi and Yashoda Nandan, for Respondents.

CASE REFERRED TO:

(A) ('12) 17 Ind Cas 361: 17 Cal WN 318 (Pr 7)

AGARWALA J.:

These are two connected appeals from an order passed by the learned Civil Judge of Banares, rejecting an application for the issue of an injunction but at the same time directing the defendants to furnish security and to submit accounts. The facts, briefly stated, are as follows:

(2) The dispute in the case relates to a cinema hall, called the "Prahlad Ka Theatre Hall" at Banares, hereinafter referred to as the Hall. It was owned by a joint Hindu family consisting of Seth Sagarmal and his sons, Sri Nand Kishore and Sri Bhagwati Prasad. These three persons were arrayed as defendants 2, 3 and 4 in the court below. They carry on joint Hindu family business in the name and style of Messrs. Sagarmal Brij Mohan Das. This firm was also impleaded as defendant 1. The plaintiff, Sri Joti Bhushan Gupta, was a tenant of the Hall for the purpose of carrying on business of showing films, etc.

(3) In 1949, there was a litigation between the plaintiff and the proprietors of the Hall, namely, defendants 1 to 4 hereafter referred to as proprietors. Two suits were filed — one was filed by Sri Joti Bhushan Gupta for fixation of rent and the other was filed by the proprietors for arrears of rent and for ejectment of Joti Bhushan Gupta from the Hall. On 4-4-1950 the suits were compromised and Joti Bhushan Gupta was allowed by the terms of the compromise to remain in possession of the Hall as a tenant for three years certain with power of renewal of the lease for another period of two years. There was also a clause that if the proprietors bona fide sold the Hall to a third person, Joti Bhushan Gupta would vacate the premises on receiving three months' notice. Joti Bhushan Gupta continued in possession of the Hall.

New rules for running cinema business, however, came into force requiring certain specific alterations and renovations in the Hall. As the proprietors did not make the required alterations and renovations the parties came to an agreement that, if the proprietors sold the premises within one month, the tenancy of the plaintiff would be deemed to have ceased with effect from 1-2-1952, but that if no sale was made within the stipulated period, the agreement would be deemed to be null and void and the tenancy would be deemed to be continuing, as if it had never come to an end. This agreement was recorded in two documents both dated 13-3-1952. In one of the documents it was stated that the Hall was being vacated and its possession was handed over to the proprietors on 1-2-1952 and that no rent would be accruing after that date. In the other document, which was in the form of a letter from the proprietors to Joti Bhushan Gupta, it was stated that the first document had been signed with a view to help the proprietors in selling the cinema building and that it would become absolute only if the proprietors were successful in selling it within one month of the agreement. It was further stated that, in the absence of such sale, the proprietors agreed that the tenancy of the plaintiff would continue without a break on the same terms and conditions as before, and that the rent would not be charged for the period for which the cinema remained closed after 1-2-1952. It was alleged by the plaintiff that the proprietors did not intend to sell the premises at all but got the two documents from him under a pretext in order to run the Hall as a cinema in their own name and for their own benefit, and that on learning of the true intention of the proprietors, the plaintiff applied to the District Magistrate on 14-8-1952 for revival of the licence to run the cinema in his name.

On 16-8-1952 an application was made by Bhagwati Prasad, defendant 3 one of the proprietors, to the District Magistrate for the licence to be issued in his name. Before any licence could be issued the plaintiff filed the suit which has given rise to the present appeals, impleading the proprietors as defendants 1 to 4 in the suit, praying that by means of a permanent injunction the defendants be restrained from interfering with the possession of the plaintiff over the Theatre Hall and from executing any document for the transfer of the Hall to some other person, or in the alternative if the plaintiff be not deemed to be in possession of the Hall, to pass a decree for possession in his favour. On the same date he made an application for the issue of an injunction prohibiting the defendants from making any sale to a third person and also prohibiting them from obtaining a licence for running the cinema. It was alleged in the plaint, that as the sale was not made by the defendants within the period of one month stipulated in the agreement of 13-3-1952, the agreement had become null and void and the plaintiff remained in possession as a tenant in the eye of law.

(4) The court passed an interim order, but the proprietors are alleged to have made a sale of the property in favour of the Western States Trading Company Ltd., on 5th or 6th of September 1952. The plaintiff impleaded the Western States Trading Company Ltd. also as defendant 5 and prayed for an injunction against them not to lease the Hall to third persons. The court granted an interim injunction to that effect, but before it could be served defendant 5 is alleged to have leased out the Hall to Messrs. G. D. Gandhi and S. D. Gandhi on 8-9-1952. The plaintiff then

impleaded the two Gandhis as defendants 6 and 7 and asked for an injunction against them not to obtain a licence for the Cinema for exhibition of pictures. The court issued an interim injunction but ultimately passed the final order under appeal.

Recalling its temporary injunction and directing the defendants to furnish security in the sum of Rs. 25,000/- within two weeks and to submit a statement of accounts for the first six months from the date when the Hall was actually used for the exhibition of pictures, showing the nett income. The court reserved to itself the liberty of varying the amount of security on looking into the accounts. It also directed that the accounts were to be submitted monthly. It is against this order that the above two appeals have been filed in this Court — one by the plaintiff against the order withdrawing the interim injunction and refusing his application for the issue of an injunction and the other by defendants 6 and 7, the alleged lessees of the Hall, challenging the direction in the order requiring them to furnish security and to submit accounts. While the appeals were pending in this Court two interim orders were made — (1) staying the operation of the order directing the defendants to furnish security and to submit accounts and (2) restraining the defendants from taking out a licence for the running of a cinema.

(5) In the appeal filed by the two Gandhis, defendants 6 and 7, it has been urged that the Court below had no jurisdiction to make an order directing the defendants to furnish security and to submit accounts. It was urged that the suit was essentially for possession of the building and not for damages and that in such a case the court could not ask the defendants to render an account of the income which he might earn by using the property. It was pointed out that no relief for mesne profits was claimed by the plaintiff. We do not think that this contention has any force.

(6) The plaintiff alleged that there has been a breach of the terms of the agreement of 13-3-1952 and that no sale had been effected within the period stipulated in that agreement and, as such, his tenancy continued. He, therefore, claimed the right to hold possession of the Hall and further claimed that he was in the eye of law to be deemed to be in possession according to the terms of the agreement. As by the date on which the suit was instituted, namely, 4-9-1952, neither the sale had been made nor the lease had been executed in favour of the defendants, there was no question of his claiming any damages. By way of protecting his interests during the pendency of the suit he prayed for an injunction restraining the defendants from transferring the property or using it in a way which would be detrimental to his interests. The Hall was intended to be used as a cinema. Using it as such required a licence. If a third person were to get a licence the plaintiff's interest would be jeopardised even if he got possession over the Hall, because he not being a licensee for running the cinema would not be able to make any use of the Hall. It was to protect this interest of his that he made the application for the issue of an injunction. If the Court finds that the issue of an injunction would unnecessarily hamper the utility of the Hall to the defendants or might injure the interest of both the parties, it has jurisdiction, in the ends of justice, to make an order securing the interests of the plaintiff in some other way. The Court has inherent power to make such orders as it considers just. The order requiring security and accounts to be furnished was calculated to protect the interests of the plaintiff during the pendency of the litigation and, as such, the court had jurisdiction to make it.

(7) It was urged on behalf of the plaintiff that no appeal lies against the order demanding security and directing accounts to be furnished because such an order was passed under the inherent powers of the Court under S. 151, Civil P. C., and not under O. 39, R. 1 or R. 2, Civil P. C. As there is no force in the Gandhi's appeal on the merits, it is not necessary to go into this question at any length. Suffice it to say that we agree with the contention. In this connection reference may be made to the decision of the Calcutta High Court in — 'Sito Mahton v. F. F. Christien', 17 Ind Cas 361 (Cal) (A). The facts of that case were similar to the facts of the present case, and it was held that such an order did not fall under R. 1 or R. 2 of O. 39 and that no appeal lay therefrom. We respectfully agree with this decision. It was also held in that case that the order in question could be passed under cl. (e) of S. 94, Civil P. C. No doubt S. 94 including cl. (e) thereof empowers the Court to make such other interlocutory orders as may appear to the Court to be just and convenient but this power is circumscribed by what has been stated in the governing clause of the section which reads:

> "In order to prevent the ends of justice from being defeated, the court may, 'if it is so prescribed'."

The power to make such other interlocutory orders mentioned in cl. (e) can only be exercised if it is so prescribed by the rules. If there is nothing in O. 39, R. 1, or in any other provision of the rules, the power conferred on the Court under cl. (e) could not be exercised at all. This, however, does not prevent the court from exercising its inherent jurisdiction which is referred to in S. 151, Civil P. C., as already stated.

(8) The result, therefore, is that so far as the appeal of defendants 6 and 7 is concerned, it fails and we dismiss it with costs.

(9) In the appeal filed by the plaintiff it was contended that the lower Court erred in not issuing an injunction restraining the defendants from taking out a licence and using the Hall as a cinema hall to the detriment of the interests of the plaintiff. It has already been noted that no party has yet been able to obtain a licence. If the plaintiff's prayer that the defendants be restrained from obtaining a licence were to be granted, the result would be that the Hall would remain vacant and everybody concerned would suffer. The court below was, therefore, right in refusing to issue an injunction. At the same time, in our opinion, the circumstances of the case demanded that in order to protect the interests of the plaintiff, a receiver should have been appointed who might obtain the licence and run the cinema hall for the benefit of the person ultimately entitled to the possession of the Hall. The plaintiff is obviously not in possession and the defendants are in possession. The proper order that should have been passed by the court below was to appoint defendants 6 and 7, who allege to be lessees of the premises, as joint receivers to obtain licence to run the cinema and, as such, to render accounts to the court. Such a course would not have interfered with the use of the Hall as a cinema by the defendants and would have amply protected the interests of the plaintiff

(10) We, therefore, in modification of the order passed by the Court below appoint defendants 6 and 7 as receivers of the Hall for the purpose of carrying on a cinema business therein. They may obtain a licence for that purpose which will enure for the benefit of the party who will succeed in the suit. The directions issued by the court below regarding the furnishing of security by them and submitting of accounts shall stand.

(11) Two weeks' period laid down by the court below for furnishing security has expired and they shall now furnish security within a period of two months. In case of their failure to furnish security or to submit accounts as directed by the court below, the plaintiff shall act as a receiver and in that case the licence for running the cinema show will be obtained by him and he will furnish security to the same extent, that is to say, in the amount of Rs. 25,000/- and submit account in the same terms as the defendants have been directed.

(12) In case the plaintiff takes the place of defendant as receiver he shall deposit in court the amount of profit every month that accrues out of the cinema business. In any case, whether the defendants 6 and 7 are receivers or the plaintiff is the receiver a sum of Rs. 1100/- will be paid to the credit of defendant 5 who may withdraw it with the consent of defendants 1 to 4 as rent which the plaintiff was admittedly bound to pay for the premises. This order does not affect the liability of defendants 6 and 7 to pay such amount of rent to defendant 5 as he may have agreed to pay to it.

(13) Hearing of the suit in the court below shall be expedited.

(14) Our order has been passed to operate during the pendency of the suit in the court below. After the decision of the suit it will be open to the parties to apply afresh for such orders as they be advised.

C/R.G.D. Order accordingly.

A. I. R. 1954 ALL. 115 (Vol. 41, C. N. 68)
(LUCKNOW BENCH)
V. BHARGAVA J.

Rameshwar Prasad and others, Defendants-Appellants v. Satya Narain, Plaintiff and others, Defendants-Respondents.

Second Appeal No. 557 of 1946, D/- 5-12-1952, against decree of Dist. J., Unao, D/- 5-8-1946.

(a) Civil P. C. (1908), O. 41 R. 33 — Partition suit — Preliminary decree — Appeal by defendant — Some defendants respondents discharged as not served within time — Question in appeal being share to which plaintiff was entitled — No question between defendants 'inter se' — Appeal held was competent even in absence of discharged respondents. (Para 2)

Anno: C. P. C., O. 41 R. 33 N. 6.

(b) Civil P. C. (1908), S. 11 — Matter not in issue — (Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 11).

Where in a suit for partition the finding was that the plaintiff was entitled to a 6 annas share, but in the Encumbered Estates Act proceedings the 10 annas share shown by the plaintiff in his written statement was determined, in the absence of any objection by the defendant, to be liable to attachment, sale or mortgage in the debts of the plaintiff:

Held that it was open to the Court to hold that the plaintiff's share was only 6 annas and not 10 annas. AIR 1952 All 227, (FB), Applied. (Para 3)

Anno. C. P. C., S. 11 N. 12, Pt. 1

R. N. Shukla, for Appellants; N. Banerji, for Respondent No. 1.

CASE REFERRED TO:

(A) ('52) AIR 1952 All 227: 1952 All LJ 156 (FB) (Pr 3)

JUDGMENT: This second appeal arises out of a suit for partition. The plaintiff respondent claimed a 10 annas share in the property in suit. The defendants appellants contended that the share of the plaintiff was 6 annas only. The trial Court held that on merits the evidence justified the finding that actually the share of the plaintiff was only 6 annas and not 10 annas. In the lower appellate Court, this finding of the trial Court was not challenged by the plaintiff in support of the decree which had been passed by the trial Court in his favour holding that his share was 10 annas. On facts, therefore, there is a concurrent finding by the two lower Courts that the plaintiff's share is actually six annas only.

Both the lower Courts, however, held that the defendants were not entitled to challenge the claim of the plaintiff for the 10 annas share on account of a decision by the Special Judge in proceedings under the Encumbered Estates Act. It appears that the plaintiff had applied under S. 4, Encumbered Estates Act on 27-10-1936, and in his written statement under S. 8 he showed a 10 annas share in this property. The whole 10 annas share was published in the notification under S. 11 and no objection under S. 11 was filed by the defendants within the time allowed. The objection was filed beyond time and was ultimately rejected on the ground of its being time barred.

Consequently the 10 annas share shown by the plaintiff in his written statement under S. 8 and notified under S. 11 was determined by the Special Judge to be liable to attachment, sale or mortgage in the debts of the plaintiff who was the landlord applicant. The plea was that this determination by the Special Judge operated as 'res judicata' or in any case barred any plea from the defendants that the share of the plaintiff was 6 annas and not 10 annas.

(2) When this appeal came up for hearing a preliminary question arose as to whether this appeal was competent and could be heard by this Court when two persons who were parties in the lower Courts were not served and were exempted from the appeal. These two persons were Jagannath Singh and Dr. Shyam Manohar, who were originally impleaded as respondents 2 and 3 in the memorandum of appeal. At one stage due to non-service on them, the Court called upon the defendants appellants to have service effected on these two respondents by publication and to take steps for that purpose within ten days. This order was passed on 20-3-1952. The order also directed that, in case steps were not taken within ten days, these two respondents would be discharged.

No steps were taken within the ten days allowed and, consequently, under the orders of the Deputy Registrar dated 7-4-1952, these two respondents were discharged. The Deputy Registrar merely carried out the order of the Court which had directed the discharge of the respondents on default occurring in taking steps within the time allowed. The question thus was whether in the absence of these two respondents the appeal was still competent. It has to be noticed that the defendants appellants in this appeal only

challenge the preliminary decree under which the share of the plaintiff respondent has been declared to be 10 annas in the property in suit and desire that that share should be determined to be 6 annas.

If this appeal is allowed, the order passed by this Court will benefit all persons who were defendants in the suit and against whom partition was sought. In the suit, there was no question of determination of the shares of the defendants, 'inter se, in the property left after separating the plaintiff's share. If the share of the plaintiff is reduced from 10 annas to 6 annas, a 10 annas share instead of a 6 annas share will remain out of which all the defendants would get their shares and such a decree would, therefore, enure to the benefit of defendants Jagannath Singh and Dr. Shyam Manohar also. It can in no way prejudicially affect their rights in the property in suit.

Consequently, under O. 41, R. 33, Civil P. C., it is open to this Court to vary the decree in this appeal even in the absence of Jagannath Singh and Dr. Shyam Manohar in the manner asked for in this appeal. If the appeal succeeds on merits, the absence of Jagannath Singh and Dr. Shyam Manohar from the array of parties in the appeal will be immaterial and the appeal can be allowed so as to enure to their benefit also. This preliminary objection therefore fails.

(3) On merits, the only question that has to be examined is whether, as a result of the proceedings under the Encumbered Estates Act, it must be held that the plaintiff's share in the property in suit is 10 annas and not 6 annas though on the evidence on the record, the finding of fact is that the actual share of the plaintiff was only 6 annas and not 10 annas. I cannot see how, if the share of the plaintiff in the property was only 6 annas, he can claim that he has acquired title to a further 4 annas as a result of the Encumbered Estates Act proceedings. The plaintiff came to Court claiming a share of 10 annas and asking for separate possession over that share by partition, and the burden was on the plaintiff to prove that he was owner of this 10 annas share.

The findings of the lower Courts, as I have said earlier, are that the plaintiff's share was only 6 annas. The mere fact that, in the Encumbered Estates Act proceedings, the claim of the plaintiff that a 10 annas share was liable to attachment, sale or mortgage in his debts cannot convey to him title to a further 4 annas share in the property which did not actually belong to him. Under S. 11, Encumbered Estates Act, the Special Judge is not required to determine the rights of ownership in the property involved in the proceedings. All he is required to determine is whether that property is liable to attachment, sale or mortgage in the debts of the landlord applicant. That determination may not be open to challenge and, if the property is actually attached and sold, the proceedings of attachment and sale may also not be open to challenge by the real owner but the mere determination by the Special Judge that property is liable to attachment, sale or mortgage cannot extinguish the ownership of the real owner and convey it to the applicant. This principle was clearly enunciated by a Full Bench of this Court of which I was a member in — 'Krishna Pal Singh v. Mt. Babban', AIR 1952 All 227 (A). The principle laid down by the Full Bench is fully applicable to the present case and consequently it must be held that, even though no objection had been taken by the defendants appellants in the proceedings under the Encumbered Estates Act, it is open to the Court in this case to hold that the plaintiff's share is only 6 annas and not 10 annas. On facts, the share having been found to be 6 annas, the preliminary decree should have granted only this share to the plaintiff. The appeal is consequently allowed with costs in all the Courts and the preliminary decree is varied inasmuch as the share of the plaintiff shall be 6 annas and not 10 annas in the property in suit.

B/V.R.B. Appeal allowed.

A. I. R. 1954 ALL. 116 (Vol. 41, C. N. 69)

HARISH CHANDRA J.

Ganesh Prasad, Convict Applicant v. State of Uttar Pradesh.

Criminal Revn. No. 1342 of 1952, D/- 9-9-1953, against order of Addl. Sessions J., Kanpur, D/- 30-7-1952.

Constitution of India, Art. 20(2) — Fresh prosecution — Retrial after setting aside conviction in appeal — It is not fresh prosecution on same facts — (Criminal P. C. (1898), S. 403).

A retrial cannot be regarded as fresh prosecution within the meaning of Art. 20 (2). Where a person has been prosecuted and convicted but the appellate court finding the conviction illegal inasmuch as the charge had been improperly framed, sets aside the conviction, and orders a retrial, the retrial is not a fresh trial but continuance of the same prosecution.

Moreover, the prohibition is against a person being prosecuted and sentenced for the same offence more than once. Where the sentence once passed has been set aside, Art. 20(2) can be no bar to a retrial for the same offence. (Para 2)

Anno: Cr. P. C. S. 403 N. 7.

Bishnu Chandra Saxena, for Applicant; H. L. Kapoor, for the State.

ORDER : The only point raised in this revision is that the order of the court below directing a retrial of the applicant is illegal, inasmuch as it is against the provisions of Art. 20(2), Constitution of India.

Article 20(2) provides that no person shall be prosecuted and punished for the same offence more than once. In this case, the applicant was prosecuted and convicted by a Magistrate of the First Class under S. 409, Penal Code, and sentenced to eighteen months' rigorous imprisonment. He appealed. The learned Sessions Judge found that the trial was illegal, inasmuch as the applicant had been charged with having committed offences during a period exceeding one year. He accordingly set aside the conviction and sentence and remanded the case to the Magistrate for retrial after reframing the charge in the light of the observations contained in the judgment. It is contended that the procedure involves a prosecution of the applicant more than once.

(2) In my view, the retrial of the applicant cannot be regarded as a fresh prosecution. He was prosecuted before the Magistrate and convicted and sentenced. The appellate court found that the conviction was illegal, inasmuch as the charge had been improperly framed and has directed, after setting aside that conviction and sentence, a retrial of the applicant. It is a continuance of the same prosecution.

Moreover, the prohibition is against a person being 'prosecuted and sentenced' for the same offence more than once. In this case the sent-

ence once passed has been set aside and the said Article of the Constitution can be no bar to a retrial of the applicant for the same offence. In my view the order passed by the court below does not err against the provisions of Art. 20(2) of the Constitution and the contention has no force.

The application is accordingly rejected. The applicant is on bail. The applicant will remain on the bail which has already been granted to him pending completion of the proceedings in the Court below. The order staying further proceedings is discharged. The record will be returned forthwith to the court below.

B/R.G.D. Application rejected.

A. I. R. 1954 ALL. 117 (Vol. 41, C. N. 70)
(LUCKNOW BENCH)

AGRAWALA AND RANDHIR SINGH JJ.

Roop Kishore Tandon and others, Appellants v. Braj Kishore Tandon and others, Respondents.

First Appeals Nos. 101 & 102 of 1946, D/- 14-8-1953, against decree of Civil Judge, Sitapur, D/- 23-5-1946.

(a) Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 2 — Person holding vested remainder in property.

The word 'pays' in S. 2 shows that the liability for payment must be 'in praesenti'. Therefore, a person who holds a vested remainder in the property and who has not yet come in possession of the property cannot be said to be an agriculturist under the Act. (Para 8)

(b) Hindu Law — Joint family — Presumption — Tenancy — (Evidence Act (1872), S. 114).

In the case of a tenancy standing in the name of one of the members of a joint Hindu family, the presumption is that the person in whose name the tenancy stands is the person who is liable to pay rent to the landlord:

Held that the plaintiff did not establish a joint family tenancy. (Para 9)

Anno: Evidence Act, S. 114 N. 20.

J. S. Trivedi and G. N. Mehrotra, for Appellants; M. K. Seth holding brief of K. N. Tandon, for Respondents.

JUDGMENT: These two appeals arise out of two suits but the same question is involved in both of them and they may, therefore be disposed of by this judgment.

(2) Appeal No. 101 of 1946 arises out of a suit under S. 33, Agriculturists' Relief Act for accounting under a mortgage deed dated 9-7-1928, executed by Shrimati Ram Piari defendant-respondent 4 and her four sons, Onkar Nath, Brij Kishore, Shiam Kishore, defendants-respondents 1 to 3 and the plaintiff-appellant, Rup Kishore. The mortgagee was Sukhan Lal, defendant-respondent 5 who transferred his mortgagee rights to Brij Kishore one of the mortgagors, arrayed as defendent-respondent No. 1. The plaintiff's case was that he was an agriculturist both at the date of the suit as well as at the date of the loan & therefore, he was entitled to sue for accounts under the Agriculturists' Relief Act.

(3) The defence was that the plaintiff was not an agriculturist on the date of the loan.

(4) Appeal No. 102 arises out of a similar suit for accounts under S. 33, Agriculturists' Relief Act in respect of two mortgage deeds one dated 9-7-1928 and the other dated 20-1-1928, executed by the same mortgagors, namely, Ram Piari, Onkar Nath, Brij Kishore, Shyam Kishore and Rup Kishore in favour of Shrimati Shyamo Bibi, wife of Onkar Nath one of the mortgagors. Shrimati Shyamo Bibi having died, her rights have devolved upon her husband, Onkar Nath, defendant-respondent 1. The same question whether the plaintiff Rup Kishore was an agriculturist on the date of the loan arises in this appeal as well.

(5) The Court below accepted the defence contention and dismissed the suits.

(6) The only point involved in these appeals is whether the plaintiff was an agriculturist at the date of the loans. The plaintiff-appellant relied upon three facts to establish that he was an agriculturist on the date of the loan. Firstly, that he held a vested remainder in certain property along with his mother, Ram Piari, who held a life estate under the will of Seth Jai Dayal, father of Ram Piari. Secondly, that he was a co-tenant in the tenancy holding which stood in the name of Onkar Nath, defendant-respondent. Thirdly that under the mortgages in suit he should be deemed to be merely a surety and not the original mortgagor. It was contended on his behalf that as he was an agriculturist at the date of the suit he had a right to sue under S. 33, Agriculturists' Relief Act as admittedly Ram Piari the principal debtor was an agriculturist on the date of the loan.

(7) It appears that Seth Jai Dayal executed a will in favour of Ram Piari and her four sons on 18-6-1920. By this will he gave a life estate to Ram Piari and directed that Onkar Nath, Brij Kishore, Shyam Kishore and Rup Kishore would succeed to the estate after her death. The four sons of Ram Piari, therefore, obtained a vested remainder in the property while Ram Piari received only a life estate. Seth Jai Dayal died in 1922. Ram Piari relinquished four-fifths of the share in favour of her sons by two deeds of relinquishment, one dated 29-7-1930 and the other dated 27-11-1942. By these deeds of relinquishment the four sons including the plaintiff-appellant, became the owners 'in praesenti' of four-fifths of the property and were no doubt agriculturists since 1930 but the mortgages having been executed in the year 1928 the deeds of relinquishment could not make them agriculturists retrospectively. For the purposes of determining whether they were agriculturists on the date of the loan, the relinquishment deeds cannot be taken into consideration.

(8) An agriculturist is defined in S. 2 of the Act as a person who pays land revenue, local rate or rent. The word 'pays' shows that the liability for payment must be 'in praesenti'. The estate was in the possession of Ram Piari at the date of the loans. She was alone liable to pay revenue, local rate or rent. It could not be said that her sons who hold a vested remainder and would have come into possession of the property on her death also paid any land revenue, local rate or rent. In our opinion a person who holds a vested remainder in the property and who has not yet come in possession of the property cannot be said to be an agriculturist under the Agriculturists' Relief Act. The plaintiff was, therefore, not an agriculturist on the date of the loans.

(9) The evidence with regard to the tenancy holding which stood in the name of Onkar Nath in the year 1923 to show that it was a joint family

holding is contradictory. While the plaintiff alleges that the holding standing in the name of Onkar Nath was held by him on behalf of all the members of the family, because all were members of a joint Hindu family, Brij Kishore has sworn that it was not a joint family tenancy. In the case of a tenancy standing in the name of one of the members of a joint Hindu family, the presumption is that the person in whose name the tenancy stands is the person who is liable to pay rent to the landlord. Assuming that it can be proved that the tenancy is a joint family tenancy we do not think that the plaintiff has succeeded in establishing this in the present case. We, therefore, agree with the Court below that the plaintiff was not an agriculturist on the date of the loan by virtue of the tenancy which stood in the name of Onkar Nath.

(10) As regards the plaintiff's allegation that he was merely a surety in the transactions relating to the three mortgages, we may state that in the mortgage deeds executed by Ram Piari and her sons including the plaintiff, there is no indication whatsoever that the sons of Ram Piari were merely her sureties. The mortgagees may not have advanced any loan to Ram Piari alone having regard to the fact that she was merely a lifeholder. They accordingly advanced the loan not to Ram Piari alone but also to the sons who together represented the entire estate. There is, therefore, no reason to think that the plaintiff and his brothers were merely sureties. This being so, the third ground on which the plaintiff claims that he is entitled to sue also fails.

(11) There is no force in these appeals. They are dismissed with costs.

B/H.G.P. Appeals dismissed.

A. I. R. 1954 ALL. 118 (Vol. 41, C. N. 71)

MOOTHAM AND SAPRU JJ.

Bhakat Shiromani, Applicant v. The Rent Control and Eviction Officer and another, Opposite Party.

Civil Misc. Writ No. 548 of 1953, D/- 15-9-1953.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 2 — Control and Eviction Rules — Rule 7 — Portion of premises occupied by owner — Allotment of unoccupied portion — Owner must be consulted before making allotment — Allotment without consulting owner is bad. **(Para 3)**

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 2 — Control of Rent and Eviction Rules, Rule 7 — Accommodation falling vacant, whether is part of a accommodation occupied by owner or separate independant accommodation, depends on facts of case — One house divided into two parts and numbered separately in municipality — Portion of one part and whole of the other part occupied by owner — Allotment of unoccupied portion — Rule 7 held applied. **(Para 5)**

S. K. Agarwal, for Applicant; A. Banerji, for Opposite Party.

MOOTHAM J.:

This is a petition under Art. 226 of the Constitution by a landlord who seeks to have quashed an allotment order made under the U. P. Control of Rent and Eviction Act in favour of respondent 2. Respondent 1 is the Rent Control and Eviction Officer, Allahabad.

(2) The petitioner is the owner of a building in Motilal Nehru Road, Allahabad, which has been sub-divided into two parts known as 11A and 11B. It is a two storyed building and the petitioner occupies the whole of 11A and the first floor of 11B. The premises which are the subject of the allotment order are the ground floor of 11B. The case for the petitioner is that he was not consulted before the allotment order in favour of respondent 2 was made as is required by R. 7 of the Control of Rent and Eviction Rules.

(3) The allotment order, which has not been produced, was made on 24-3-1953. The petitioner had, prior to this date, written several letters to the Rent Control Officer asking that the disputed accommodation be allotted to him, but on 21-3-1953, that is three days before the allotment order was made, he wrote a further letter to the Rent Control Officer saying that he had no objection if the premises were allotted to one Sjt. Kr. Trilochan Pandit Singh Ji.

The learned Standing Counsel, who appears for the Rent Control and Eviction Officer, has argued that as at the time of making the allotment order respondent 1 had before him this letter of the petitioner dated the 21st March, he was aware of the wishes of the petitioner and that there was, therefore, a sufficient compliance with the provisions of R. 7, we do not think this contention can be upheld.

In the first place it is clear from the counter-affidavit filed on behalf of respondent 1 that all that the latter took into account at the time of making the order of allotment were the relative needs of the petitioner and respondent 2. In the second place R. 7 provides that where a portion of an accommodation falls vacant and the owner is in occupation of another portion, the Rent Control Officer must before making an allotment order,

> "consult the owner and shall, so far as possible make the allotment in accordance with the wishes of the owner."

In our opinion the purpose of this rule is to avoid, as far as possible, the friction and difficulties which may arise in those cases in which an owner has, in effect, to share his house with a tenant of whom for some reason he may disapprove; and that when the rule provides that the Rent Control Officer shall "consult the owner" it means that the owner has to be consulted as to the suitability of the proposed tenant. It is clear in this case that this was not done.

(4) Sri P. C. Chaturvedi, who appears for respondent 2, has advanced another argument. He has contended that the petitioner was not in fact in occupation of accommodation another portion of which has been allotted to respondent 2. He says that premises 11A and 11B constitute separate "accommodation" and that consequently R. 7 has no application. He has laid stress on the fact, which is not in dispute, that premises 11A and 11B are separately assessed by the Municipality and this he says is conclusive as regards the separateness of the accommodation. He has also invited our attention to the definition of the term 'accommodation' in S. 2 of the Act. In our opinion it is not possible to lay down any general test by which it can be determined whether the accommodation which has fallen vacant is part of the accommodation occupied by the owner. We think each case must depend upon its own facts.

(5) In the present case some confusion has been caused by the inaccurate use of the phrase 'build-

ing No. 11B'. It is clear that 11B is not a separate building but is part of one building which has been sub-divided into two parts. We are also satisfied on the evidence that it is not the whole of the part 11B which has been allotted to respondent 2, but only a portion of that part, namely, the ground floor, and that the first floor is in the occupation of the petitioner. We are, therefore, satisfied that the facts are such as make applicable the provisions of R. 7.

(6) We hold, therefore, that the petitioner ought to have been consulted before the allotment order in favour of respondent 2 was made and that he was not consulted. The petition therefore succeeds, and we quash the order of allotment in favour of respondent 2 dated 24-3-1953, and direct that the Rent Control and Eviction Officer make a fresh allotment of the premises in dispute after complying with the Act and the Rules made thereunder.

(7) The petitioner is entitled to his costs.

C/R.G.D. Petition allowed.

A. I. R. 1954 ALL. 119 (Vol. 41, C. N. 72)

MALIK C. J. AND CHATURVEDI J.

Wasiq Ali Khan, Appellant v. Nand Kishore and others, Respondents.

Ex. Second Appeal No. 1621 of 1944, D/- 26-8-1953, against order of Dist. Judge, Aligarh, D/- 6-4-1944.

Civil P. C. (1908), S. 144 — Redemption decree — Plaintiff depositing redemption amount — Defendant not withdrawing same but appealing — Appeal allowed — Application under S. 144 by defendant for possession and mesne profits for period of dispossession — Interest on deposit held should be deducted from mesne profits.

A suit for redemption was decreed on the plaintiff-mortgagors paying within time fixed, a sum of Rs. 6221/-. The mortgagors deposited the amount under O. 34, R. 7 in Court. The money, however, remained in deposit in the Court as the defendants did not choose to withdraw it. The defendants filed an appeal, which was allowed. It was held that the mortgage had become time-barred on the date of the suit and the plaintiff could not, therefore, get a decree for redemption. Thereafter the defendants applied under S. 144 for restoration of possession and also claimed mesne profits for the period during which they had been out of possession. The plaintiff raised various pleas. One of the pleas raised by the plaintiff was that they were not entitled to any mesne profits as during the period that they were out of possession, the sum of Rs. 6221/- had remained deposited in Court and they could have easily withdrawn that amount:

Held that the mesne profits have to be worked out according to the principle of justice, equity and good conscience, there being no other guide for the purpose. In working out the figures, the loss suffered by the defendants could have been mitigated by them to some extent if they had withdrawn the amount which had been deposited and by reason of which deposit they had been deprived of possession of the property. The withdrawal of the amount would not have prejudiced the defendants' case. In the circumstances they voluntarily suffered part of the damage by allowing the money to remain in deposit in Court when they could have easily withdrawn the amount. In calculating mesne profits, therefore, the Courts could take that fact into consideration and allow them only such damage as they did not suffer voluntarily. Hence interest at the rate of 6 per cent., the rate at which the interest has been allowed the defendants from the plaintiff, should be allowed on the sum of Rs. 6221/- from the date of dispossession to the date of restitution of possession of the property to the defendants, to be deducted from the mesne profits awarded to the defendants. (Para 3)

Anno: Civil P. C., S. 144 N. 22.

J. Swarup, for Appellant; A. P. Gupta, for Respondents.

CASES REFERRED TO: Paras

(A) ('29) AIR 1929 Pat 593: 126 Ind Cas 383 2
(B) ('42) AIR 1942 Mad 166: 201 Ind Cas 202 2
(C) ('25) AIR 1925 Rang 215: 3 Rang 251 2

MALIK C. J.:

The facts of this case are very simple, but it raises a point of law of some interest, as there are no clear decisions on the point.

The plaintiff-appellant is the mortgagor who filed a suit for redemption of a mortgage with possession. That suit was decreed on 24-7-1934 on payment of Rs. 6221/-. A decree under Order 34, R. 7 for redemption of the mortgage was passed and the decree-holder was given six months' time to pay the amount. The decree-holder mortgagor thereupon deposited Rs. 6221/- and on the deposit being made in accordance with the provisions of Order 34, Rule 7, a final decree for redemption was passed and the plaintiff-decree-holder was put in possession of the property.

The money, however, remained in deposit in the Court as the defendants did not choose to withdraw it. The defendants filed an appeal, which was allowed on 16-4-1941. It was held that the mortgage had become time-barred on the date of the suit and the plaintiff could not, therefore, get a decree for redemption. Thereafter the defendants applied under Section 144, Civil P. C. for restoration of possession and also claimed mesne profits for the period during which they had been out of possession. The plaintiff raised various pleas. One of the pleas raised by the plaintiff was that they were not entitled to any mesne profits as during the period that they were out of possession, the sum of Rs. 6221/- had remained deposited in Court and they could have easily withdrawn that amount. The lower Courts have held that the defendants were not bound to withdraw the sum of Rs. 6221/- and have allowed them mesne profits, calculating the amount on the basis of gross rental. The plaintiff was, however, allowed 10 per cent. as collection charges and was given credit for the amount paid by him as land revenue and interest on the balance of the income payable to the defendants was also charged. A sum of Rs. 1957/12/5 was found due from the plaintiff to the defendants.

(2) In this second appeal the point urged is that in allowing mesne profits, the amount which the defendants would have earned on the sum of Rs. 6221/- if they had withdrawn the amount, should be deducted. Learned counsel for the defendants, however, has urged that the defendants were not bound to withdraw the amount and as they did not withdraw it, the income that might have been

earned from that amount should not be taken into consideration in working out the mesne profits.

Several cases have been cited at the Bar, but barring certain observations in — 'Daluram v. Ramanand', AIR 1929 Pat 593 (A) the other cases are not very helpful. — 'Sitaramayya v. Venkanna', A. I. R. 1942 Mad 166 (B) is a decision of a Bench of the Madras High Court where A had obtained a decree against R for a sum of money. R appealed. A did not apply for execution but R in anticipation of such an application asked for stay of execution. The stay was granted on his furnishing security to the satisfaction of the Court in the amount of the decree. As R was not able to furnish security, he deposited the whole amount in cash which remained lying in Court. R's appeal was allowed and the suit filed by A was dismissed. Thereupon R became entitled to withdraw the money that he had deposited. He filed an application under Section 144 for restitution and claimed interest. The Court held that if the respondent had suffered any loss, the blame rested on him and he could not claim that A should be made to make up the loss. The learned Judges pointed out that A had not even applied for execution of the decree and he was not responsible either for the deposit or for the money remaining idle in Court for the period during which the appeal had remained pending.

The other case, viz., — 'Ma Tok v. Maung Mo Hnaung', A. I. R. 1925 Rang 215 (C), is also not very helpful. In that case A had obtained a decree against B. In execution of the decree B's property was sold and purchased by X. X deposited the money in Court. The sale was, however, not confirmed, with the result that X was not able to obtain possession of the property. On appeal to the Privy Council, the decree passed in A's favour was set aside, with the result that the sale fell through. The auction-purchaser then claimed that she had suffered damage as her money had remained in deposit in Court and she was entitled to be compensated and claimed interest. Nobody had the benefit of the money that she had deposited and no party was responsible for her having made the deposit. In the circumstances the learned Judges held that it will not be equitable that either party to the suit should be ordered to pay interest on the money to the auction-purchaser.

In — 'Dalu Ram v. Ramanand (A)', (ante), the decree-holder had put his decree under execution. The judgment-debtor filed an appeal and an application for stay. He got a stay on deposit of the whole of the decretal amount, which amount, however, he did not want to be paid over to the decree-holder without his furnishing sufficient security for its refund. The decree-holder was not able to furnish security, with the result that the amount remained lying in Court for some time. The appellate Court allowed the appeal and set aside the decree. When withdrawing the amount deposited, the judgment-debtor claimed that the decree-holder must pay him interest as he had suffered loss by reason of the amount having been deposited in Court. The learned Judges rejected the claim for interest for a part of the period and in considering the question as to the meaning of the words "mesne profits" and how the equities were to be worked out, the learned Judges made the following observation:

> "If he (the decree-holder) could with ordinary diligence have received the amount, there is no reason why he would not be liable to pay interest to the party who was by reason of his action deprived of the benefit of his money. In the present case our attention is drawn by the learned advocate for the appellant to the fact that the judgment-debtor had raised an objection to his withdrawal of the money. It appears that the judgment-debtor did really file an objection petition but this was dismissed on 29-3-1924. So up to that date even with ordinary diligence the decree-holder could not have withdrawn the decretal amount deposited by the judgment-debtor, but after that if he was diligent in the ordinary way, the money was certainly available to him."

They, therefore, allowed interest to the respondent from the date when the money became available to the decree-holder till its repayment.

(3) It is not necessary for us to consider in this case whether if a judgment-debtor has deposited money in Court and the decree-holder does nothing to withdraw that amount, the decree-holder thereby becomes liable to pay interest by way of damages to the judgment-debtor and to make good to the judgment-debtor any loss that he might have suffered by reason of the deposit. The position in this case is slightly different. Here the successful defendants are claiming mesne profits from the plaintiff for the period during which they had been deprived of possession of the property under the decree of the trial Court. These mesne profits have to be worked out according to the principle of justice, equity and good conscience, there being no other guide for the purpose. In working out the figures, it appears that the loss suffered by the defendants could have been mitigated by them to some extent if they had withdrawn the amount which had been deposited and by reason of which deposit they had been deprived of possession of the property. It is not shown to us that the withdrawal of the amount would have, in any manner, prejudiced the defendants' case. In the circumstances, it appears to us that they voluntarily suffered part of the damage by allowing the money to remain in deposit in Court when they could have easily withdrawn the amount. In calculating mesne profits, therefore, the Courts can take that fact into consideration and allow them only such damage as they did not suffer voluntarily. In our view, therefore, from the sum of Rs. 1957/12/5 interest at the rate of 6 per cent., the rate at which interest has been allowed the defendants from the plaintiffs, should be allowed on the sum of Rs. 6221/- from the date of dispossession to the date of restitution of possession of the property to the defendants and if the amount exceeds the sum of Rs. 1957/12/5, the defendants will not be entitled to claim any mesne profits. The defendants were dispossessed on 11-8-1935, and as the appeal was allowed by this Court on 16-4-1941, the possession of the property must have been restored to the defendants on some date after the decision of the appeal. The interest on the sum of Rs. 6221/- for this period at the rate of interest mentioned by us exceeds Rs. 1957/12/5 and therefore the defendants are not entitled to claim any amount as mesne profits.

(4) The result, therefore, is that this appeal is allowed, the order of the lower Court directing the sum of Rs. 1957/12/5 to be paid to the defendants as mesne profits is set aside. In the circumstances of the case we are not prepared to allow any costs to either party. The parties will, therefore, bear their own costs throughout.

B/R.G.D. Appeal allowed.

A. I. R. 1954 ALL. 121 (Vol. 41, C. N. 73)

MALIK C. J. AND CHATURVEDI J.

Municipal Board, Mau Nath Bhanjan, Defendant-Appellant v. Raghunath Prasad, Plaintiff-Respondent.

Second Appeals Nos. 587 and 1441 of 1945 and 2440 of 1944, D/- 26-8-1953, from order of Civil Judge, Azamgarh, D/- 18-2-1944.

(a) Municipalities — U. P. Municipalities Act (2 of 1916), S. 293 — Bye-law 8 of Mau Municipal area — Right of Municipality to charge fee for projection.

Plaintiff shop-keeper, covering up Municipal drain 6'-4" deep and 2'-4" wide before the shop, by putting few slabs, in order to enable customers to cross it, without falling into the drain — This is not projection from shop — Bye-law 8 has no application — No fee can be charged.

(Para 5)

(b) Municipalities — U. P. Municipalities Act (2 of 1916), S. 164 — Assessment wholly illegal — Jurisdiction of Civil Court is not barred — (Civil P. C. (1908), S. 9).

Section 164 does not bar the jurisdiction of the Civil Court in a case where the assessment is wholly illegal and the Board has no right to assess the tax under the provisions of the Act. AIR 1940 PC 105, Applied. (Paras 8, 9)

Quaere: Whether S. 164 apply to fees chargeable for projection. AIR 1939 All 337, Ref. (Para 10)

Anno: Civil P. C., S. 9 N. 50.

S. N. Misra, for Appellant; Baleshwari Pd., for Respondent.

CASES REFERRED TO:

(A) ('51) AIR 1951 All 867: 1951 All LJ 561 (FB) (Pr 2)
(B) ('48) AIR 1948 All 382: 1948 All LJ 338 (FB) (Pr 8)
(C) ('49) AIR 1949 All 741: 1949 All LJ 208 (Pr 8)
(D) ('40) AIR 1940 PC 105: ILR (1940) Mad 599 (PC) (Pr 9)
(E) ('39) AIR 1939 All 337: 1939 All LJ 168 (Pr 10)

MALIK C. J.:

These three second appeals can conveniently be decided by one judgment as the points raised in all the three cases are identical.

(2) The respondents in these cases are owners of certain shops in the Municipal Area of Mau. These shops were built by the side of a Municipal drain which was 2 feet 4 inches wide and 6 feet and 4 inches deep. It was dangerous for the customers coming to the shops to pass over the drain and the shop-keepers, therefore, put stone slabs on the drain to cover it up and make a passage to their shops. The appellants issued notices to the shop-keepers claiming a tax on what they called "a projection". When the appellants threatened the shop-keepers that they would realise the amount by the issue of distress warrants, the shop-keepers filed three test suits out of which these three appeals have arisen claiming an injunction against the appellants on the ground that the levy of the tax was entirely illegal and beyond the competence of the appellant Board.

The suits were dismissed by the trial Court on the ground that they were barred by S. 164, U. P. Municipalities Act. On all other points the finding was in the plaintiffs' favour. On appeals by the plaintiffs the lower appellate Court has decreed the suits and against the decrees passed by the lower appellate Court these second appeals were filed. These cases were referred to a Bench by a learned single Judge in the year 1947 but the hearing was stayed pending the decision of a Full Bench of a case in which the question of jurisdiction of the civil Courts to entertain such suits was raised. The decision of the Full Bench in — 'Municipal Board, Kanauj v. Manohar Lal', AIR 1951 All 867 (FB) (A) does not, however, deal with the question of jurisdiction of civil Courts in such matters.

(3) The learned counsel for the appellants has urged that the Municipal Board was entitled to levy the tax under Ss. 209 and 293, Municipalities Act and under bye-law No. 8 of the Mau Notified Area (now Municipal Area). Section 209 of the Act entitled a Municipal Board, subject to any rules made by the State Government, to give permission for construction of projections, and S. 293 gives the Municipal Board a right to charge fees for such projections. The lower appellate Court has held that no sanction having been obtained under S. 209, Municipalities Act to cover up the drain no fee could be levied for the same under S. 293 of the Act. It is not necessary for us to go into that question as the cases can be decided on another ground.

(4) The tax or the fee is chargeable under R. 8 of the bye-law mentioned above which is in these terms:

"Projections over public streets or drains may be permitted only on the following conditions:

(i) that the owner or occupier shall daily remove all refuse from the land over which his projection extends and keep the land clean,

(ii) that the owner shall keep any open drain over which the projection extends in good working order and free from depression in which liquid can stagnate;

(iii) that the owner or occupier shall, at any time, on demand vacate the surface of his projection for a period of not more than 6 hours to permit of municipal servants inspecting or repairing or cleaning any covered drain therein;

(iv) that the owner shall duly pay in advance the fees prescribed by the next following bye-law."

(5) The bye-law makes it clear that the fee to be charged is for 'a projection'. The learned District Judge inspected the locality and in the inspection note he has noted that

"the Municipal drain is in front of the plaintiff's shop towards the north. The plaintiff has only covered the drain by stone slabs and this covering is not in the shape of platform. The drain is 2 feet 4 inches wide and 6 feet and 4 inches deep."

The learned District Judge has held in the judgment under appeal as follows:

"What the plaintiff has done is only that he has put stone slabs on the drain simply to enable customers to come to the shop. It is not a projection in the sense in which the term is generally used."

Projection from the shop would be something which projects from the shop on to the land of the appellant. If there had been a hanging platform in the shape of an extension of the floor of the shop to give a greater floor area, it might have been a projection. In these cases all that the plaintiffs have done is to put a few stone slabs

to cover the drain so that their customers may not have to jump across it and run the risk of falling into the drain. It cannot be said that the stones covering the drain are a projection of the plaintiffs' shops. The bye-laws were, therefore, clearly not applicable.

(6) Learned counsel has relied on S. 164, Municipalities Act and has urged that the jurisdiction of the civil Court is barred and no suit can be maintained for determining the question of liability of the plaintiff to assessment. Section 164, U. P. Municipalities Act, Act 2 of 1916, is as follows:

"(1) No objection shall be taken to a valuation or assessment nor shall the liability of a person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act.

(2) The order of the appellate authority confirming, setting aside or modifying an order in respect of valuation or assessment or liability to assessment or taxation shall be final; provided that it shall be lawful for the appellate authority, upon application or his own motion, to review any order passed by him in appeal by a further order passed within three months from the date of his original order."

(7) The appellate authority mentioned in this section to whom a right of appeal is given under S. 160, Municipalities Act and who can entertain an appeal against an assessment is the District Magistrate. There is no further appeal provided. In case of doubt on questions of law, however, the District Magistrate, if he so desires, can make a reference to the High Court under S. 162 of the Act.

(8) The question whether S. 164 bars the jurisdiction of the civil Court in a case where the assessment is wholly illegal and the Board has no right to assess the tax under the provisions of the District Boards Act was dealt with by a Full Bench of this Court in — 'District Board of Farrukhabad v. Prag Dutt', AIR 1948 All 382 (FB) (B) and a Division Bench of this Court in — 'Devi Prasad v. Municipal Board, Kanauj', AIR 1949 All 741 (C) has held that the law was the same in cases under the Municipalities Act.

(9) Their Lordships of the Judicial Committee in — 'Secy. of State v. Mask & Co.', AIR 1940 PC 105 (D) have held that

"The exclusion of the jurisdiction of the civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

The decisions of this Court cited above conclude the point and we must, therefore, hold that the civil Court had jurisdiction.

(10) At the close of the arguments while we were dictating the judgment, learned counsel for the respondents has drawn our attention to a Division Bench case of — 'Jagannath v. Municipal Board, Saran', AIR 1939 All 337 (E), where it was held that Ss. 160 and 164, Municipalities Act had no application to the fees chargeable for projections. It is not necessary for us to express any opinion, as we have not heard any argument on the point.

(11) In our view the lower Court decided the cases correctly. These appeals have no force and are dismissed with costs.

B/R.G.D. Appeals dismissed.

A. I. R. 1954 ALL. 122 (Vol. 41, C. N. 74)
(LUCKNOW BENCH)

MALIK C. J. AND C. B. AGARWALA J.

Dr. S. Chaturvedi, Applicant v. Central Railway through General Manager, Bombay, Opposite Party.

Misc. Appln. No. 9 of 1953, D/- 30-7-1953.

Master and servant — Railway servant — Dismissal.

Services of a railway servant appointed temporarily and not either permanently or for a definite period could be terminated in accordance with the terms of his appointment and when so terminated the servant cannot claim that he has a right to continue in service and that his removal from service is illegal. (Para 2)

N. Banerji, for Applicant.

ORDER: The applicant was a temporary substitute working in a hospital at Jhansi. There was a case started against him for bribery and he was suspended on 11-8-1949. He was convicted by the Magistrate on 3-2-1951, but was acquitted on appeal by the learned Sessions Judge on 7-4-1952. Even before his conviction by the Magistrate, however, on 2-9-1949, the railway authorities terminated the services of the applicant while he was under suspension.

(2) The applicant being a temporary servant and not having been appointed either permanently or for a definite period his services could be terminated at any time in accordance with the terms of his appointment, and, if his service was so terminated he cannot claim against his employer that he had a right to continue in service and that his removal from service was, therefore, illegal. There is nothing in the application or in the affidavit to show how the order dated 2-9-1949, terminating the services of the applicant was in contravention of the terms under which he was appointed.

Learned counsel has relied on certain suspension rules for railway servants. The relevant rule is quoted in the supplementary affidavit and is as follows:

"1711 — Suspension — (a) A railway servant shall be placed under suspension when he is arrested or committed to prison pending trial by a Court of law, and he shall remain under suspension until judgment is delivered by the Court, unless in the event of his release on bail, the authority competent to suspend him decides to allow him to resume duty pending decision of the Court."

Learned counsel's argument is that this rule means that during the continuance of the suspension an employee cannot be removed from service. This interpretation put on the rule is clearly wrong.

It may be that in a case where the trial has been protracted the period of service can come to an end during the pendency of the trial even in the case of a permanent employee e.g. an employee may attain the age of 55—if that is the age of retirement in that service—and the rule does not provide that even though he may have attained the age of 55 the employer must grant him extension and must not terminate his service so long

as the trial has not ended. The rule is only a guide to railway authorities as to what is to happen to an employee who was charged with a criminal offence and how he is to be dealt with after he has been convicted or acquitted. This rule has no bearing on the case before us nor can it be said that it in any way affects the order dated 2-9-1949, terminating the services of a temporary servant.

(3) As we are dismissing this application on the merits we are not going into the question whether this Court can entertain this writ petition against the Central Railway at Bombay.

(4) The application is dismissed.

C/M.K.S. Applicaion dismissed.

A. I. R. 1954 ALL. 123 (Vol. 41, C. N. 75)

MALIK C. J. AND V. BHARGAVA J.

Messrs. Dwarka Prasad Sheokaran Das, Kanpur, Applicant v. Commr. of Income-tax, U. P., Lucknow, Respondent.

Misc. Case No. 276 of 1950, D/- 1-4-1953.

(a) Income-tax Act (1922), S. 28 — Jurisdiction and power of Income-tax Officer, Commissioner etc.

The Income-tax Officer is entitled to act on all materials that come before him when he is dealing with assessment proceedings or with penalty proceedings under S. 28. There is nothing anywhere in any law laying down that the finding of the assessment proceeding is to be inadmissible in the penalty proceedings. (Para 4)

Anno: Income-tax Act, S. 28 N. 4.

†(b) Civil P. C. (1908), S. 11 — Miscellaneous proceedings — (Income-tax Act (1922), S. 28).

The Income-tax Officer is not a Court. The considerations for giving a decision on facts which have to be found in proceedings for imposition of penalty under S. 28 are entirely different from those in the assessment proceedings. The principle of 'res judicata' does not therefore apply to the proceedings for assessment or for imposition of penalty under the Income-tax Act. AIR 1950 All 249, Followed. (Paras 5, 6)

Anno: Civil P. C., S. 11 N. 28; Income-tax Act, S. 28 N. 1.

R. L. Gulathe, for Applicant; J. Swarup, for Respondent.

CASE REFERRED TO:

(A) ('50) AIR 1950 All 249: 1950-18 ITR 812 (Pr 5)

V. BHARGAVA J.:

This is a reference under S. 66(1), Income-tax Act in which the Income-tax Appellate Tribunal has referred the following two questions for our decision:

"(a) Whether the findings of the Appellate Assistant Commissioner in assessment proceedings are relevant for the purpose of deciding the penalty proceedings; and

(b) If so, whether they operate as 'res judicata'?"

(2) The assessee in this case is a firm consisting of four partners. During the assessment proceedings for the assessment year 1943-44, the Income-tax Officer held that income to the extent of Rs. 17,315/15/3 had been concealed by the assessee in his returns and added this sum when calculating the income liable to be assessed to tax. On 9-11-1944, the Income-tax Officer also issued a notice under S. 28(1)(c), Income-tax Act calling upon the assessee to show cause why penalty should not be levied against him. The assessee, on 16-11-1944, gave his explanation but no fresh evidence was adduced in support of this explanation. The Income-tax Officer considered his own previous finding during the assessment proceedings and held that there had been concealment of income and imposed the maximum penalty permissible under S. 28. The assessee appealed to the Appellate Assistant Commissioner and the Appellate Tribunal but failed and on his request the two questions mentioned above have now been referred for our decision.

(3) When the appeal was heard by the Tribunal the Tribunal refused to allow the counsel for the assessee to argue the appeal on merits and show that there had been no concealment on the ground that the finding, which had been given in the assessment proceedings and which had become final, operated as 'res judicata' in these penalty proceedings under S. 28. It is in these circumstances that the second question arose for reference to this Court.

(4) So far as the first question is concerned, we cannot see how the assessee can contend that the findings in the assessment proceedings out of which the penalty proceedings have arisen are not at all relevant for the purpose of deciding the penalty proceedings. The Income-tax Officer is entitled to act on all materials that come before him when he is dealing with assessment proceedings or when he is dealing with penalty proceedings under S. 28. The findings of the assessment proceedings were available to him and he could certainly use those findings as materials for arriving at the findings in the penalty proceedings. There is nothing anywhere in any law laying down that such material is to be inadmissible in the penalty proceedings. This question must, therefore, be answered in the affirmative.

(5) On the second question the principle has been so frequently laid down that it does not appear to be necessary to enter into any detailed discussion. The Income-tax Officer is not a Court and no question arises of a previous decision operating as 'res judicata' in subsequent proceedings before the Income-tax Officer. The principle of 'res judicata' is only applicable to suits where there are two parties coming up before a Court for adjudication of their disputes and not to the proceedings for assessment or imposition of penalty under the Income-tax Act. This principle was clearly enunciated by one of us in the case of — 'Kamlapat Motilal v. Commr. of Income-tax, U. P.', AIR 1950 All 249 (A). It has also been laid down by various other High Courts, but since we are following the view which has already been taken in this Court it is not necessary to cite those cases.

(6) Apart from the question whether the Income-tax Officer is a Court or not, it is also clear that findings given during assessment proceedings cannot operate as 'res judicata' in proceedings for imposition of penalty as the considerations that apply for giving a decision in the two proceedings are not identical. In the assessment proceedings, the Income-tax Officer, after hearing the evidence on specified points, assesses the total income of the assessee and all that is necessary for him to find out is what items can be treated as income of the assessee. It is not at all necessary for him to give a finding that there has been concealment of

the particulars of his income or that the assessee has deliberately furnished inaccurate particulars of such income, as is necessary for imposing a penalty under S. 28(1)(c). Since the facts which have to be found are entirely different, findings given during the assessment proceedings cannot operate as 'res judicata' in proceeding for imposition of penalty where entirely different facts have to be found.

(7) The second question must, therefore, be answered in the negative.

(8) Since we are answering one question in favour of the assessee and the other in favour of the department we make no orders as to costs.

B/H.G.P. Reference answered.

A. I. R. 1954 ALL. 124 (Vol. 41, C. N. 76)

AGARWALA AND CHATURVEDI JJ.

All India Shia Conference through Syed Kalbe Abbas Hony. General Secretary, Petitioner v. Taqi Hadi and others, Opposite Parties.

Civil Misc. (Writ) No. 335 of 1952, D/- 26-8-1953.

(a) Civil P. C. (1908), Preamble — Interpretation of Statutes — Retrospective effect — Vested rights — (Interpretation of Statutes).

The general principle no doubt is that an enactment is presumed to be prospective only and should not be interpreted as affecting vested right and the presumption is still stronger in the case of a pending action. But this is only a rule of presumption. That rule itself implies that if the Legislature so desires, it may affect vested rights, whether in past transactions or in pending cases, provided its language is clear beyond doubt. The Judiciary is not competent to question the law unless it be unconstitutional and must apply it to the facts of the case brought before it for decision. The rights of the parties in a pending action may be altered by the law, with the result that while a party was entitled to succeed if the law that was applicable at the commencement of the action were to be applied, may be defeated by the change of the law during the pendency of the action. The courts in such a case will have to apply the law as amended by the Legislature. What the Legislature cannot do is to decide cases itself, for instance it cannot say that a particular case or class of cases 'is hereby dismissed.' But there is nothing in law to prevent the Legislature from so altering the rights of the parties as to make it incumbent upon the judiciary to decide a case in a particular way as intended by the Legislature or the Legislature may even lay down that certain particular suit or classes of suit shall be dismissed, leaving thereby to the Judiciary to pass the order of dismissal. Although in this way the Legislature in substance decides a pending action, it is really not usurping the judicial function, because it is acting within its power to declare the law which is applicable to a particular case.

(Para 6)

Anno: Civil P. C., Preamble N. 7.

(b) U. P. Muslim Waqfs Act (13 of 1936 as amended by Act 9 of 1953), S. 8A — Section is retrospective.

Section 8A is retrospective in operation and affects vested rights in pending actions.

(Para 6)

Syed Kalbe Abbas, Ambika Pd.; M. H. Beg and K. N. Seth, for Petitioner; R. S. Pathak, for Respondents.

CASES REFERRED TO :

(A) (1905) 1905 AC 369: 74 LJ PC 77 (Pr 5)
(B) ('44) AIR 1944 FC 86: 1944-6 FCR 295 (FC) (Pr 6)

AGARWALA J. :

This is an application under S. 226 of the Constitution. The applicant All India Shia Conference is a registered Society under the Societies Registration Act 21 of 1860. It is a representative body of the Shias of India. It has been given representation on the Shia Central Waqf Board, formed under the U. P. Muslim Waqfs Act 13 of 1936. That Act created two bodies, the Shia Central Waqf Board and the Sunni Central Waqf Board to look after and manage Shia and Sunni Waqfs respectively.

Section 8 provided for the constitution of the Shia Central Board which shall consist of

(i) five members to be elected in the manner prescribed by the Shia members of the local legislature; .

(ii) one member to be elected in the manner prescribed by the Executive Committee of the All India Shia Conference;

(iii) one member to be elected in the manner prescribed by the Board of Trustees of the Shia College, Lucknow;

(iv) three members to be co-opted by the above seven members from persons whom they regard as ulemas; and

(v) the President, if he is not one of the above ten members.

(2) Section 9 then provided:

"(1) If at any election of members of a Central Board the full number of five members is not elected by the local legislature, the deficiency shall be made up by election of the requisite number of members by the Provincial Muslim Educational Conference in the case of Sunni Central Board, and by the Executive Committee of the All India Shia Conference in the case of Shia Central Board. In case of the failure of the Provincial Muslim Educational Conference or the All-India Shia Conference to make up the deficiency, the same shall be made up by nomination by the State Government."

Section 12 then went on to say

"After the formation of legislative bodies under the Government of India Act, 1935, the five members of the local legislature referred to in sections 7 and 8 shall be elected as follows:

(i) four members by the Sunni or Shia members as the case may be, of the Provincial Legislative Assembly.

(ii) one member by the Sunni or Shia members, as the case may be, of the Provincial Legislative Council."

(3) It will be observed that S. 8(1)(i) directed five members to be elected by the Shia members of the local Legislature not necessarily from amongst themselves, but in S. 12 the five members referred to in S. 8 were described as members of the local Legislature. There was, therefore, an ambiguity and a certain amount of conflict between S. 8(1)(i) and S. 12. After the formation of the first Shia Central Waqf Board

the practice in the past is alleged to have been that whenever there were less than five Shia members of the local Legislature the deficiency was made up by calling upon the All India Shia Conference to elect the requisite number of members under S. 9.

But in the middle of July 1952, in a fresh election to the Shia Central Waqf Board when the Shia members of the State Legislature were only three, namely Syed Taqi Hadi, Syed Mohammad Wasi and Syed Ali Zaheer, opposite parties Nos. 1 to 3, they elected besides themselves two more members, namely Raja Syed Ahmad Mehdi and Nawab Hamid Hussain, opposite parties Nos. 4 and 5, who were not members of the Legislature. The applicant's grievance is that this could not be done under the law by the opposite parties Nos. 1 to 3, that since the members of the local Legislature were only three, the applicant had the right to elect the remaining two members and that this right could not be taken away by the opposite parties Nos. 1 to 3.

The applicant, therefore, moved this Court by means of the present writ petition on 1-8-1952, to direct the opposite parties Nos. 4 and 5 not to participate in the proceedings of the Shia Central Waqf Board as its members and further to direct opposite parties Nos. 1 to 3 to cause the deficiency in the membership of the Shia Central Waqf Board to be made up by the applicant as contemplated by S. 9 of the Act.

(4) While this petition was pending, the U. P. Legislature passed the U. P. Muslim Waqfs (Amendment) Act 9 of 1953. The Act received the assent of the President on 26-2-1953. By this Act, the anomaly which existed between Ss. 8 and 12, as mentioned above, was removed. Section 12 was deleted altogether from the principal Act and after S. 8, the following section was added:

> "8-A. Nothing in sections 7 or 8, or in section 12 omitted by section 5 of the U. P. Muslim Waqfs (Amendment) Act, 1952, shall be deemed ever to have required that the members to be elected by the members of the State Legislature shall be from amongst the members for the time being of any House of the said Legislature.".

This amendment made the position absolutely clear. It is not necessary now that the five members who were to be elected by the members of the Legislature under section 8 should themselves be members of the Legislature. They could be outsiders. The right of election was vested in the members of the Legislature, but the persons to be elected need not necessarily be members of that body.

(5) The applicant's contention, lastly is that this amending Act does not apply to the present case which was pending on the date on which it came into force, and, secondly that the legislature has no power to affect the rights of parties in a pending case for two reasons:

(a) it cannot take away vested rights,

and

(b) it cannot decide a pending case which is the function of the judiciary and not the function of the Legislature.

The contentions raised by the counsel for the applicant have no force. The general principle no doubt is that an enactment is presumed to be prospective only and should not be interpreted as affecting vested rights, vide — 'Colonial Sugar Refining Co., Ltd. v. Irving', (1905) AC 369 (A), and the presumption is still stronger in the case of a pending action. But this is only a rule of presumption. That rule itself implies that if the Legislature so desires, it may affect vested rights, whether in past transactions or in pending cases, provided its language is clear beyond doubt. The contention of the learned counsel, therefore, that the Legislature has no power to affect vested rights is without substance.

(6) The further contention that the Legislature has no power to pass an Act which would in effect be decisive of a pending action is also unsound. The line of demarcation between the functions of the Legislature, the Executive and the Judiciary is not always well defined. But it is well settled that the Legislature lays down the law, the Judiciary interprets that law and applies it to disputes between parties. The law laid down by the Legislature may, as already stated, affect vested rights even in pending cases. The Judiciary is not competent to question the law unless it be unconstitutional and must apply it to the facts of the case brought before it for decision. The rights of the parties in a pending action may be altered by the law, with the result that while a party was entitled to succeed if the law that was applicable at the commencement of the action were to be applied, he may be defeated by the change of the law during the pendency of the action. The courts in such a case will have to apply the law as amended by the Legislature. What the Legislature cannot do is to decide cases itself, for instance it cannot say that a particular case or class of cases 'is hereby dismissed' vide — 'Basanta Chandra v. Emperor', AIR 1944 FC 86 at p. 91 (B), but there is nothing in law to prevent the Legislature from so altering the rights of the parties as to make it incumbent upon the judiciary to decide a case in a particular way as intended by the Legislature or the Legislature may even lay down that certain particular suit or classes of suit shall be dismissed, leaving thereby to the Judiciary to pass the order of dismissal. Although in this way the Legislature in substance decides a pending action, it is really not usurping the judicial function, because it is acting within its power to declare the law which is applicable to a particular case.

That the Legislature in the present case has affected vested rights in a pending case can admit of no doubt. The election was held in July 1952, and the present petition was filed in August 1952 in which the formation of the Shia Central Waqf Board was challenged. The language of the Amending Act is clearly retrospective. The word 'ever' in the amending section clearly refers to the past and therefore acts retrospectively so as to affect vested rights even in pending actions. Whatever meaning we might have attached to S. 8(1)(i) as it stood before the amendment, there is no scope for any doubt or ambiguity after its amendment. It must be held that the members of the Legislature could elect five members of the Shia Central Waqf Board not only from amongst themselves but also from outsiders and that this view of the law must be taken to have 'ever' been the meaning of section 8(1)(i) of the principal Act.

(7) In this view of the matter, the contention raised by the applicant has no force. The application is therefore dismissed. But as the application fails because of an Act which came into force during the pendency of the present case, we make no order as to costs.

B/R.G.D. Application dismissed

A. I. R. 1954 ALL. 126 (Vol. 41, C. N. 77)

MALIK C. J. AND CHATURVEDI J.

Jangi Lal, Applicant v. Rent Control and Eviction Officer, Allahabad and another, Opposite Party.

Misc. Writ. Appln. No. 745 of 1953, D/- 27-8-1953.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 7 and 3 — Decree by landlord under S. 3 — Eviction of tenant and possession by landlord in execution — Town Rationing officer can allot the premises to another.

To premises to which S. 7 of the Act applies even the landlord's right, on the premises falling vacant, is subject to the orders of the District Magistrate and it is not open to the landlord either to let out the premises to a new tenant without an allotment or even to step in and occupy it without the permission of the District Magistrate. There is no difference between such a case and a case where the premises fall vacant as the tenant had to leave by reason of the execution of a decree for ejectment under S. 3 of the Act passed by a Court of law. The delivery of possession by the Civil Court in execution to the landlord is merely as the owner of the premises and his right to occupy it is governed by the provisions of the U. P. (Temporary) Control of Rent and Eviction Act. The landlord cannot therefore, occupy the premises in contravention of the provisions of the said Act and claim that the Town Rationing Officer had no authority to make an allotment in favour of another tenant. (Para 3)

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) S. 17 — Rules under, Rule 7 — Applicability.

Rule applies where part of premises is in occupation of owner and the other part is let out to tenants — Premises occupied by two tenants in two portions — Owner living in separate house, at some distance — One of tenant ejected in execution of eviction decree and possession delivered to owner — Allotment of this portion — Rule 7 has no application — Owner need not be consulted. (Para 4)

Gopi Nath, for Applicant.

CASES REFERRED TO:

(A) ('53) AIR 1953 All 543: 1953 All LJ 237 (Pr 4)

(B) ('54) AIR 1954 All 6: 1953 All LJ 440 (Pr 4)

MALIK, C. J.:

There is no force in this writ application and it must fail. This application has been filed against an allotment order made by the Town Rationing Officer of Allahabad allotting the ground-floor of a certain premises to the opposite party No. 2, Narbada Prasad. The house was rented out in two portions, the ground-floor being in the occupation of one Ram Autar and the upper portion being in the occupation of another tenant. The landlord was living in another house at some distance from this house. The landlord filed a suit No. 485 of 1949 under S. 3 of the U. P. Temporary Control of Rent and Eviction Act, 1947, and obtained a decree. In execution of the decree Ram Autar was ejected in April 1953. After the ejectment of Ram Autar, the ground-floor became vacant and it could be allotted to a tenant under the Rent Control and Eviction Act. The applicant, however, took possession of the premises and after the allotment order was made by the Town Rationing Officer on 4-5-1953, he raised certain objections which were disallowed and he has now filed this writ petition.

(2) Learned counsel for the applicant has raised two points: Firstly, that the Rent Control and Eviction Act could not apply to the ground-floor as the portion was not vacant, the applicant having taken possession of it in execution of the decree. The second point urged is that under Rule 7 framed under S. 17 of the U. P. Temporary Control of Rent and Eviction Act the Town Rationing Officer was bound to take the wishes of the landlord into consideration.

(3) Neither of these contentions, however, has any force. If the tenant had left of his own accord and the premises had fallen vacant, the vacant premises could be allotted to a tenant or to the landlord himself, if he wanted to occupy the premises, with the permission of the District Magistrate. In such a case it was not open to the landlord, without the permission of the District Magistrate, to occupy the premises and claim that he was not liable to ejectment under S. 7-A of the Act. To premises to which S. 7 of the Act applies even the landlord's right, on the premises falling vacant, is subject to the orders of the District Magistrate and it is not open to the landlord either to let out the premises to a new tenant without an allotment order or even to step in and occupy it without the permission of the District Magistrate.

We see no difference between such a case and a case like the present where the premises fell vacant as the tenant had to leave by reason of a decree for ejectment passed by a court of law. The delivery of possession by the civil Court was to the applicant merely as the owner of the premises and his right to occupy it was governed by the provisions of the U. P. (Temporary) Control of Rent and Eviction Act. The landlord could not therefore, occupy the premises in contravention of the provisions of the said Act and claim that the Town Rationing Officer had no authority to make an allotment in favour of the opposite party No. 2.

(4) Reliance is placed on Rule 7 and it is said that before making the allotment the Town Rationing Officer was bound to consult the wishes of the applicant. Rule 7 of the U. P. (Temporary) Control of Rent and Eviction Act is as follows:

> "Where a portion of accommodation falls vacant and the owner is in occupation of another portion thereof, the District Magistrate shall before making the allotment order, consult the owner and shall, so far as possible, make the allotment in accordance with the wishes of the owner."

It cannot be said that the applicant was in the occupation of another portion of the premises at the time of the allotment. The possession taken by the applicant in execution of the decree being wholly illegal, it cannot be said that he was in the occupation of a part.

Moreover, this rule applies to a case where a part of the premises is in the occupation of the owner and the other part is let out to tenants. The rule provides that the wishes of the landlord are to be consulted so that the unwelcome or a troublesome tenant may not be forced on the landlord and thus cause him inconvenience when he is occupying a part of the house. The cases

relied upon by the learned counsel, namely, — 'Ram Katori v. Rent Control Officer', AIR 1953 All 543 (A) and — 'Chandra Bhan v. The Rent Control Officer', AIR 1954 All 6 (B), deal with the question as to when a house should be deemed to be vacant and are distinguishable. They are not relevant to the case before us.

(5) The application has no force and is dismissed.

B/R.G.D. Application dismissed.

A. I. R. 1954 ALL. 127 (Vol. 41, C. N. 78)

BEG J.

Gunda and another, Appellants v. State.

Criminal Appeal No. 299 of 1951 and Criminal Appeal No. 984 of 1952, D/- 31-7-1953, from Order of 2nd Addl. S. J., Allahabad, D/- 15-2-1951.

(a) Criminal P. C. (1898), Ss. 162, 297 and 298 — Confession to police recorded on recovery list — Jury trial — Procedure deprecated — (Evidence Act (1872), S. 25).

Statement relating to confession of guilt made to the police in the recovery list of the property recovered at the instance of the accused is clearly inadmissible. There is no doubt that if the attention of the jury is drawn to the said statement and the recovery lists are read out in extenso before the jury, a serious and irreparable prejudice will be caused to the case of the accused. (Para 4)

Dictum: "The procedure of exhibiting entire documents containing objectionable and inadmissible matter of this nature is irregular. I have noticed this procedure being indiscriminately followed in a number of cases, and I cannot help observing that the repetition of it must in the end have serious repercussions on the fate of the case and must cause incalculable damage to the interests of the accused. It is regrettable that investigating Officers make it a practice to invariably append such confessions and to incorporate them in recovery lists." (Para 6)

Anno: Cr. P. C., S. 162, N. 3; S. 297 N. 9; S. 298 N. 3; Ev. Act, S. 25 N. 3.

(b) Criminal P. C. (1898), Ss. 298 and 537 — Jury trial — Document inadmissible in evidence admitted — Prejudice to accused.

A document inadmissible in evidence does not become admissible when not objected to by the party concerned. The defect in admitting lies in the procedure followed by the Courts and it is for the Courts themselves to see that such irregularities do not occur in the proceedings. Even though no objection is taken on behalf of the accused on that score, the appellate Court cannot shut its eyes to the obvious prejudice that has accrued to the accused by following a wrong procedure of this nature. (Para 7)

Prejudice in such cases should be presumed. An objective demonstration of the prejudice caused in such cases is impossible. (Para 8)

Anno: Cr. P. C., S. 298 N. 5; S. 537 N. 32.

Mohd. Baqar Usmani, for Appellants; A. G. A., for the State; Man Singh, for Moti Lal and Raja Ram.

JUDGMENT: These are two appeals by three appellants. Criminal Appeal No. 299 of 1951 has been filed on behalf of Gunda alias Basudeo and Buddha through counsel. Criminal Appeal No. 984 of 1952 has been preferred by Ram Autar from jail. All the three appellants mentioned above have been convicted under S. 395, Penal Code, & sentenced to four years' rigorous imprisonment each. Along with them four other persons were sent up for trial by the Committing Magistrate. Their names are Jagjit, Ram Rup, Manni and Srimati Mahrania. Jagjit, Ram Rup and Manni were charged with the abovementioned appellants under S. 395. Srimati Mahrania was charged under S. 412, Penal Code. The trial court acquitted Ram Rup, Manni and Srimati Mahrania. The remaining four accused, namely, Gunda alias Basudeo, Buddha, Ram Autar and Jagjit were convicted by the trial court and sentenced to four years' rigorous imprisonment under S. 395, Jagjit does not appear to have filed any appeal and I am not concerned with his case. The case was tried with the aid of a jury. The unanimous verdict of the jury with regard to Ram Rup, Manni and Sm. Mahrania was that they were not guilty. The trial court, agreeing with the said verdict acquitted them. The majority of the members of the jury, however, gave their verdict in favour of the guilt of the aforementioned three appellants and they were accordingly convicted by the trial court.

(2) The abovenamed appellants were charged with having committed dacoity on 30-1-1949, in the evening at about dusk, on the road near village Shahzadpur, police station Kohkiraj, district Allahabad. A first information report of this incident was made by Raja Ram, son of Moti Lal, on 31-1-1949, at about 6-35 A. M. This first information report gives a brief narration of the incident. In this report Raja Ram stated that his father Moti Lal a resident of village Shahzadpur had gone to Ajhwa bazar to lay his 'sarrafa' shop. He was returning from the said bazar. On the way Raja Ram met him at Ghulamipur. From Ghulamipur Raja Ram started for his house in village Shahzadpur along with his father Moti and one Bullah Faqir. Raja Ram took the 'sarrafa' box from his father and tied it on to his cycle.

When they had reached about four or five furlongs near Shahzadpur and it was getting dark, five men armed with lathis intercepted them, surrounded the party and began beating them with lathis. Another batch of five or six persons remained standing at some distance armed with lathis. Raja Ram and Bullah raised an alarm. The dacoits snatched the 'sarrafa' box, which contained ornaments, and ran away. Raja Ram recognized Rajjan Brahmin of his village. The other dacoits were not recognized. Niwar Tamboli, Bhola Kalwar, Shiva Ghulam, Ram Nath and Sri Nath Vaish of his village also happened to be returning from the bazar & witnessed the incident. Raja Ram and his father had received injuries. Raja Ram and Moti Lal reached their house in the night. Owing to fear they did not go to lodge the report till the morning.

(3) Against all the aforementioned appellants the prosecution evidence is of two kinds. There is, firstly the evidence of identification by witness; and, secondly the evidence of the recovery of some property alleged to be stolen. Against Gunda there is the identification evidence of two identification witnesses, namely, Raja Ram (P. W. 1) and Moti Lal (P. W. 4). In addition, some stolen property is also said to have been recovered from him. Against Buddha and Ram Autar there is the identification evidence of three witnesses, namely, Raja

Ram (P. W. 1), Habibullah (P. W. 3) and Moti Lal P. W. 4. Further, there is the evidence of recovery of articles alleged to be stolen against these two appellants also. So far as the evidence of recovery of stolen property is concerned, it may be mentioned that the learned trial court severely criticised this evidence on various grounds in its charge to the jury.

It would appear from his charge to the jury that the learned Judge considered this part of the prosecution evidence to be quite unreliable. He invited the attention of the jury to the fact that no list of stolen property was given in the first information report in spite of the fact that the said report was made after a good deal of delay and deliberation. He also went on to consider the list of stolen property which was produced on behalf of the prosecution. In this connection he drew the attention of the jury to the serious contradiction that existed between the statement of the investigating officer and that of Raja Ram on the point. According to the statement of the investigating officer, the list was ready when he reached the spot. On the other hand, Raja Ram's statement would show that the list was dictated by Moti Lal after the investigation had started while Moti Lal was giving his statement to the investigating officer. The trial court considered the statement of the investigating officer unreliable on the point and held the list of stolen property to be inadmissible under S. 162, Cr. P. C.

Further the trial court expressed its view to the effect that the identification proceedings in the case could not be relied upon as genuine. It was admitted by witnesses on behalf of the prosecution that all the stolen ornaments were new and it was also admitted by the said witnesses that all the ornaments mixed with them were old. Under these circumstances the trial Court did not consider the identification proceedings relating to property as worthy of any credence. The trial court further pointed out the fact that the items of stolen property produced in the case were not properly exhibited. The exhibit marks on the said items did not tally with the list of material exhibits in the calendar. As a result all the material exhibits were in a total mess and it was impossible to say which article was picked out by which witness before the identification Magistrate and before the Committing Court.

In view of this confusion, it was also not possible to say whether the witnesses had identified the same articles in the Court of Session as they had in the other two courts. After criticising the evidence of identification of the property in the above manner, the learned trial Judge summed up his conclusions as follows:

> "Thus the identification proceedings in respect of the property is extremely doubtful and it cannot fix any crime against any accused without any doubt. The fact that old ornaments were mixed with these ornaments shows that a proper test was not applied and the witnesses were not put to sufficient test in order to assess their ability to point out the looted ornaments. Under the circumstances it cannot be said that these ornaments were looted in the dacoity and that they were properly identified by the witnesses subsequently. It would, therefore, be dangerous to hold this point in favour of the prosecution on the fact as it stands before you."

(4) On this aspect of the case the learned counsel for the appellants argued before me that the charge of the learned Judge to the jury was vitiated by virtue of the fact that he had omitted to direct the jury to the effect that in assessing the guilt of the appellants under S. 395, Penal Code, the jury should in view of the weakness of the evidence relating to the recovery of the property, ignore that evidence altogether. There is no doubt that the learned Judge did not, in so many words, tell the jury to eliminate this part of the evidence, but, in my opinion, the charge of the learned Judge on this point is as fair as it can be. He has given a criticism of the said evidence. He has duly cautioned the jury and clearly opined that it would be dangerous to rely on it for the purpose of convicting the accused. I am accordingly, unable to agree with the contention of the learned counsel on this particular point.

(5) The second argument of the learned counsel for the appellants was that the appellants in this case were seriously prejudiced as a result of the fact that the entire contents of the recovery lists, which contained the admission of guilt by or on behalf of the aforesaid appellants, were brought on record by the trial Court. To appreciate this part of the arguments, it is necessary to refer briefly to the recovery lists of property alleged to have been recovered from the appellants. Exhibit P-2 is the recovery list of the property alleged to have been recovered from Gunda alias Basudeo appellant 1. In this recovery list the investigating officer stated that Basudeo alias Gunda, after confessing his guilt, handed over his share of ornaments after digging them out from under the 'mendh' of a sweet-potato field. Similarly, Ex. P-3 is the recovery list of the property recovered at the instance of Srimati Mahrania, wife of appellant Buddha the brother of the appellant Gunda. In this recovery list also the investigating officer stated that Srimati Mahrania, after confessing her guilt, stated that the ornaments in question were given to her by her husband. After saying this, she dug out the ornaments from a sweet-potato field.

Exhibit P-4 is the recovery list of property alleged to have been recovered from the house of Ram Autar appellant. In this recovery list also there is a similar statement to the effect that Ram Autar, after having confessed his participation in the dacoity at Shahzadpur, admitted his possession of the ornaments which he dug out from the kitchen wall of his house.

There is no doubt that the statement relating to confession of guilt in all the three aforementioned exhibits is clearly inadmissible. There is further no doubt that if the attention of the jury was drawn to the said statements and these documents were read out in extenso before the jury, a serious and irreparable prejudice would be caused to the case of the appellants. There is nothing on the record to indicate that any precaution was taken by the trial court to see that the objectionable portions of these documents were eliminated during the course of the trial, or any step was taken to see that they were not brought on record. On the other hand, it appears to me that the statements of the prosecution witnesses indicate that the entire documents were proved in the case and exhibited as P-2, P-3, and P-4.

(6) Krishna Pal Singh is a common witness of all the three recovery lists P-2, P-3 and P-4. He stated in his examination-in-chief that all the three recovery memos. P-2, P-3 and P-4 were prepared in his presence and bore his signature. Raghuraj Singh (P. W. 13) was produced to prove exhibits P-3 and P-4. He also proved the entire exhibits and stated that the said recovery memos, were prepared by the Darogha and bore his signature. Similarly, Jagat Singh P. W. 7 S. O. Kohkiraj, who was the investigating officer in the case and effected the recoveries mentioned above, proved all the

aforementioned exhibits P-2, P-3 and P-4 and stated that the exhibits in question bore his signature as well as the signatures of the witnesses and were correct. In view of the above evidence, there is no doubt that the entire Exs. P-2, P-3 and P-4 were brought on record in this case and, I take it, were open for the consideration of the jury. If the jury were intelligently following the proceedings of the case, their attention must have been drawn to the fact that the aforementioned appellants or their family members nad confessed their guilt before the investigating officer.

There is nothing in the charge itself to indicate that any precaution was taken by the Judge to warn the jury that they should disabuse their mind in this regard and blot out any damaging impression that they might have got from the contents of the said recovery lists. The procedure of exhibiting entire documents containing objectionable and inadmissible matter of this nature is, in my opinion, irregular. I have noticed this procedure being indiscriminately followed in a number of cases, and I cannot help observing that the repetition of it must in the end have serious repercussions on the fate of the case and must cause incalculable damage to the interests of the accused. It is regrettable that investigating officers make it a practice to invariably append such confessions and to incorporate them in recovery lists apparently for the purpose of introducing inadmissible and damaging evidence against the accused by the backdoor. It is more regrettable that courts should indiscriminately allow such statements to be brought on record in a wholesale fashion without taking the care to dissect them and to sift the admissible portions from the inadmissible ones. In such cases, in my opinion, the trial court should exhibit only the admissible portion and exclude the inadmissible portion. The danger of the admission of the entire documents containing objectionable material of this nature might not be so great in cases tried by assessors. In cases, however, triable by jury, the danger of a wholesale importation of evidence of this nature cannot be over-estimated.

(7) The learned counsel for the State argued in reply that no objection having been raised on behalf of the appellants, the charge cannot be said to be vitiated on that ground. In a matter like this the defect, to my mind, lies in the procedure followed by the courts and it is for the courts themselves to see that such irregularities do not occur in the proceedings. Even though no objection was taken on behalf of the accused on that score, the appellate court cannot shut its eyes to the obvious prejudice that has accrued to the accused by following a wrong procedure of this nature.

(8) The next argument of the learned counsel for the State was that there was nothing to indicate that any prejudice was actually caused to the appellants as a result of the erroneous procedure adopted by the trial Court. In my opinion, prejudice in such cases should be presumed. An objective demonstration of the prejudice caused in such cases is impossible. If the result of the case can be a test of prejudice in such cases, then certainly it does indicate that prejudice was caused to the appellants. As observed above, in the opinion of the trial court, the evidence of recovery of property in this case was quite worthless. If this part of the evidence is eliminated, there remains only two identification witnesses, namely, Raja Ram and Moti Lal against Gunda, and three identification witnesses namely, Raja Ram, Moti Lal and Habibullah against Buddha and Ram Autar. As mentioned above, the jury acquitted Ram Rup and Manni accused by a unanimous verdict, yet the only evidence against both Ram Rup and Manni consisted only of the same witnesses that identified both Buddha as well as Ram Autar.

Thus the case of Buddna and Ram Autar, the convicted accused, stood on exactly the same footing as that of Ram Rup and Manni the acquitted accused all or them having been identified by the same three witnesses. On the other hand, the case of Gunda stood on a better footing than the case of Ram Rup and Manni, as Gunda was identified by only two out of the same three witnesses that identified the acquitted accused. In spite of the above position, the jury gave a unanimous verdict of acquittal in favour of Ram Rup and Manni, and convicted Gunda, Buddha & Ram Autar by a majority verdict. Thus, there is an apparent indication of prejudice to the convicted accused in this case. The members of the jury are laymen. They are after all human beings and must necessarily be influenced by damaging evidence of this character. It is up to the courts to see that such evidence is rigorously excluded and not allowed to come before the jury. Where, however, such irregularity has been committed, it is not possible, in my opinion, to condone it on the ground that no actual proof of prejudice exists on record. In my opinion, the aforesaid irregularity of procedure has in the present case resulted in vitiating the charge and destroying the sanctity to be attached to the verdict of the jury. The conviction based on such a charge cannot, therefore, be sustained.

(9) In the circumstances of this case, I do not think it necessary to order a retrial. The evidence of recovery, as rightly observed by the trial court and as mentioned by me above, is absolutely unreliable. The evidence of identification, so far as the appellants are concerned, is the same as that against the two acquitted accused. So far as the third appellant, namely, Gunda is concerned, the evidence of identification against him is weaker than the evidence against the accused that were unanimously acquitted by the jury itself. Under the circumstances, it would not be in the interests of justice to order a retrial.

(10) In view of the conclusions arrived at by me, this appeal must be allowed. I, accordingly, allow the appeals of the aforementioned appellents, set aside their convictions and sentences and acquit them of the offence with which they were charged. Gunda alias Basudeo and Buddha are on bail. They need not surrender. Ram Autar is in jail. He shall be released forthwith unless required in connection with some other offence.

B/V.S.B. Accused acquitted.

A. I. R. 1954 ALL. 129 (Vol. 41, C. N. 79)

BRIJ MOHAN LALL J.

U. P. Oil Mills Agency, Kanpur, Petitioner v. Saraswati Soap and Oil Mills Ltd., Opposite Party.

Appln. No. 31 of 1953 in Company Case No. 11 of 1950, D/- 26-8-1953.

(a) Companies Act (1913), Ss. 229, 230—Interest — Trusts Act (1882), S. 23 — Provincial Insolvency Act (1920), S. 48.

Where the sum constituted a trust money in the Company's hands and therefore the claimant is entitled to priority not under S. 230, Companies Act but independently of it, such a claim is subject to the same

rule about interest as any other debt provable in the liquidation proceedings and the mere fact that the debt was trust money will not entitle the claimant to claim any special treatment in the matter of payment of interest. (Para 3)

Thus where, the official liquidators had not received interest for the sum from any other person, nor was it a case where they ought or might be fairly presumed to have received interest, nor had any unreasonable delay been made in paying the trust money, the case was not governed by S. 23, Trusts Act and the company being not a solvent company the payment was governed by the rules applicable to insolvency cases. (Para 3)

Anno: Companies Act, S. 229 N. 7; S. 230 N. 5; Trusts Act S. 23 N. 4; Provin. Insol. Act S. 48 N. 1.

(b) Provincial Insolvency Act (1920), S. 28 — Relation back.

The principle underlying the law of insolvency is that interest ceases to run when adjudication takes place. An order of adjudication relates back to, and takes effect from, the date of the presentation of the petition on which it is made. Therefore, interest should run up to the date of the presentation of the petition in an insolvency case and up to the date of presentation of winding up petition in the case of an insolvent company. Case law referred. (Paras 4, 5)

Anno: Provi. Insol. Act, S. 28 N. 27.

A. Sanyal, for Petitioner; Official Liquidator, for Opposite Party.

CASES REFERRED:

(A) ('26) AIR 1926 All 361: 97 Ind Cas 556 (Pr 4)

(B) ('45) AIR 1945 Nag 276: ILR (1945) Nag 1009 (Pr 6)

(C) ('31) AIR 1931 Rang 334: 9 Rang 318 (Pr 6)

(D) (1929) 1929-2 Ch 261: 98 LJ Ch 396 (Pr 7)

ORDER: This is an application under S. 183 (5), Companies Act (7 of 1913) by the U. P. Oil Mill Agency, Kanpur (hereinafter described as claimant) against a decision of the official liquidators awarding it interest up to the date of the winding up order. The claimant contends that interest should be allowed till the date of payment.

(2) The claimant had deposited two sums of Rs. 25,000/- and Rs. 15,000/- with the Saraswati Soap and Oil Mills Ltd. (hereinafter described as Company) while it (the Company) was a going concern. When the Company went into liquidation the claimant filed a claim before the official liquidators and urged that it was entitled to priority against other creditors. The official liquidators admitted the claim but denied priority to the claimant. A petition under S. 183(5) was filed by the claimant and the only point argued on that occasion was whether or not it was entitled to priority. By my order dated 5-12-1952 I held that the claimant was not entitled to priority in respect of the sum of Rs. 25,000/- but was entitled to priority in respect of the sum of Rs. 15,000/-. As the question of interest was not in issue at that time I was not invited to give a finding on that issue.

It was remarked in the said order that the aforesaid sum of Rs. 15,000/- would be payable as a preferential claim "together with such interest as may be payable thereon". When the time of payment came the official liquidators offered to the claimant interest till the date of the winding up order. The claimant however maintained, as already stated, that it should be allowed interest till the date of payment.

(3) When a company goes into liquidation and an official liquidator is appointed the creditors have to lodge their claims and prove their debts before the official liquidator. Section 230, Companies Act lays down that certain debts are entitled to priority and interest on those debts is to be paid up to the date mentioned in sub-s. (5) of that section. The claimant's debt however did not fall under S. 230 of the Act and therefore sub-s. (5) has no application. The finding in the former litigation was that this sum of Rs. 15,000/- constituted a trust money in the Company's hands and therefore the claimant was entitled to priority not under S. 230 of the Act but independently of it. Notwithstanding this finding the ordinary rules relating to the proof of claims and debts govern this claim also. The said claim is subject to the same rule about interest as any other debt provable in the liquidation proceedings. The mere fact that the debt was trust money should not entitle the claimant to claim any special treatment in the matter of payment of interest.

Reference was made by the learned counsel for the claimant to S. 23 of the Trusts Act. But this section instead of helping him goes against his claim. It is provided in this section that the trustee who commits a breach of trust is not liable to pay interest except where he has actually received interest or ought, or may be fairly presumed, to have received interest or where the breach consists in unreasonable delay in paying trust money to the beneficiaries. In the present case the official liquidators have not received interest for this sum from any other person. Nor is it a case where they ought, or may be fairly presumed, to have received interest; nor has any unreasonable delay been made in paying the trust money. Therefore, if the point in dispute is to be decided by considerations of the Trusts Act only, the claimant is entitled to no interest whatsoever. But the case is not governed by S. 23, Trusts Act. The relevant provision is that contained in S. 229, Companies Act. It is laid down in this section that:

> "In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent."

It may be pointed out that the Company in question is an insolvent company in the sense that it is unable to pay its debtors in full. The case of companies which can pay their debts and yet have some surplus left stands on a different footing. In the cases of such companies the creditors can be paid interest up to the date of payment even if the shareholders or even the preferential shareholders are left totally unpaid. But the present Company, as already stated, is not a solvent company. The payment must, therefore, be governed by the rules applicable to insolvency cases.

(4) Section 61 (5), Provincial Insolvency Act, lays down that:

"Subject to the provisions of this Act, all debts entered in the schedule shall be paid rateably according to the amount of such debts respectively and without any preference."

Sub-section (6) says that:

"Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts entered in the schedule".

It will, therefore, follow that in the absence of surplus amounts interest is payable up to the date of adjudication. Section 48 which is the only other section relating to payment of interest and which covers cases in which "interest is not reserved or agreed for," also lays down that interest shall be paid till the date of adjudication. It is, therefore obvious that the principle underlying the law of insolvency is that interest ceases to run when adjudication takes place. This view finds support from the following remarks made by Sulaiman, C. J., in — 'Ganga Sahai v. Mukarram Ali Khan', AIR 1926 All 361 at p. 364 (A) viz.:

"As soon as the debtor is adjudged an insolvent, his entire estate vests in the Court or the receiver and his estate becomes liable to distribution at once. Ordinarily therefore interest ceases to run automatically, and for purposes of dividend the rate of interest for all creditors is uniform rate of 6 per cent. per annum."

(5) It is, therefore, obvious that the interest cannot be paid after adjudication and it is not possible to maintain that it should run right up to the date of payment in the case of an insolvent company. It however remains to determine as to what is meant by the date of adjudication. Section 28(7), Provincial Insolvency Act, lays down that:

"An order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on which it is made."

This means that interest should run up to the date of the presentation of the petition in an insolvency case and up to the date of presentation of winding up petition in the case of an insolvent company.

(6) A similar point arose for decision in the case of — 'Ganpati Sheoram v. Balram Ramji', AIR 1945 Nag 276 (B) where it was held that:

"Under insolvency the ordinary rule is that all interest ceases once there is an insolvency and no interest is ordinarily permissible to be granted after the presentation of a petition."

A Division Bench of the Rangoon High Court has also dealt with a similar question in the case of — 'Esmail Esoof Moola v. Chartered Bank of India, Australia and China', AIR 1931 Rang 334 (C) and held that:

"Section 229 is only applicable to an insolvent company and in the winding up of an insolvent company interest accruing after the commencement of the liquidation is not a provable debt within S. 229."

Under S. 168, Companies Act "the commencement of winding up" by Court is deemed to take place on the date of presentation of the petition for winding up. Therefore interest can accrue up to the date of presentation of the winding up petition and not afterwards.

(7) The law in England is also to the same effect. In the case of — 'In re The Agricultural Wholesale Society, Ltd.', (1929) 2 Ch 261 (D) it was held that the amounts proved for by the creditors were to be computed only up to the date of the "commencement of the winding up", which phrase, as already stated, means the date of the presentation of winding up petition.

(8) In the circumstances I am of the opinion that the claimant was entitled to interest up to the date of the presentation of winding up petition only. In offering to pay him interest till the date of winding up order the official liquidators have really offered to make an over payment to him. I am not concerned at this stage with the question whether or not the amount offered to be paid to the claimant can be cut down. All I must hold at present is that the claimant's demand for interest till the date of payment must be rejected. The application is, therefore, rejected with costs.

C/H.G.P. Application rejected.

A. I. R. 1954 ALL. 131 (Vol. 41, C. N. 80)
(LUCKNOW BENCH)
RANDHIR SINGH J.
Budhya Singh, Applicant v. State.
Criminal Revn. No. 105 of 1953, D/- 8-9-1953, from order of Addl. S. J., Bahraich, D/- 2-4-1953.

(a) U. P. Panchayat Raj Act (26 of 1947), Ss. 52, 55 and 85 — Offence under S. 411, Penal Code — Value of property recovered — Jurisdiction of Panchayati Adalat.

The property which should be taken into consideration in a case under S. 411, I. P. C., is the property which is recovered from the possession of the accused and not the property which has been stolen. Thus, where the value of the property recovered from the accused is less than Rs. 50/- it is the Panchayati Adalat which has jurisdiction to try the offence, unless the Sub-Divisional Magistrate or the Munsiff passes an order under S. 85. (Paras 3, 6)

(b) U. P. Panchayat Raj Act (26 of 1947), S. 66 — Case found triable by Panchayati Adalat — It must be transferred to it at any stage of trial. **(Para 4)**

B. P. Misra, for Applicant; M. L. Trivedi, for Addl. Govt. Advocate, for the State.

ORDER: This is an application in revision against the order of conviction and sentence passed by a Magistrate, first class, which was also upheld in appeal by the Sessions Judge.

(2) It appears that one Sri G. S. Chaudhary and another gentleman by the name of Sri M. P. Srivastava were robbed of some of their belongings while travelling and reports were lodged. Ultimately, some property was recovered from the possession of the applicant and two others in a search made by the police. The property recovered from the possession of the applicant was identified to be a part of the stolen property.

The applicant and the other two persons, from whose possession property was recovered, were ultimately sent up for trial. A charge under S. 411, I. P. C., was framed against all three of them, but the property which was found in the possession of the other two accused who are not applicants in the present case was not identified as stolen property and they were acquitted. The property recovered from the possession of the applicant was, however, identified as part of the stolen property and he was convicted by the Magistrate under

S. 411, Penal Code, and sentenced to imprisonment for a period of four months. The applicant then went in appeal but his appeal was rejected.

(3) The applicant had raised the point before the Sessions Judge that the trial of the case by the Magistrate was illegal inasmuch as he had no jurisdiction to try the case, the case being triable exclusively by the Panchayati Adalat. It is not disputed that the property recovered from the possession of the applicant was worth less than Rs. 50/-. Section 52 of the Panchayat Raj Act gives a list of the offences which are triable by the Panchayati Adalat. Offences under S. 411, Penal Code, are also triable by the Panchayati Adalat provided the value of the stolen property does not exceed Rs. 50/-.

Section 55, Panchayat Raj Act, lays down that no Court shall take cognizance of any case or suit which is cognizable under the Act by a Panchayati Adalat unless an order has been passed by a Sub Divisional Magistrate or Munsif u/s. 85. Admittedly, no order had been passed by the Sub Divisional Magistrate and in view of the provisions of S. 55 the only court which could take cognizance of the offence with which the applicant was charged was the Panchayati Adalat.

Section 56, Panchayat Raj Act, lays down as follows:

> "If at any stage of proceedings in a criminal case pending before a Magistrate it appears that the case is triable by a Panchayati Adalat, he shall at once transfer the case to that Panchayati Adalat, which shall try the case de novo."

(4) It would thus appear that if the Magistrate at any stage of the proceedings or trial came to the conclusion that the case was triable by the Panchayati Adalat, it was his duty to have transferred the case to the Panchayati Adalat for disposal. There are two cases on this point which have recently been decided by this Court in which it has been held that the case should be transferred to the Panchayati Adalat even at the time of the writing of the judgment if it appears that the case is triable by the Panchayati Adalat.

(5) In the present case the offences against all the three accused were triable by the Panchayati Adalat and the learned Magistrate should have transferred the case to the Panchayati Adalat.

(6) It has been argued that the stolen property was worth more than Rs. 50/- and that should be the criterion for deciding whether a particular case in connection with stolen property was or was not triable by the Panchayati Adalat.

It has been held in a recent case by Desai J., that the property which should be taken into consideration in a case under S. 411, I. P. C., is the property which is recovered from the possession of the accused and not the property which has been stolen. The man who is charged with an offence under S. 411 is evidently liable for being in possession of the stolen property found in his possession only and the value of the entire property stolen cannot therefore be taken into consideration. The view taken by Desai J. appears, if I may say so with respect, to be the correct view.

(7) The learned Magistrate who decided the case and convicted the applicant had therefore no jurisdiction to try the case against him. The conviction and sentence of the applicant are, therefore, set aside and the case is sent back to the Court of the Magistrate who will transfer the case to the Panchayati Adalat for disposal.

B/R.G.D. Order accordingly.

A. I. R. 1954 ALL. 132 (Vol. 41, C. N. 81)
(LUCKNOW BENCH)

SAPRU J. on difference of opinion between MISRA AND BRIJ MOHAN LAL JJ.

Works Manager, Carriage and Wagon Shop, E. I. Rly., Appellant v. Mahabir, Respondent.

F. A. F. O. No. 38 of 1951, D/- 6-4-1953, against decree of Commr. under Workmen's Compensation Act, Lucknow, D/- 25-5-1951.

(a) Workmen's Compensation Act (1923), S. 3(1) — 'Out of and in the course of his employment' — Meaning — (Railways Act (1890), S. 122).

The word employment is of wider import than the word "work" or "duty". The expression 'in the course of employment' means not only the actual work which the man is employed to do but what is incident to it, in the course of his service. The expression is not to be regarded as confined to the "nature of the employment." It applies to employment as such i.e. to its nature, its conditions, its obligations, and its incidents. It would thus include not only the period when he is doing the work actually allotted to him but also the time when he is at a place where he would not be but for his employment. (Para 43)

What may be called 'environmental accidents' i.e. accidents resulting from the surroundings in which the workman is employed or through which he has to reach his place of work in order to carry out his obligations to his employer also fall within the scope of the phrase "arising out of or in the course of employment." (Para 43)

This rule, of course, is subject to the exception that where the accident occurs in a public place, and the risk faced by the workman is not due to his employment but to his being on the spot as a member of the public. The employer will be liable only if the presence of the workman on the spot can be found traceable to an obligation imposed upon him by the employer. There is no difficulty, however, with cases where the accident takes place while the workman is on the spot in his capacity as an employee. Case law discussed. (Para 43)

A, a workman, who lived in a village close to Malhaur railway station used to come free of cost to Lucknow junction every morning from Malhaur along with other employees in a workmen's special provided by the railway and proceed after crossing the lines to the Alambagh Workshop which is at a distance of about a mile from the junction across the railway yard. This was a somewhat shorter route and it was taken as a matter of routine for going to and coming from the works in preference to a sub-way and two other overbridge routes which were also available. On the day of accident A finished his work at 5-30 a.m. and was returning as usual to the Lucknow junction station over the yard in order to catch the passenger train which left there at 8 a.m. for Malhaur. When he was within a short distance of the station platform he crossed the line and in doing so he was run over by a shunting engine at about 6-30 a.m.

As a result of the accident his legs were crushed and they had to be ultimately amputated.

Held that the accident arose out of and in the course of A's employment within S. 3(1). (Para 58)

(2) Section 122, Railways Act, did not apply because A could not be regarded as trespasser. He was a railway employee and the route taken by him was the route he was accustomed to daily as a matter of routine. It was a route used by similarly situated employees of the railway and the railway workshop with the implied permission of the railway authorities. On the admitted facts of the case the Railway authorities had by implication permitted workman employed in the workshop to use this routes. (Para 45)

(3) No question of 'added peril' arose in the case. (Para 56)

Anno: W. C. Act, S. 3 N. 2, 3.

(b) Workmen's Compensation Act (1923), S. 3(1) — Nature of liability.

The Workmen's Compensation Act has created a new type of liability inasmuch as it makes an employer liable to pay compensation at a fixed rate to a servant incapacitated by an accident arising out of and in the course of his employment. This liability to pay compensation is independent of any neglect or wrongful act on the part of the master or his servant. In other words, it is not a liability which arises out of tort. Properly speaking, it is a liability which springs out of the relationship of master and servant. (Para 43)

Anno: W. C. Act, S. 3 N. 1.

R. K. Bose, for Appellant; H. D. Srivastava and R. S. Mathur, for Respondent.

CASES REFERRED:

(A) (1924) 1924 AC 59: 93 LJ KB 177 (Prs 4, 6, 20, 24, 49)
(B) (1917) 1917 AC 127: 86 LJ PC 102 (Prs 4, 41-43)
(C) (1917) 1917 AC 479: 86 LJ KB 1074 (Pr 4)
(D) (1928) 97 LJ KB 183: 138 LT 544 (Pr 4)
(E) (1926) 1926-1 KB 472: 95 LJ KB 654 (Pr 4)
(F) (1900) 1900-2 QB 409: 69 LJ QB 854 (Pr 4)
(G) (1905) 1905-2 KB 139: 74 LJ KB 566 (Pr 4)
(H) (1932) 101 LJ KB 664: 147 LT 361 (Prs 5, 29, 47)
(I) ('28) AIR 1928 Pat 508: 8 Pat 24 (Prs 5, 35, 52)
(J) ('43) AIR 1943 Mad 352: ILR (1944) Mad 61 (Pr 5)
(K) ('43) AIR 1943 Mad 353: ILR (1944) Mad 29 (Prs 5, 34, 51)
(L) (1948) 1948-1 All ER 233: 92 Sol Jo 166 (Prs 5, 32, 48)
(M) (1915) 1915 AC 725: 84 LJ KB 1373 (Pr 19)
(N) (1917) 1917 AC 352: 86 LJ KB 715 (Pr 21)
(O) (1908) 1908-1 KB 469: 77 LJ KB 326 (Pr 24)
(P) (1926) 135 LT 386: 70 SJ 689 (Pr 24)
(Q) ('37) AIR 1937 Nag 397: ILR (1938) Nag 200 (Pr 25)
(R) ('40) AIR 1940 Pat 599: 19 Pat 514 (Pr 26)
(S) ('50) AIR 1950 Cal 164 (Pr 27)
(T) ('51) AIR 1951 Cal 501: 55 Cal WN 522 (Prs 30, 53)
(U) (1917) 1917 AC 249: 86 LJ KB 729 (Prs 31, 41-43)
(V) (1929) 1929 AC 570: 98 LJ KB 97 (Pr 34)
(W) ('33) AIR 1933 Cal 220: 60 Cal 421 (Pr 34)
(X) ('40) AIR 1940 Rang 18: 187 Ind Cas 767 (Pr 34)
(Y) ('49) AIR 1949 Cal 295 (Pr 35)
(Z1) (1909) 1909 AC 523: 78 LJ PC 148 (Pr 44)
(Z2) (1909) 1909-2 KB 539: 78 LJ KB 921 (Pr 46)
(Z3) (1938) 1938 AC 126: 107 LJ KB 62 (Pr 47)
(Z4) ('28) AIR 1928 Bom 1: 52 Bom 45 (Pr 50)
(Z5) ('35) AIR 1935 Rang 428: 13 Rang 553 (Pr 54)

MISRA J.:

This appeal arises out of a case for compensation under S. 3, Workmen's Compensation Act. The sole point which requires determination in the appeal is whether the accident which occurred on 22-5-49, in the railway yard at Lucknow and resulted in the loss of both legs of the respondent Mahabir, a machine man employed in the Carriage and Wagon Shops of the East Indian Railway, Alambagh, Lucknow, arose 'out of and in the course of his employment' within the meaning of S. 3 of the Act.

(2) The facts are no longer in dispute. Mahabir lives in village Mahmudpur which is close to Malhaur railway station on the East Indian Railway. He used to come free of cost to Lucknow junction every morning from Malhaur along with other employees in a workmen's special provided by the railway and proceed after crossing the lines to the Alambagh Workshop which is at a distance of about a mile from the junction across the railway yard. This was a somewhat shorter route and it was taken as a matter of routine for going to and coming from the works in preference to a sub-way and two other overbridge routes which were also available. When the workmen were on night shift, they were provided with special permits for travelling by ordinary passenger trains free of charge between Lucknow junction and Malhaur station. Mahabir was on duty on the night between the 21st and 22nd May, 1949. He finished work at 5.30 a. m. and was returning as usual to the Lucknow junction station over the yard in order to catch the passenger train which left there at 8 a. m. for Malhaur. When he was within a short distance of the station platform he crossed the line and in doing so he was run over by a shunting engine at about 6.30 a. m. As a result of the accident Mahabir's legs were crushed and they had to be ultimately amputated.

(3) The claim which gives rise to the present appeal was preferred by the respondent after due formalities. The commissioner appointed under S. 20, Workmen's Compensation Act awarded a sum of Rs. 4900/- as compensation against the appellant, the Works Manager, Carriage and Wagon Workshop. The money was deposited with the Commissioner and the decision is now challenged under S. 30 of the Act.

(4) The relevant portion of S. 3(1), Workmen's Compensation Act reads:

"If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

Provided that the employer shall not be so liable

(a) .....

(b) in respect of any injury, not resulting in death, caused by accident which is directly attributable to—

(i) .....

(ii) the wilful disobedience of the workman to an order expressly given or to a rule expressly framed for the purpose of securing the safety of workmen, or

(iii) ....."

The expression 'out of and in the course of his employment' occurring in the aforesaid section has been the subject of interpretation in numerous cases and it has been found almost a hopeless task to give such a comprehensive or exhaustive meaning as may be applicable to all cases. It is plain that the phrase defines the time within which the accident must occur in order to saddle the employer with liability. In cases, therefore, which arise in consequence of an injury caused to an employee while he is actually engaged in the work for the doing of which he is employed, there can hardly be any room for controversy on the ground of interpretation for it would clearly fall within the section. The word 'employment', however, has been given a wider meaning than the word 'work' and it has been universally accepted that a man may be in the course of employment without being actually engaged on work for the doing of which he is engaged. In the well known case of — 'St. Helen's Colliery Co. v. Hewinston', (1924) AC 59 (A), Lord Atkinson emphasised that a workman acts in the course of his employment not only when he is engaged in doing something in discharge of a duty to his employer which is directly or indirectly imposed upon him by his contract of service, but also when he is engaged in acts, 'belonging to and arising out of it.' Thus where a workman is injured when he is on his way to or from his work, Courts have in appropriate cases held that the accident arose in the course of his employment, the principal point to be regarded in such cases being whether he was doing something which was implied in his contract or in other words whether it was necessarily involved in or connected with the workman's duty to his employer. As held in the two English cases to be referred to hereafter, the language used is of wide amplitude and it covers not only the nature of the employment but its conditions, obligations and incidents as distinguished from risks which are common to all mankind and not directly connected with employment in the above sense (vide the address of Lord Shaw in — 'Simpson v. Sinclair', (1917) AC 127 (B) and that of Lord Loreburn in — 'Dennis v. J. C. White & Co.', (1917) AC 479 (C).

From what has been said above, it would appear to be a legitimate corollary that what may be called environmental accidents, that is accidents resulting from the surroundings in which the workman is employed or through which he has to reach his place of work in order to carry out his obligations to his employer, may fall within the scope of the phrase 'arising out of or in the course of his employment.' This rule is subject of course to court exception in those cases where the accident occurs in a public place and the risk faced by the workman was not on account of the employment as such but on account of his presence at the spot as a member of the public. The law insists in this latter type of cases that in order that the employer should be chargeable the presence of the workman at the spot must be traceable to an obligation imposed upon him by the employer. In cases, however, where the risk of injury is traceable to the employment in the sense that at the time of the accident the workman was at the spot in his capacity as a workman, the provisions of S. 3. I conceive, will apply fully. The case of — 'Howells v. Great Western Rly.', (1928) 97 LJKB 183 (D) may be referred to in this connection. There a dock-yard labourer, John Howells, generally used to take along with the other dock labourers, as a matter of routine while going to his steamer to load cargo, a short cut which involved the crossing of some railway lines, in preference to the route via the metalled road provided by the employers. One day he was knocked down and killed by a railway engine while going across. In an action by Howells' widow and his infant child the County Court ruled that since the deceased did not go by the way provided for the labourers, but used instead an unauthorized route and since he was not doing anything which he was under any obligation to his employer to do, the accident could not be deemed to arise in the course of his employment. The Court of Appeal overruled this view. It held that since the workman was in the employer's premises and was proceeding to work over an accustomed & permitted, though not provided, route the accident must be considered to have arisen out of and in the course of employment. The following observations of Lord Atkin L. J. may be reproduced here with advantage:

"It is obvious that there is a margin between the time when a man actually begins and actually leaves his employment and the time when he has entered upon the course of his employment. All these cases that were cited in the case that I have referred to of — 'Howells v. Powell Duffryn & Co.', (1926) 1 KB 472 (E) are cases which illustrate the proposition which now seems to me to be quite fully established, that it is not the moment at which a man reaches the actual place where he is going to begin to earn wages that his employment begins. Here there were dock premises and there are a number of dock cases where the man's employment began when he reached the dock premises which belonged to his employers, and, if one may say so in this case, the man began to incur the very special risks of his employment which were incident to the fact that he was employed in a dock. I think it is quite ridiculous to suggest that he only began the course of his employment when he actually got to shed No. 2 where he would begin to load the ship."

Cases like — 'Holmes v. Great Northern Rly.', (1900) 2 QB 409 (F) and — 'Sharp v. Johnson & Co.', (1905) 2 KB 139 (G) lay down the same principle.

(5) It was urged on behalf of the appellant that in order to charge the employer, the workman must prove—

(a) That it was obligatory for him to take the more dangerous route, and he must further show

(b) That the case did not fall within proviso (b) (ii) appended to S. 3(1), Workmen's Compensation Act.

(6) On the first part of the argument, apart from what I have already said, it has to be kept in mind that the route adopted by Mahabir was the customary route in the sense that the shop workers always went to and from their place of work through the yard. Therefore the implied consent of the employers in this behalf will have to be presumed. It would, I apprehend, be wrong to press into use in this connection, as was sought to be done by the appellant's learned counsel, the provisions of S. 122, Railways Act which penalizes members of the public for entering the railway 'unlawfully'. I say so because Mahabir was neither a member of the public at the time of the accident, nor was he crossing the lines 'unlawfully' inasmuch as he did so in the normal way with the tacit permission of the railway officials. Notwithstanding

the existence of safer routes, therefore, I would be prepared to hold that the accident is covered by S. 3. In this connection I am inclined to adopt, if I may do so with respect the principle enunciated by Lord Macmillan in — 'Northumbrian Shipping Co. v. McCullam', (1932) 101 LJKB 664 (H). The following observation contained in his address is of particular importance:

"It has been recognized time and again that the sphere of a workman's employment is not necessarily limited to the actual place where he does his work. If in going to or coming from his work he has to use an access which is part of his employer's premises or which he is only entitled to traverse because he is going to or coming from his work, he is held to be on his master's business while he is using that access."

He further observed:

"The seaman who on his way back to his ship has left the public highway with its risks common to all wayfarers and has entered the private premises of the harbour in which his ship lies with its special risks to which only those who have business at the harbour are exposed, seems to me to have come within the protection of the Act, for if he sustains an accident while using this access he sustains it by reason of risks incidental to his employment which he would not have encountered but for his employment."

The same principle has been adopted in — 'Urmila Dasi v. Tata Iron Steel Co. Ltd.', AIR 1928 Pat 508 (I), — 'Veerabhadra Naicker v. Gangamma', AIR 1943 Mad 352 (J); — 'Ramabrahman v. Traffic Manager, Vizagapatam Port', AIR 1943 Mad 353 (K) and — 'Hill v. Butterley Co. Ltd.', 1948-1 All ER 233 (L). In the last mentioned case a workman while crossing her employer's premises on her way to the office to 'clock in' before starting work slipped on any icy slope and was injured. There was no public right of way across the premises and no actual road there but a practice had sprung up during a number of years without objection by the employers by which the inhabitants of a neighbouring village crossed part of the premises where the accident occurred to reach an adjoining railway station. It was held by the Court of Appeal that the accident arose 'out of and in the course of' the workman's employment because the employers had allowed the crossing of the premises and the risk incurred by the workman was not identical with the risk incurred in a public street by members of the public. It is noticeable that there was no element of compulsion in any of these cases.

(6a) '1924 AC 59 (A)' which I have already referred to in another connection was cited by the appellant's learned counsel along with a number of other cases which have been noticed in the judgment of my learned brother Brij Mohan Lall J. for the proposition that when an accident occurs at a time or place when the workman is not actually engaged in his legitimate work, it is incumbent on him to establish that his presence at the spot was obligatory. The principle, however, which is laid down in these cases is, as stated above, applicable only to the limited class of claims which arise where the workman met with the accident and received the injury complained of not because he was a workman of his employer but as a member of the public. The facts of — 'Hewitson's case (A)' may be examined to illustrate this point. The colliery there had made arrangements with the railway company to take its workmen to the works at a reduced fare which was payable in the first instance by the company but ultimately deducted from the workmen's wages and it undertook also to indemnify the railway company against claims for accidents. The trains, however, by which the men were carried were used by the public equally as much as by the workmen of the colliery. One day Hewitson was injured in an accident which occurred on the railway and he claimed compensation. The action failed because it was found that he met with the accident in common with the other travellers, that he could, if he so desired, use other means of transport and that his employment did not make it obligatory on him to travel over the railway. Here Mahabir's injuries were not caused by the use of any transport, optional or otherwise, either provided by the railway or by any other agency. He was injured on the employer's premises which were used as the normal way of approach to the workshop by the tacit consent of the railway officials. Cases occurring on the public highway or public conveyances cited on behalf of the appellants need not, therefore, detain us.

(7) The case remark would apply to cases decided on the basis of added peril.

(8) On the second point urged on behalf of the appellant, there is no material for thinking that the crossing of the yard amounted to wilful disobedience of any orders expressly given or of any rules expressly framed by the railway for the purpose of securing the safety of the workmen. As stated above, S. 122, Railways Act does not apply. The appellant places reliance on a manual of instructions called 'Safety First Instructions' contained in a pamphlet issued under the authority of the Indian Railway Conference Association. These instructions are not on the record and there is no evidence to indicate that they were ever brought to the knowledge of Mahabir, nor is there anything which might go to show that they were framed with the necessary formalities under the rule making powers of the railway.

(9) For the reasons given above, I regret I am unable to agree with my brother Brij Mohan Lall J. who thinks that the employer can be called upon to pay compensation, only if it was obligatory on the employee to adopt the route which he was taking when the injury occurred.

(10) I would dismiss the appeal with costs.

BRIJ MOHAN LALL J.:

(11) This is an appeal under S. 30 (1) (a), Workmen's Compensation Act (8 of 1923) by the Works Manager, Carriage and Wagon Shop, East Indian Railway, Alambagh, Lucknow, against the decision of a Commissioner appointed under the said Act awarding a sum of Rs. 4,900/- as compensation to the respondent. The amount has been deposited by the appellant with the Commissioner and the usual certificate prescribed by the third proviso to S. 39 (1) of the Act has been filed. The correctness of the amount of compensation was not challenged before us. The only point argued was whether there was a liability to pay on the part of the appellant.

(12) The respondent was employed as a machine man at the Carriage and Wagon Shop (hereafter described, for brevity's sake, as C. & W. Shop) of the East Indian Railway at Alambagh, Lucknow. He is a resident of village Mahmudpur. In order to reach the place of his employment he had to board a train at railway station Malhaur and to detrain at Lucknow Junction railway station. From there he had to walk a distance of about one mile to reach the C. & W. Shop which lines on the other side of the railway line. Three different routes exist for covering this distance. In two of these routes there are bridges over the railway line and in the third there is a sub-way. Thus all these three are perfectly safe routes.

(13) For performing the railway journey the railway administration had issued a permit to the respondent, and the latter could travel both ways without making any payment. But there is nothing to indicate that there was any obligation on the part of the respondent to necessarily perform the journey with the help of the said permit. He could as well go by bus or any other conveyance.

(14) There was no obligation whatsoever on the part of the railway administration to provide conveyance from Lucknow Junction railway station to the C. & W. Shop. Nor was the railway company to make any payment to the respondent in lieu of providing conveyance for this distance.

(15) On 21-5-1949 the respondent had night duty to perform. His duty hours expired at 5.30 a. m. on 22-5-1949. Thereafter he went towards the Lucknow Junction railway station in order to catch the train for Malhaur which was to leave Lucknow Junction at 8 a. m. But instead of following any one of the aforesaid three safe routes the respondent chose to go through the 'yard'. Obviously he wanted to follow a shorter route. While crossing the railway line he was run over by a train and eventually both his legs had to be amputated. It is this circumstance which provided the basis for the claim.

(16) The appellant's defence was that the injuries were not caused to the respondent by an accident "arising out of and in the course of his employment" within the meaning of S. 3 of the Act. This contention was overruled by the Commissioner. Hence this appeal.

(17) It is to be remembered that the C. & W. Shop area is totally separate from the area of the 'yard'. There is an enclosure round the C. & W. Shop. Similarly, the 'yard' is fenced on both sides. No portion of the C. & W. Shop falls within the 'yard' and no portion of the 'yard' lies within the C. & W. Shop. The two units, viz., the C. & W. Shop and the 'yard', have different sets of employees. The employees of the C. & W. Shop have no business to be in the 'yard' and vice versa. In other words, it was no part of the respondent's duty to be in the 'yard'.

(18) The words "arising out of and in the course of his employment" have been borrowed in the Workmen's Compensation Act from the English statute. In the circumstances, English decisions are of great help in interpreting this clause.

(19) Prima facie it appears that, if a workman suffers any injury after his duty hours are over, he cannot legitimately contend that he received the injury by means of an accident "arising out of and in the course of his employment". The test laid down in — 'Parker v. Owners of Ship Black Rock', (1915) AC 725 (M) was: whether the workman at the time he sustained the injury by accident was discharging a duty which he owed to his employer?

(20) This test was approved of in a later case, viz., — '(1924) AC 59 (A)'.

(21) A somewhat similar test was laid down by Lord Sumner, in his oft-quoted dictum in — 'Lancashire and Yorkshire Rly. Co. v. Highley', (1917) AC 352, at p. 372 (N) in the following language:

> "Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment."

(22) Applying these tests, one arrives at the conclusion that the respondent was not discharging a duty towards the employer when he crossed the railway line. His duty did not at all require him to enter the 'yard' and to expose himself to the risk of being run over by a train. As a matter of fact, S. 122, Railways Act makes it penal to unlawfully enter upon a 'railway'. The term 'railway' has been defined in S. 3(4) of the said Act and it includes, inter alia, 'lines of rails'. Therefore, it is obvious that not only it was no part of the respondent's duty to cross the railway lines, but in doing so he was doing a forbidden act for which he might have been prosecuted. The circumstance that other persons also similarly trespassed on the railway lines and were not prosecuted did not make the trespass by the respondent legal. It may be possible in the case of a private individual to infer an implied consent on his part to let people cross his land. But certainly such an implied permission cannot be imputed to the railway administration which is an official body, particularly in face of the statutory prohibition contained in S. 122 of the Act. The mere circumstance that the officials for the time being did not care to prosecute the trespassers did not confer any right on trespassers to cross the line, much less did it make the respondent's act in committing the trespass a part of his official duty.

(23) It will, therefore, follow that according to the tests laid down above the respondent was not performing any part of his duty while he crossed the railway line. The danger to which he exposed himself was not a part of his official duty.

(24) It was contended on behalf of the respondent that as soon as he started from his home for his place of business he should be deemed to have entered upon his duty and should be presumed to be continuing on duty till the time he reached home. In other words, the time spent in going to the place of duty and in returning home should be treated as having been spent on duty. This proposition is too widely stated. There is no authority in support of this proposition. Even the case of — 'Cremins v. Guest, Keen & Nettlefolds, Limited', (1908) 1 KB 469 (O) which goes the longest way in support of the respondent's contention but which, as will presently be shown, was later on overruled, did not go to this extent. In that case the employer company had made arrangements for the conveyance of the colliers to and from their houses. The workmen had the right, but not the obligation, to travel by the train provided by the employers. One of the colliers was knocked down and killed while waiting on the platform for the train. His widow was awarded compensation and the deceased was supposed to be on duty. But the learned Judges guarded themselves against being understood to hold that in every case a workman should be supposed to be on duty while going from his place of business to his house and vice versa. Cozens-Hardy M. R. expressed himself on page 472 in the following language, viz.,

> "To avoid misconception, I desire to say that I base my judgment on the implied term of the contract of service, and that it by no means follows that every workman is entitled to the protection of the Act whenever an accident happens to him on his way from his home to his employers' place of business."

This ruling was overruled by the House of Lords in — '(1924) AC 59 (A)'. The test laid down in that case was that if the workman had the right, but not the obligation, to travel by the conveyance provided by the employer, he could not claim compensation. But if he was bound by the terms

of his employment to travel by the means of communication provided by the employer, he had a valid claim. The 'ratio decidendi' was that if he was so bound, he, by using that means of conveyance, was performing a part of the contract with his employer and was discharging a duty which, under the terms of his employment, he was bound to perform. If there was such an obligation on his part and if he was performing a duty, he was protected and he satisfied the test laid down above. The same view was reaffirmed by the House of Lords in the case of — 'Newton v. Guest, Keen, and Nettlefolds, Ltd.', (1926) 135 LT 386 (P).

(25) In this country also the same view has been adopted by different High Courts. The Nagpur High Court followed this view in — 'Mt. Champi v. Shaw Wallace & Co.', AIR 1937 Nag 397 (Q).

(26) The Patna High Court subscribed to this view in — 'Becharam Mallik v. Khas Joyrampur Colliery', AIR 1940 Pat 599 (R).

(27) The Calcutta High Court adopted the same view in the case of — 'Tobacco Manufacturers (India) Ltd. v. Mrs. Marian Stewart', AIR 1950 Cal 164 (S). In that case the deceased workman's widow had claimed compensation on the ground that her husband, while using the cycle which had been provided by the employer and which he was bound to use, had been knocked down and killed. The Court, while reaffirming the aforesaid principle, held that it had not been proved that the cycle had been supplied by the employer and therefore the very basis of the suggestion that the deceased was doing something which he was bound by the terms of his employment to do disappeared. On that ground the claim was rejected.

(28) Certain cases were cited before us in which compensation was allowed to the workman, or, in the case of his death, to his legal representatives. But they were all cases in which it was found on facts that the workman was, or should be deemed to have been, employed, in his master's work at the time when he received the injury. No principle different from that discussed above was laid down in any such case.

(29) Another argument advanced on behalf of the respondent was that if a workman meets with an accident at any place on his master's premises he can claim compensation even if he had ceased to do his master's work at that time. I have examined the cases cited in support of this proposition, but I have come to the conclusion that no such general principle has been laid down in any case. The decisions in which the master's liability was enforced on the ground that the workman met with an accident on his (master's) land were those in which it was found that it was a part of the workman's duty to be at the place where he met the accident. The leading case on the subject is that of — '(1932) 101 LJ KB 664 (H)'. That was a case in which a seaman returning from his home to the ship in the evening in order to attend to his duty as a watchman during night met with an accident in the dock premises before he could reach the ship and before he could assume his duty. Compensation was awarded to his legal representatives because it was found that the deceased "sustained the accident by reason of risks incidental to his employment, which he would not have encountered but for his employment." On page 667 there is a definite finding of fact that the deceased had to traverse the private premises of his master in order to reach the place where he was to perform his duty and "which but for his employment he would have had no right to traverse and which were of such a character as to expose him to special risks to which his death is attributable." In other words, there was a clear finding of fact that it was a part of his duty to go through the area which exposed him to risks. In the present case, there was, as already stated, no obligation on the part of the respondent to enter the 'yard' to incur the risk which he did.

(30) The case of — 'Rani Bala Seth v. East Indian Rly.', AIR 1951 Cal 501 (T) is also distinguishable. In that case a workman was returning from duty and had not left the master's premises when he met with the accident. There were four different routes, but three of them were found to be unsafe for one reason or another. There was a clear finding that the workman had to follow the fourth route which he did. In other words, there was, in the circumstances of the case, an obligation on the part of the workman to go by the fourth route. Consequently, the master was held bound to pay compensation to the widow of the deceased.

(31) Another case cited for the respondent was that of — 'John Stewart and Son Ltd. v. Longhurst', (1917) AC 249 (U). In that case a carpenter, (who was employed in repairing a barge lying in dock) after finishing his day's work, started on a dark night to walk along the quay to the dock gates, but fell off the quay and was drowned. The dock was private property and was not open to the public, but the workmen had leave to pass through the dock on their way to and from the barge. While allowing a claim for compensation, Lord Atkinson expressed himself on page 258 in the following words, viz.:

> "It unquestionably conferred upon him the right, if permitted by the dock company, to traverse the premises of that company from the dock gate to the place where the barge he was working on lay. 'It imposed upon him an obligation to do so.' He had no right or obligation to do this save under and by virtue of his contract of employment."

It was this obligation which served the basis of the claim being granted and it distinguishes this case from the present one.

(32) '1948-1 All ER 233 (L)' is another case cited on behalf of the respondent. In that case compensation was awarded to a workman who, while crossing her employers' premises on her way to the office to "clock in" before starting work, had slipped on an icy slope and got injured. But the basis of the decision is to be found in the judgment of Scott L. J. on page 234 where he observed as follows:

> "She, therefore, met her accident quite close to the 'clocking in' office where she was bound to go as part of her duty before she started her daily work at the surgery."

(33) As already pointed out, all these cases are distinguishable from the present one because the respondent was not at all bound to go to the place where he met with the accident. The theory of the accident happening on the 'master's premises' is based on the supposition that it was a part of the servant's duty to be on that portion of the master's premises where the accident took place. Suppose a workman, after finishing his work in the workshop, goes to the master's private garden which place is not open to workmen and there meets with an accident, he cannot claim compensation from the master on the ground that accident took place on the 'master's premises'.

(34) The doctrine of "added peril" was also referred to during the course of arguments and reference was made to the cases of — 'Stephen v. Cooper', (1929) AC 570 (V); — 'AIR 1943 Mad 353 (K)' and — 'Gouri Kinkar Bhakat v. Radha Kis-

sen Cotton Mills', AIR 1933 Cal 220 (W). The basis of all these decisions is that if a workman, while performing his master's work, undertakes to do something which he is not ordinarily called upon to do and which involves extra danger, he cannot hold the master liable. But this doctrine implies that the workman was, at the time of meeting the accident, performing his duties. Since, in the present case, the respondent was not, in my opinion, performing any part of his master's duty, the doctrine of "added peril", strictly speaking, does not apply. He was trespassing upon the railway line like any other member of the public and he was exposing himself to a risk common to all members of the public. The risk had nothing to do with the performance of his duties. It was held in the case of — 'U Yan Shin v. Ma E Sein', AIR 1940 Rang 18 (X) that when the workman was sharing a risk common to all members of the public he could not claim compensation from the master.

(35) Two more cases were referred to on behalf of the respondent, viz., — 'AIR 1928 Pat 508 (I)' and — 'Bhut Nath Dal Mills v. Tirat Mistry', AIR 1949 Cal 295 (Y). They are cases on the interpretation of the term 'wilful disobedience.' In other words, they lay down an interpretation of the exception to the general rule provided in the proviso to S. 3(1), Workmen's Compensation Act. Since the respondent has failed to bring his case within S. 3(1) which creates a right in his favour, it is unnecessary to discuss whether or not the exception on which the employer could possibly rely applies.

(36) The learned counsel for the appellant showed us a small booklet containing "Safety First" rules. The object was to avail of the exception provided in S. 3 (1) (b) (ii). But, for the reasons already indicated, it is unnecessary to examine this part of the case. Moreover, the learned counsel could not point out to us whether these rules had been framed under the clause of which he wanted to take the benefit.

(37) For the reasons stated above, I have come to the conclusion that the respondent's injuries were not caused by an accident "arising out of and in the course of his employment" and therefore the employer is not bound to pay any compensation whatever to him. Consequently, I will allow the appeal and dismiss the respondent's claim with costs throughout.

BY COURT:

(38) Since there is a difference of opinion, let this appeal be laid before the Hon'ble Chief Justice for necessary orders under Rule 3, Chapter VIII, High Court Rules. The point which arises for determination in the case is whether the accident referred to in our judgments 'arose out of and in the course of employment' within the meaning of S. 3, Workmen's Compensation Act.

SAPRU, J.:

(39) This appeal has been referred to me for opinion under Rule 3 of Chapter VIII of the High Court Rules, because of a difference of opinion between two learned Judges of this Court.

(40) This appeal was presented to this Court under S. 30(a), Workmen's Compensation Act of 1923, by the Works Manager, Carriage and Wagon Shop, East Indian Railway, Alambath, Lucknow, against the decision of a Commissioner acting under that Act, who had awarded a sum of Rs. 4,900/- as compensation to the respondent. There is no question of the correctness of the amount of compensation, which indeed has been deposited by the appellant with the Commissioner, the usual certificate prescribed by the third proviso to S. 30(1) of the Act having also been filed. The point which requires consideration is whether for the accident of 22-5-1949, in the railway yard at Lucknow Junction there was any liability to pay compensation on the part of the appellant. The answer to this question depends upon whether the accident resulting in the loss of the respondent's legs arose out of and in the course of his employment within the meaning of S. 30 of the Act.

(41-43) There is no controversy as regards the facts. (After stating the facts, the judgment proceeds as under:) The question for consideration, therefore, is whether the appellant's defence that the injuries were not caused to the respondent by an accident "arising out of" and "in the course of his employment" within the meaning of S. 3 of the Act is well founded. In order to appreciate this point I think it convenient to reproduce the relevant portion of S. 3(1), Workmen's Compensation Act: (Vide para 4 of the Section.)

The plain intention of the section would seem to be to fasten liability for compensation upon the employer, independently of any neglect or wrongful action on the part of the employer or his servants, if the accident to the workman occurs out of and in the course of his employment. Much controversy has gathered round those expressions but there seems to be no doubt that if an injury is caused to an employee while he is actually engaged in doing the work for which he is employed, the employer is responsible. The important word to my mind is, 'employment.' Now it occurs to me that this word is of wider import than the word "work" or "duty". It strikes me that the fallacy, if I may use that word with respect, into which Brijmohan Lall J. has fallen is that of looking upon "employment" as almost synonymous with "work" or "duty". It has been established, observed Viscount Finlay in — 'John Stewart and Son (1912) Ltd. v. Longhurst', (1917) AC 249 at p. 252 (U)

> "by a series of decisions that employment for the purposes of the Workmen's Compensation Act may in many cases be regarded as existing before the actual operations of the workman have begun, and that it may continue to exist after the actual work has ceased."

Indeed the words 'in the course of employment' mean not only the actual work which the man is employed to do but what is incident to it, in the course of his service. The expression is not to be regarded as confined to the "nature of the employment." The expression applies to employment as such i. e. to its nature, its conditions, its obligations, and its incidents per Lord Shaw in '1917 AC 127 at p. 142 (B)'. I think that the view of Misra J. that it is legitimate to infer from what has been said above that, what may be called 'enviromental accidents' i.e. accidents resulting from the surroundings in which the workman is employed or through which he has to reach his place of work in order to carry out his obligations to his employer, also fall within the scope of the phrase 'arising out of or in the course of employment.' This rule, of course, is subject to the exception that where the accident occurs, as pointed out by Misra J., in a public place, and the risk faced by the workman is not due to his employment but to his being on the spot as a member of the public; the employer will be liable only if the presence of the workman on the spot can be found traceable to an obligation imposed upon him by the employer. There is no difficulty, however, with cases where the accident takes place

while the workman is on the spot in his capacity as an employee.

The Workmen's Compensation Act has created a new type of liability inasmuch as it makes an employer liable to pay compensation at a fixed rate to a servant incapacitated by an accident arising out of and in the course of his employment. This liability to pay compensation is independent of any neglect or wrongful act on the part of the master or his servant. In other words, it is not a liability which arises out of tort. Properly speaking, it is a liability which springs out of the relationship of master and servant. The total amount that a servant can get is fixed by the Act, is governed by a scale, and is dependent not on the suffering caused to this workman or the expenses incurred by him in his illness but on the difference between his wage earning capacity before and after the accident. I am mentioning all this to indicate that the words 'arising out of' are intended to indicate, the origin or place of the accident. The accident must have relation to the servant's employment. This would include not only the period when he is doing the work actually allotted to him but also the time when he is at a place where he would not be but for his employment. These principles seem to me well established by a large number of cases to only some of which I propose to invite attention.

(44) The first case on which attention may be focussed is that of — 'Low or Jackson v. General Steam Fishing Co. Ltd.', 1909 AC 523 (Z1). In that case the appellant's husband's principal duty consisted in watching trawlers in Grant Harbour between their voyages. In order to perform that duty it used to be necessary for him to be sometimes on the trawlers and some times on the quay. Occasionally he had to provide his own food. This used to be brought to him by members of his family, but occasionally it became necessary for him to leave his place for a short time to get refreshments. On the evening on which the accident took place he went to a hotel situate at a short distance from the quay to get some refreshment. On his return to the quay he proceeded to descend the fixed ladder attached to the quay for the purpose of getting on board one of the trawlers and while so doing he slipped, fell into the water & was drowned. Dealing with the above state of facts Lords James observed that the passing from the quay to the trawler arose out of and was in the course of the servant's employment and the fact that the deceased had been to the hotel did not alter the position. Lord Atkinson did not doubt that the accident could be said to have arisen out of and in the course of the deceased's employment. Even Lord Loreburn, L. C. who dissented from the majority view and held that the accident did not arise out of or in the course of the servant's employment, nevertheless observed that the provisions of a remedial Act such as the Workmen's Compensation Act is, should not be construed in any narrow spirit. 'A man', said Lord Loreburn,

> "may be within the course of his employment not merely while he is actually doing the work set before him, but 'also while he is where he would not be but for his employment, and is doing what a man so employed might do without impropriety. It is always a question to be solved on the facts of a particular case and not much help can be given by attempts to formulate in more precise language the meaning of the words used by parliament'."

(45) I greatly regret that I cannot agree with the view of Brijmohan Lall J. that the workman in this case was not discharging a duty towards the employer when the accident occurred. Going back home for rest after his duty hours were over was essential to him for the adequate performance of his duties. It is my misfortune that I am unable to agree with the view of Brijmohan Lall J. that if a workman suffers any injury after his duty hours are over, he cannot legitimately contend that he received an injury by means of an accident arising out of and in the course of his employment. In this particular case the workman's duty hours were over at 5-30 A.M. It was not possible for him to get back home by any train leaving before 8 A.M. He was at the place where he was not by choice but of necessity. For doing so he had to go to the Lucknow Junction platform as the only way in which he could get home was a railway train. Invariably he used to get to the railway station by crossing the lines. The workshop was 'attached to the railway station' and indeed was a part of it. The workers of the Workshop had been allowed in the past without any objection on the part of Railway authorities to get to the platform by crossing the lines. The workman could not, therefore be regarded as a trespasser within the meaning of S. 122, Indian Railways Act. He was a railway employee & even the workshop he was working in was subject to the control of the Railway department. The route taken by him was the route he was accustomed to daily as a matter of routine. It was a route used by similarly situated employees of the railway and the railway workshop with the implied permission of the railway authorities. On the admitted facts of the case the Railway authorities had by implication permitted workmen employed in the workshop to use this route. Actually when the accident occurred, he was on the railway premises and he could not help being so having regard to the interval that elapsed between his duty hours and the time at which the railway train was to leave the station for carrying him back home.

(46) Attention may also be drawn to the case of — 'Gane v. Norton Hill Colliery Co.', (1909) 2 KB 539 (Z2). This was a case of a collier employed at the respondent's Colliery, who used to get back home invariably from the colliery through a door, down some steps & across certain lines of railway upon which the colliery trucks are moved backwards and forwards, as occasions might require. That way was used not only by this particular collier but all the colliers coming from the same district. There were no doubt two ways by which the colliers might have left the colliery premises and gone home. One was by crossing a bridge and going a little further round and the other was in a different direction. The workman had the wheels of one truck driven over his legs and had both his legs amputated. Dealing with this state of facts, Lord Cozens-Hardy M. R. observed as follows:

> "What was the duty of this man and what was really the implied term of his employment. That he should when his duty's work was over, without loitering, and with all reasonable speed, leave the colliery premises by the accustomed and permitted route. That is what he did. It was in the course of his doing so that the accident happend. I feel bound to say in point of law that this accident, which happened in the immediate neighbourhood of the pit's mouth, close to the scene on the colliery premises, was an accident which happened in the course of his employment. The course of a collier's employment is plainly not limited at one end by the moment when he gets

to the place where he is to use his pick, or at the other end by the moment when he comes up from the pit. It must include a reasonable interval of time and of space during which the employment lasts."

Lord Farwell L. J. held that even though the line was covered by trucks, the men always used that route and the accident must be deemed in these circumstances to have arisen out of & in the course of the employment of the workman.

(47) Reference may also be made to the case of — 'Blee v. London and North Eastern Rly. Co.', 1938 AC 126 (Z3). Now, in this case the deceased workman was a ganger in the employ of the London and North Eastern Railway Company. He was killed as the result of an accident while proceeding to fulfil an emergency call at the railway. His normal hours of work were from 7-20 A.M. to 5 P.M., but the terms of his contract included a condition that he could be ordered outside those hours to come to do emergency work on the railway. On the day in question the workman after coming back home retired to bed. He received a message to go to Hornsey siding where some trucks had derailed. He started at 10-30 to go to the siding, but while he was on his way there he was knocked down in the street by a motor car and sustained injuries from which he afterwards died. Lord Roche went in this case to the length of observing that a servant carrying a message for his employer through the public streets may be on duty or in the course of his employment while so doing. Having regard to the fact that there was evidence to support the conclusion that the appellant was on duty at the time of the accident, the view that he took was that the accident arose out of and in the course of the deceased man's employment. The fact that there were safer routes is in the context of this case immaterial. Misra J. has referred to the observations of Lord Macmillan in — '(1932) 101 LJKB 664 (H)' and it is unnecessary to quote them further as they will be found reproduced in his judgment. Those observations clearly enunciate the principle that the sphere of a workman's employment is not to be regarded as restricted to the actual place he works. An employee who uses a way which is part of the employer's premises of which he can only traverse only when he is going to or coming back from his work is deemed to be on his master's service while actually using that means of communication. I think it will make the position clear if I were to invite attention to the actual illustration given by Lord Macmillan:

"The seaman who on his way back to his ship has left the public highway with its risks common to all wayfarers and has entered the private premises of the harbour in which his ship lies with its special risks to which only those who have business at the harbour are exposed, seems to me to have come with the protection of the Act, for if he sustains an accident while using this access he sustains it by reason of risks incidental to his employment which he would not have encountered but for his employment."

(48) The principle enunciated by Lord Macmillan has been followed, as pointed out by Misra J., in several cases to which reference has been made by him in his judgment. They have been discussed by him with his usual lucidity and I feel that it is unnecessary to multiply cases to illustrate this principle. Particular attention may, however, be drawn to the recent case of — '1948 1 All ER 233 (L)'. As has been pointed out by Misra J., in this particular case, a workman got injured by slipping on an icy slope while she was crossing her employer's premises to 'clock in'. The facts of the case were that there was no public right of way to the premises and no actual way. Only for many years past it had become usual for the members of a neighbouring village to cross the premises without any objection in order to reach an adjoining railway station. On these facts, the Court of appeal held that the accident arose out of and in the course of employment.

(49) Reference has been made by Brij Mohan Lall J. to — 'Hewinston's case (A)'. He has also noticed some other cases. The exact principle which is deducible from these cases has been explained with lucidity by Misra J. and I am in agreement with him when he says that an examination of them will show that they have reference to that category of accidents which are received by a workman not as a servant of his employer but as a member of the public. The point to notice in this case is that the servant's injuries were not caused by any transport, compulsory or optional provided by the railway. They were caused to him while he was on the actual premises. He was in no sense, as Brij Mohan Lall J. holds, a trespasser. He was using a way located in the premises which the responsible officers of the railway had invariably allowed to be used by him and the other employees of the Railway Workshop, the workshop itself being under the control of the Railway department.

(50) In a careful argument which has been addressed by learned counsel for both the parties, reference has been made to a number of cases some of which have been considered by Misra J. and I propose to make brief comments on them. The first case to which attention may be invited is that of — 'G. I. P. Railway v. Kashinath Chimnaji', AIR 1928 Bom 1 (Z4). This was a case of a G. I. P. Railway Co. workman who was sent on a message by one of the Company's officers from Kalyan to Bombay. On arrival in Bombay, he was directed by another of the Company's officers to go back to Kalyan. On his way back he was travelling in an electric train. While he was standing at the door of the carriage which was left open and supporting himself on the vertical iron bar, the train, while going on a bridge, received a jerk and as a result of it he fell down on the lines and died consequently. In an action brought by his heirs, it was conceded by the Railway Co. that the accident occurred in the course of the workman's employment; but it was denied that it arose out of his employment. On these facts, it was held that the accident arose out of the employment of the workman and it could not be said that he took any greater risk than any ordinary traveller would do while travelling on one of these electric trains. It was further held that the warning notice in connection with these electric trains in which it was stated, inter alia, "do not stand near the door" had been framed not for workmen but for the purpose of securing the safety of passengers in general and that the defendant Company was not protected by this provision.

(51) 'AIR 1943 Mad 353 (K)' was a case of two workmen who were employed by the contractor of the Vizagapatam Port authorities and were killed within the premises of the harbour. They had been engaged for loading manganese ore into ships at a dump within the harbour premises, the hours of work being from 2 p. m. to 10 p. m. On the day of the accident, these workmen, after having worked from 2 to 7-30 p. m., left the harbour

premises to drink some coffee without any permission. It was usual for workmen to go away for short periods when convenient. While returning, they took a short cut which necessitated their crossing certain railway lines. While they were so doing, a railway engine ran into them and they were killed. The Railway authorities had put up a notice prohibiting persons from crossing railway lines. But the evidence showed that it was usual for workmen in the harbour premises to cross the line in spite of these prohibitions. The finding of the Commissioner under the Workmen's Compensation Act was that this practice had been permitted, connived or winked at by the employers of labour or responsible officials of the port. On these facts, it was held by the bench deciding the case that in leaving their work to take refreshment at 7-30 p. m., the workmen did what they were entitled to do as it would have been impossible for them to go on doing that heavy work from 2 p. m. to 10 p. m. without some break. It was further pointed out that, in crossing the railway line, the workmen were following the usual practice of the workmen engaged in the harbour, the prohibition being not an effective prohibition inasmuch as the responsible officials of the harbour had been conniving at its being disregarded. The accident having taken place in the harbour premises in the circumstances narrated above, the bench took the view that the risk which they ran was incidental to their employment and arose out of it.

(52) 'AIR 1928 Pat 503 (I)' was a case of an employee of the Company who was killed by being run over by an engine in the works. The deceased workman was under a duty to start work at 6 a. m., but before so doing he had to change his 'check' and for that purpose it was usual for him to go to the check house. The deceased met with the accident while going to the check house. Kulwant Sahay J. pointed out that the learned Commissioner had found that the deceased was not guilty of disobedience of R. 7 prohibiting employees to take short cuts over dangerous places inasmuch as the evidence showed that in spite of there being safety gates close to the place where the deceased met with the accident, the place was used all along by employees without prevention. They were, indeed, in the habit of crossing the railway track as a short cut without any objection on the part of the Company or their agents. He made a distinction between a wilful act of disobedience of a rule and merely a thoughtless act. The bench came to the conclusion that there was no wilful disobedience of any rule on the part of the employee and the claimants were, therefore, entitled to compensation.

(53) 'AIR 1951 Cal 501 (T)' was a case of an engine driver who was knocked down by a train at a railway platform and killed while returning to his quarters after finishing his day's duty. It was held on the above facts that inasmuch as he was knocked down and killed in the railway premises, it must be held that the accident arose out of and in the course of his employment.

(54) 'Burma Oil Co. Ltd. v. Ma Hmwe Yin', AIR 1935 Rang 428 (Z5) was the case of a servant who was employed as a workman. He could go to his work by three different ways leading to his place of duty. He for his own convenience chose one way and quite before the usual time started off for his place of duty; on the way he was bitten by a snake and died. It was held that the accident did not occur either in the course of or out of his employment and the claimant was not entitled to any compensation.

(55) No useful purpose will be served by considering at any length cases of accidents occurring on public highways and not on the premises of the employer.

(56) I do not think that there is any question of added peril in this case and I do not propose to dilate on this point.

(57) I am unable to understand how the workman can be said to have wilfully disobeyed any orders either expressly given or deducible from rules framed by the railway for the safety of the public. Reliance for this argument has been placed upon the Manual of Instructions contained in a booklet issued by and under the authority of the Indian Railway Conference Association. Misra J. refused to look into them as they had not been brought on the record. Apart from this, there is no evidence whatsoever to show that they were ever brought to the notice of Mahabir. I further agree with Misra J. that they cannot be presumed to have been issued with all the necessary formalities.

(58) For the reasons given above I agree with the judgment of Misra J. and hold that the accident arose out of and in the course of employment. I would, therefore, maintain the order of the Commissioner. I direct that the papers of this case be laid before the Hon. the Chief Justice for orders.

BY THE COURT (KIDWAI AND CHATURVEDI JJ.) :

(59) This case originally came up for disposal before a Bench consisting of Hon'ble L. S. Misra J. and our brother Brij Mohan Lall J. There was a difference of opinion, Misra J. being of the opinion that the appeal should be dismissed and our brother Brij Mohan Lall J. being of the opinion that the appeal should be allowed. In view of this difference of opinion the matter was placed before our learned brother Sapru J. who has agreed with the opinion expressed by Hon. Misra J. The decision of this appeal must be in accordance with the opinion of Sapru J., the third Judge to whom the matter was referred. We accordingly direct that the appeal be dismissed with costs.

B/D.R.R. Appeal dismissed.

A. I. R. 1954 ALL. 141 (Vol. 41, C. N. 82)

AGARWALA AND CHATURVEDI JJ

Hathi Ram, Applicant v. Hazi Mohammad, Opposite Party.

Civil Revn. No. 387 of 1949, D/- 4-3-1953 against order of Civil J., Gorakhpur, D/- 25-3-1948.

Civil P. C. (1908), S. 10 — Matter directly and substantially in issue in both suits must be same — (U. P. Agriculturists Relief Act (27 of 1934), S. 33).

The words "matter in issue" in S. 10, Civil P. C. mean the entire matter in controversy and not one of several issues in the case. (Para 5)

Upon the mortgagor's suit for accounting under S. 33, U. P. Agriculturists Relief Act, in case the Court declares what amount is due under the mortgage, the mortgagee is entitled to apply under S. 33(2) for a decree in his favour. But it is open to him to obtain such a decree under S. 33(2) or to bring a separate suit for sale of the mortgage property. If the mortgagee exercises the latter option the question for determination is the saleability of the mortgage property. The matter in

issue in the two suits is not directly and substantially the same and the mortgagee's suit for sale is not barred under S. 10. AIR 1920 All 70, Dist.; AIR 1940 Oudh 440, Not followed; Case law referred.

(Paras 4, 5)

Anno: Civil P. C., S. 10 N. 4 Pt. 3.

J. K. Srivastava, for Applicant; K. C. Saksena, for Respondent.

CASES REFERRED:

(A) ('29) AIR 1929 All 805: 51 All 1017 (Pr 5)
(B) ('35) AIR 1935 Lah 816: 160 Ind Cas 805 (Pr 5)
(C) ('35) AIR 1935 Mad 24: 153 Ind Cas 769 (Pr 5)
(D) ('35) AIR 1935 Mad 112: 155 Ind Cas 1002 (Pr 5)
(E) ('40) AIR 1940 Mad 7: 1939-2 Mad LJ 290 (Pr 5)
(F) ('41) AIR 1941 Cal 434: ILR (1941) 1 Cal 373 (Pr 5)
(G) ('20) AIR 1920 All 70: 42 All 290 (Pr 6)
(H) ('40) AIR 1940 Oudh 440: 16 Luck 188 (Pr 7)

ORDER: This is a defendant's application against an order of the learned Civil Judge of Gorakhpur refusing to stay further proceedings in a suit.

(2) The present suit was brought by the plaintiff on the basis of a mortgage executed by the defendant on 5-1-1939. The mortgage was in favour of one Mitra Nand and the plaintiff has purchased the mortgagee rights from Mitra Nand. Before the institution of the present suit the mortgagors filed a suit numbered as Suit No. 1 of 1944 in the same Court against the mortgagee under S. 33, U. P. Agriculturists' Relief Act for accounting. That suit, filed by the mortgagors, was dismissed by the learned Civil Judge and an appeal is now pending in this Court against the decision of the Civil Judge. In the present suit an application was made before the learned Civil Judge under S. 10, Civil P. C. praying that the hearing of the present suit be stayed, in view of the fact that the previous suit between the same parties was pending in appeal before the High Court. The learned Civil Judge dismissed this application and held that S. 10, Civil P. C. did not apply to the facts of this case. The present revision has been filed against the order of the learned Civil Judge refusing to stay further proceedings in the present suit.

(3) A preliminary objection has been taken to the hearing of this revision on the ground that the order of the learned Civil Judge does not amount to a "case decided" within the meaning of S. 115, Civil P. C. It is not necessary to decide this point, as, in our opinion the order of the learned Civil Judge is correct and he rightly refused to stay further proceedings in the suit.

(4) The learned counsel for the applicant has contended that the question arising in the two suits is directly and substantially the same, because in both the suits the main question for decision was as to what is the amount due on the mortgage in question; and the Court below was, therefore, bound to stay further proceedings in the present suit because S. 10, Civil P. C. contains a mandatory direction to the effect that further proceedings in the subsequent suit must be stayed if the matter directly and substantially in issue in the two cases is the same. He has further contended that an appeal is a continuation of a suit and the previous suit should be deemed to be pending in this Court. We agree with the learned counsel that an appeal is a continuation of a suit and Suit No. 1 of 1944 should still be deemed to be pending in appeal. The proposition is well settled and it is not necessary to cite any authorities in support of the proposition. The main point, therefore, for decision is whether the matter in issue in the previous suit is also directly and substantially in issue in the present suit. The previous suit, as stated above, was filed under S. 33, U. P. Agriculturists' Relief Act for a declaration of the amount due to the opposite party from the applicant. In the present suit the trial Court will also have to determine whether the property should be sold in enforcement of the mortgage. The previous suit was dismissed on the ground that the applicant was not an agriculturist and therefore not entitled to bring a suit under S. 33, U. P. Agriculturists' Relief Act in case the Court had declared what amount was due under the mortgage, the mortgagee would have been entitled to apply under sub-s. (2) of S. 33 for a decree in his favour. But the mortgagee is not bound so to apply; it is open to him to obtain a decree under S. 33, sub-s. (2) or to bring a separate suit for sale of the property in enforcement of the mortgage. In the present case the mortgagee opposite party has exercised the latter option. The position, therefore, is that in the present suit the Court will have to determine the question of the saleability of the mortgaged property. The present suit will have to proceed to a decree, in any case, and it is only in execution of the decree that would be passed in the present case that the mortgagee would be able to realize the amount due to him. Irrespective of the result of the previous suit, the present suit has to be tried in order to give a relief to the mortgagee opposite party. In our opinion, under these circumstances, it cannot be said that the matter in issue in the two suits is directly and substantially the same.

(5) It has been held in a number of cases that the words "matter in issue" in S. 10, Civil P. C. mean the entire matter in controversy and not one of several issues in the case. In — 'Gargi Din v. Debi Charan', AIR 1929 All 805 (A), it was held by this Court that the words "matter in issue" could not be held necessarily to mean the subject-matter in dispute, but they must clearly mean the entire matter in controversy and not one of several issue in the case. This case was followed in — 'Mt. Nasiban Bi v. Mt. Iqbal Begum', AIR 1935 Lah 816 (B). The Madras High Court has taken the same view, vide — 'Murugesa Mudaliar v. Balasundarammal', AIR 1935 Mad 24 (C), — 'Mahaganpathi v. Natesa Iyer', AIR 1935 Mad 112 (D) & — 'Munuswami v. Raghupathi', AIR 1940 Mad 7 (E). The High Court of Calcutta has also taken the same view in a case reported in — 'Naskarpara Jute Mills Co. Ltd. v. Nirmal Kumar', AIR 1941 Cal 434 (F).

(6) The learned counsel for the applicant relied on a case of this Court reported in — 'Wahid-unnissa Bibi v. Zamin Ali Shah', AIR 1920 All 70 (G). In this case one of the learned Judges was of the view that S. 10, Civil P. C. applied to the facts of that case and the proceedings were ordered to be stayed, but the other learned Judge only observed that if S. 10, Civil P. C. did not apply the proceedings of the second suit could be stayed under S. 151, Civil P. C. The facts of the case were different, but certain observations made in the case were relied upon by the learned counsel. There does not appear to be any discussion of the question whether the matter in dispute meant the entire matter in controversy or only one of the matters in controversy. No other case was cited by the learned counsel for the ap-

plicant in support of his proposition that S. 10, Civil P. C. applied to the facts of the present case.

(7) The Court below relied upon a case reported in — 'Behari Lal v. Mt. Durga', AIR 1940 Oudh 440 (H). The facts of the case are absolutely similar to those of the present case and the two suits in that case were similar to the two suits in the present case, that is, one was a suit for the declaration of the amount due. It was filed by the mortgagor under S. 33, U. P. Agriculturists' Relief Act, and the other suit was a suit brought by the mortgagee to enforce his mortgage. It was held in that case that the proceedings of the latter suit were not to be stayed under S. 10, Civil P. C. because the Court seized of the first suit had no jurisdiction to pass a decree which could be obtained in the subsequent suit. It was observed that in the suit under S. 33 there could not be a decree for the sale of the property until the mortgagee filed an application under Sub-s. (2), and as the mortgagee in that case had filed a separate suit, he was not likely to file an application under sub-s. (2) of S. 33. It was said that for this reason the Court seized of the case under S. 33 had no jurisdiction to pass a decree which the mortgagee claimed in the subsequent suit. With all respect to the learned Judges, we find it difficult to accept this reasoning. The words used in S. 10 are a Court "having jurisdiction to grant the relief claimed". In our opinion, what is to be seen is the jurisdiction of the Court to grant a relief claimed, and it is difficult to say that the Court seized of the case under S. 33 had no jurisdiction to grant the relief. In case the mortgagee filed an application under sub-s. (2), the Court could pass a decree in favour of the mortgagee. The jurisdiction in the Court to pass the decree was not wanting; but, of course, it could not grant the relief unless the mortgagee claimed that relief. Be that as it may, we consider it safer to base our decision on the ground that the matter directly and substantially in issue in the two cases is not the same.

(8) We agree with the Court below in the order that that Court has passed, though for different reasons. The revision is consequently dismissed with costs.

B/H.G.P. Revision dismissed.

A. I. R. 1954 ALL. 143 (Vol. 41, C. N. 83)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Prem Chand and another, Appellants v. Mst. Bittan Devi, Respondent.

Second Appeal No. 271 of 1947, D/- 18-8-1953, from decree of Dist. J., Gonda, D/- 31-8-1946.

Hindu Law — Joint family — Self acquisition — Shifting of onus — (Evidence Act (1872), Ss. 101 to 103).

In order to shift the burden of proving as to whether or not the subsequent acquisition was joint family property it ought to be established that there was nucleus of profit yielding property and not only nucleus of any kind of joint property.

Held that there was no evidence on record to prove that the nucleus yielded any profit with the aid of which subsequent acquisition could have led. AIR 1941 Oudh 230, Distinguished; AIR 1946 All 67 and AIR 1935 All 67, Foll. (Para 4)

Anno: Evidence Act. Ss. 101 to 103 N. 2.

M. P. Srivastava, for Appellants; J. B. Srivastava, for Respondent.

CASES REFERRED:

(A) ('41) AIR 1941 Oudh 230: 1941 Oudh WN 214 (Pr 4)
(B) ('46) AIR 1946 All 67: ILR (1946) All 130 (Pr 4)
(C) ('35) AIR 1935 All 67: 152 Ind Cas 541 (Pr 4)

JUDGMENT: This is a defendant's second appeal against the judgment and decree of the District Judge of Gonda modifying the judgment and decree passed by the Civil Judge, Bahraich.

(2) One Barati Lal had two sons, Brahma Prasad and Jot Prasad. Brahma Prasad had a son Bhagawti Prasad who had two sons, Prem Chand and Gyan Chand. Jot Prasad, the second son of Barati Lal, died issueless leaving a widow Bittan Devi. Barati Lal was possessed of two plots Nos. 5277 and 5298 which had groves standing on them along with considerable other property with which I am not concerned in the present appeal. Barati Lal died in 1932 when his two sons, Brahma Prasad and Jot Prasad, were alive. Jot Prasad died in 1936. His widow Smt. Bittan Devi instituted a suit for the possession of a half share in the grove standing in the two plots mentioned above on the allegations that a half share in each of these two groves belonged to her husband Jot Prasad and that she succeeded to the property of her husband on his death in 1936.

The caim was resisted on behalf of the defendants who were the representatives of Brahma Prasad on two points, firstly it was alleged that plot No. 5277 had been made the subject of a waqf by Barati Lal in 1908 and was under the management of the waqf with which the parties had no concern. Secondly it was urged that Jot Prasad died as a member of joint Hindu family and grove No. 5298 was a part of the joint family property and as such the plaintiff Bittan Devi had no right or interest in that property which passed to the survivors of the joint family.

(3) The lower Court came to the conclusion that the property was the joint ancestral property of Barati Lal and as such Jot Prasad had no separate interest in it. It also held that Jot Prasad died as a member of a joint Hindu family and the property passed to the survivors. With regard to plot No. 5277 the trial court held that there had been a valid waqf in respect of this property and as such the plaintiff acquired no title in this property. The plaintiff then went in appeal to the District Judge who modified the decree of the trial Court. The District Judge held the waqf to be valid but found that grove No. 5298 was the self-acquired property of Barati Lal and passed to Jot Prasad under a will dated 12-10-1927, vide Ex. I and as such Jot Prasad was the separate owner of a half grove. He decreed the claim of the plaintiff in respect of this half share and maintained the judgment of the trial court in respect of the other plot No. 5277.

The defendants have now come up in second appeal. They have submitted to the decree of the two Courts below in respect of plot No. 5277 and no appeal has been instituted challenging the propriety of the order of the Courts below in respect of that grove. They have come up in appeal only in respect of the decree of the District Judge regarding grove No. 5298.

(4) The first point which arises for determination in this appeal is whether grove No. 5298 was the self-acquired property of Barati Lal or whether the grove constituted the joint family or ancestral property of Barati Lal. In second appeal points of facts are concluded by the findings of the Courts below. The District Judge has held the grove to be the separate property of Barati Lal and it is not open to the appellants to challenge that finding in this Court. It was, however, argued on behalf of the appellants that the lower appellate Court came to a wrong conclusion inasmuch as there was a nucleus of ancestral property in the hands of Barati Lal and as such the burden of proving that any acquisition made by Barati Lal subsequently did not constitute joint family property lay on him. I have, therefore, allowed the learned Counsel for the appellants to challenge the finding on this point.

He has cited — 'Gulab Chand v. Manni Lal', AIR 1941 Oudh 230 (A) in support of the contention that whenever it is admitted that there was nucleus of property the onus would be on the party pleading that the acquisition was not joint property. A perusal of this reported case, however, shows that in this case the property which constituted the nucleus of the ancestral property was profit yielding property. The only point which was considered was if the quantum of profits could affect the burden of proof. The point as to whether there was or there was not sufficient income from the joint ancestral property would not be taken into consideration in deciding the burden of proof. There have been two later decisions of this Court in which this point came up for consideration more or less directly, vide, — 'Darshan Singh v. Parbhu Singh', AIR 1946 All 67 (B) and — 'Suraj Kumar v. Jagannath', AIR 1935 All 67 (C). In both these cases it was held that the mere existence of nucleus of ancestral property will not by itself raise a presumption that the subsequently acquired properties were joint family properties and will not shift the burden of proving that the properties are separate properties on the person alleging them to be so. To shift this burden on him, it must be proved that the nucleus was of such a character, as, taking into consideration the surrounding circumstances, could have led to the subsequent acquisitions with its help.

The ratio of these two rulings, therefore, is that in order to shift the burden of proving as to whether or not the subsequent acquisition was joint family property it ought to be established that there was nucleus of profit yielding property and not only nucleus of any kind of joint property. In the present case Barati Lal had only inherited a residential house from his father which too was subsequently rebuilt by him. There is no evidence on the record to prove that this residential house yielded any profit to Barati Lal with the aid of which he could have acquired any property.

(5) The land on which the grove was planted was admittedly given as rent free grant to Barati Lal by the Nanpara estate and the grove was then planted by Barati Lal. No funds derived from the ancestral property were utilised or were available to Barati Lal for the acquisition and plantation of this grove. In view of these circumstances the finding arrived at by the Courts below that the property was the self-acquired property of Barati Lal cannot be successfully assailed.

(6) The next point which has been urged on behalf of the appellants is that Jot Prasad inherited rights in the grove in dispute in the capacity of a member of a joint Hindu family and as such no property of Jot Prasad could pass to his widow. The plaintiff has filed a will alleged to have been executed by Barati Lal on 12-10-1927 Ex. 1. A perusal of this will shows that Barati Lal gave away half of this grove to each of his two sons in his life time. This document has been described as a will but on a proper construction it amounts either to a family arrangement or to a family partition. In any case the right granted by Barati Lal to Jot Prasad in this property would be his self-acquired property and even if he had been a member of a joint Hindu family at the time of his death, so far as this grove is concerned, his rights would be those available in property which is self-acquired. Jot Prasad died in 1936 before the Hindu Women's Rights to Property Act, 1937, came into force. Bittan Devi, plaintiff, however, even under the law as it stood in 1937, succeeded to the rights of her husband as a Hindu widow in his self-acquired property. The grove in dispute being the self-acquired property in the hands of Jot Prasad passed to the widow on the death of Jot Prasad in 1936 and the finding arrived at by the lower appellate Court is perfectly correct.

(7) No other point has been pressed in arguments.

(8) As a result the appeal is dismissed with costs to the respondent. The stay order is vacated.

C/H.G.P. Appeal dismissed.

A. I. R. 1954 ALL. 144 (Vol. 41, C. N. 84)

MOOTHAM AND SAPRU JJ.

Rameshwar Prasad Kedarnath, Applicant v. The District Magistrate and others, Opposite Party.

Writ Appln. No. 173 of 1953, D/- 3-9-1953.

(a) Constitution of India, Arts. 226, 19(1)(g) — Power to interfere with administrative orders — Refusal to renew license in Form B1, under U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1948, on grounds irrelevant to the consideration of application for renewal — Order of refusal quashed and direction to consider application on merits issued — (U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order (1948), Cl. 11).

A person has by virtue of Art. 19(1)(g) of the Constitution the fundamental right to carry on his trade or business subject to such reasonable restrictions as may be imposed under Art. 19(6). He is therefore, 'prima facie', entitled to a licence under U. P. Controlled Cloth and Yarn Dealers' Licensing Order, 1948 and the granting of it cannot therefore appropriately be described as a privilege. (Paras 1, 22)

Held on the facts as granted from the affidavit, the counter-affidavit and the affidavit in rejoinder, that the order of the District Magistrate refusing to renew the license granted to the petitioner by Form B1 under the U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1948, was not bona fide inasmuch as it was based on irrelevant considerations, namely that the petitioner had in the past dared

to approach the High Court against the order of the District Magistrate and obtain a stay order against him (The order of refusal was quashed and directions to consider the application for renewal on merits were issued.) (Para 5)

Per Sapru J.: Ordinarily the High Court does not interfere with administrative orders; but where there are reasons to think that the order has been influenced by extraneous consideration the High Court has, irrespective of the question whether the order can be classed as falling within the category of 'certiorari' or not, ample authority under Art. 226 of the Constitution to interfere with it by a proper order or direction. The words of Art. 226 of the Constitution are wide enough to cover an order of that description. AIR 1952 All 836; AIR 1952 All 61; AIR 1951 Nag 33 and AIR 1950 SC 163, Rel. on. (Para 3)

Per Mootham J.: The fact that the Licensing Authority has under cl. 11 of the Order, to record his reasons when he refuses to renew a licence is not, in the absence of any specification of the grounds on which a renewal may be refused, or indeed of any other limitation on his powers in this respect, a sufficient indication that he has to act judicially. Therefore the act of the Licensing Authority in refusing to renew the petitioner's licence was an administrative act and accordingly the High Court could not interfere with such order by a writ in the nature of certiorari. AIR 1950 SC 222, Rel. on. (Para 15)

But the High Court has power under Art. 226 of the Constitution to issue directions and orders, as well as writs, for any purpose; and in exercise of that power it can direct that an administrative order be quashed. (Para 16)

(b) U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order (1943), cl. 11 — Before refusing license the applicant must be heard — License refused without hearing applicant — Order quashed — (Constitution of India, Art. 226).

Mootham J.: A man must not be deprived of his property without being given an opportunity of being heard. The loss of a man's right to carry on his business may be no less serious in its consequences than the loss of his property; and under the Constitution the right to hold property and the right to carry on a business are equally fundamental rights possessed by every citizen. If there be authority founded upon the plainest principles of justice that (in the absence of statutory provisions to the contrary) a man be not deprived of his property without being heard there is no reason why that principle should not be applied to the protection of another fundamental right namely the right to carry on business. English case law referred. (Para 20)

The Licensing Authorities, before refusing the applicant a license under cl. 11, to do business must hear him. (Renewal of license refused without hearing applicant — Order quashed under Art. 226). (Para 23)

G. S. Pathak and R. S. Pathak, for Applicant; Standing Counsel, for Opposite Party.

CASES REFERRED:

(A) ('52) AIR 1952 All 836: 1952 All LJ 163 (Prs 3, 16)
(B) ('52) AIR 1952 All 61: 1952 All WR (HC) 153 (Pr 3)
(C) ('51) AIR 1951 Nag 33: ILR (1951) Nag 791 (Pr 3)
(D) ('50) AIR 1950 SC 163: 1950 SCR 566 (SC) (Pr 4)
(E) (1950) 1950 AC 66: 94 Sol Jo 516 (Prs 13, 21, 22)
(F) (1924) 1924-1 KB 171: 93 LJ KB 390 (Prs 13, 14A)
(G) ('50) AIR 1950 SC 222: 1950 SCR 621 (SC) (Pr 14A)
(H) ('52) AIR 1952 All 752: 1952 All LJ 319 (Pr 16)
(I) (1863) 14 CB NS 180: 32 LJ CP 185 (Prs 17, 18, 23)
(J) (1890) 24 QBD 712: 59 LJ QB 250 (Pr 17)
(K) (1878) 1878-3 AC 614: 47 LJ PC 51 (Prs 17, 19)

SAPRU J.:

While agreeing with the order proposed by my brother Mootham, I would like to point out that, having regard to the nature of our Constitution, a licence for the carrying on of a business or profession cannot be looked upon as a mere privilege which is within the unfettered discretion of the Executive Authority empowered to grant it.

Particular emphasis has been laid in Art. 19(1)(g) on the right to practice any profession, or to carry on any occupation, trade or business, subject, of course, as laid down in Art. 19(6), to any reasonable restrictions in the interests of the general public as may be placed on it. In guaranteeing this right the founding fathers were, no doubt, influenced by their concept of the functions of the State. As is clear from the directive principles of State policy to which I think it is permissible to refer in this connection, they were establishing a State guided by certain directive principles which, though not justiciable, were, nevertheless, to be 'fundamental' in the governance of the country, it being its duty to apply them in making laws. For after stating in Art. 38 that the State shall try to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life, the founding fathers went on in Art. 39(a) to lay down that State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. A refusal to renew a licence on grounds other than those which the licensing authority can legitimately take into consideration can dislocate and paralyse, in the case of a businessman, his entire business and deprive him of the means of earning his livelihood.

Necessarily, therefore, a misuse of that power can frustrate the very purpose of the welfare State established by the Constitution of this Country. I would like to emphasise that it is necessary to keep this background as the directives represent the political philosophy underlying the constitution in view in considering the questions raised by this application.

(2) Now, what are the main facts of this case? In 1949 the applicant applied for and was granted licence in Form B1 under the U. P.

Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1948, to buy and sell controlled cloth. This licence was, in the initial instance, to be valid up to 31st October 1950. Thereafter this licence was renewed on two successive occasions for a period of one year each. It expired on the 31st October 1952. Before its expiry on the 9th May 1952, the applicant was served with a notice that the District Magistrate had cancelled his licence for reasons which were not stated by the District Supply Officer in his communication to the petitioner.

On receiving that notice of cancellation, the petitioner came to this Court praying that the aforesaid order cancelling the petitioner's licence be quashed. A Bench of this Court admitted the aforesaid miscellaneous application and passed an 'interim' order staying the operation of the District Magistrate's order cancelling the licence. The allegation in the affidavit which has been presented to this Court on behalf of the petitioner is that, even after that order, the District Magistrate declined to permit the applicant to ply his business under the licence on the ground that the order of this Court was not clear and required clarification. It is stated in the affidavit that the view taken by the District Magistrate was that though this Court had directed that the order cancelling the licence should be suspended, it was nowhere ordered that the licence should be returned to the applicant.

On the 22nd June 1952 a Bench of this Court directed the District Magistrate to give possession of the licence to the applicant. On 25-9-1952 which was within the time allowed by law the petitioner presented an application to the District Magistrate for a renewal of his licence. The applicant did not get any communication from the District Magistrate in regard to the said application for renewal for a period of over two months. On 1-12-1952, however, he received a notice from the District Supply Officer that the District Magistrate had refused to renew his licence "on account of the malpractices indulged in by you and your bad reputation." The District Magistrate further directed him to suspend his business activities forthwith and declare stock of cloth within three days of the receipt of the notice. On 4-12-1952 the applicant informed the District Supply Officer that the applicant had stopped his business activities and supplied him with the details of the amount of stock in his hands.

On 12-12-1952 the applicant received a letter from the District Supply Officer directing him to transfer his stock of cloth to a licensed cloth dealer. The cloth was, as ordered by the District Supply Officer, duly transferred. Between 7-12-1952 and 4-1-1953 efforts were made by the applicant to find out from the District Magistrate the reasons for his refusing to renew the licence. It is asserted in the affidavit that he met him three or four times in that connection and drew his attention to the fact that the applicant had never indulged in any questionable activities nor had he contravened any of the relevant control orders.

(3) Now, it is important to note that according to the affidavit filed by the petitioner the District Magistrate refused to set out with any particular preciseness the reasons for his refusing to renew the licence without previously affording him any opportunity to explain the main allegations against him and merely told him that 'the applicant was free to take the matter to the High Court even as he had done previously. The District Magistrate with whom he had this talk having been transferred, the applicant presented an application on 15-1-1953, to the District Magistrate who had succeeded him setting out the facts of his case and praying that the order cancelling his licence be reconsidered. The new District Magistrate expressed his inability to alter the order made by his predecessor.

I am not impressed with the argument that the version given of the talk in paragraph 22 of the petitioner's affidavit is somewhat different, being stronger in tone, than the one given in paragraph 14. The conversation, whenever it occurred, must have been within the knowledge of the then District Magistrate. The impression should not have been allowed to be created that the District Magistrate looks upon an approach to this Court as something 'reprehensible' or outrageous on the part of those affected by his orders.

In the circumstances of this particular case, it was incumbent on the part of the State to remove the impression created by the petitioner's affidavit. It cannot be said that the then District Magistrate could not be contacted for this purpose. This being the position, I am bound to assume that, having regard to the fact that it has not been controverted by any statement in a proper counter-affidavit, the version given by the petitioner of his talk or talks is substantially correct. That being so, I am driven to the conclusion that reasons which were not relevant to a consideration of the petitioner's petition for the renewal of the licence were not absent from the minds of the authority refusing the licence. On these facts, I am inclined to the view that the refusal to grant the licence was not influenced by considerations which can be solely said to be of a 'bona fide' nature.

In the affidavit filed on behalf of the petitioner it is asserted that on his asking him as to why the licence was not being renewed and he was being discriminated against, he was told that it was because 'he had dared to question the order in this Court'. It is true that there is only the applicant's statement, without any indication of the date when the conversation took place, in the affidavit to support the statement which has been attributed to the District Magistrate, but it is no less equally important to note that, in the counter-affidavit which has been filed on behalf of the District Magistrate by a Cloth Inspector in the office of the District Supply Officer the statement that the licence had been cancelled as the petitioner had dared to approach the High Court on a previous occasion has not been refuted. It was possible for the State to file a counter-affidavit of the then District Magistrate to refute the above allegations which go to suggest that perhaps the District Magistrate was influenced, to some extent at all events, by considerations not relevant to the consideration of the petitioner's application for the renewal of the licence. This has not been done.

It may well be that the fact that he had approached this Court and obtained a stay order when his licence was cancelled was not the only operative reason so far as the decision not to renew his licence is concerned; but in the

absence of a counter-affidavit on behalf of the State, I am bound to attach importance, notwithstanding the absence of dates and minor discrepancies in the versions given in paragraphs 22 and 14 of the affidavit, to the statement made in this behalf by the petitioner in his affidavit. On the basis of the facts set out above, I am driven to the conclusion that perhaps the refusal to renew the licence was influenced by the circumstance that the applicant had, when his licence was cancelled, dared, what was apparently annoying to the Executive authorities, to assert his right by coming to this Court and seeking its assistance in getting the order of cancellation stayed.

Ordinarily this Court does not interfere with administrative orders; but where there are reasons to think that the order has been influenced by extraneous consideration this Court has, in my opinion, irrespective of the question whether the order can be classed as falling within the category of 'certiorari' or not, ample authority under Art. 226 of the Constitution to interfere with it by a proper order or direction. The words of Art. 226 of the Constitution are wide enough to cover an order of that description.

Reference may be made to the observations of Bind Basni Prasad J. in — 'Sm. Prabhabati Devi v. District Magistrate of Allahabad', AIR 1952 All 836 at p. 838 (A). While holding in that case that where they were in a state of doubt as to whether the order passed by the District Magistrate was quasi-judicial in character or not, that a writ of 'certiorari' was not permissible, they nevertheless thought that Art. 226 was now so wide that, if any authority had acted against law, then an application under that Article was maintainable against the authority for the issue of proper directions to act according to law.

Reference may also be made in this connection to two other cases, viz., — 'Dalchand Chittar Mal v. Commr. Food and Civil Supplies, Lucknow', AIR 1952 All 61 (B) and — 'Manohar Ramkrishna v. G. G. Desai', AIR 1951 Nag 33 (C). The latter was a case in which the petitioner had impugned an order requisitioning a house belonging to him under the C. P. and Berar Act, 63 of 1948. A preliminary objection was taken to the effect that Art. 226 did not permit the Court to assist the petitioner as writs of 'certiorari' and 'prohibition' could not issue unless the impugned order was a judicial or quasi-judicial order and that an order requisitioning property did not fall in either category. A further contention was that a writ of mandamus could issue only for the purpose of requiring the doing of a positive act and that in that case as no positive act was required from the State, the petitioner was not entitled to the relief or reliefs asked for.

On the above state of facts, Mangalmurti and Mudholkar JJ. made the observations quoted below:

> "It is difficult to appreciate Shri Naik's argument that 'Directions, orders or writs' can issue only in the circumstances in which the writs named specifically can issue because that argument, if accepted, would so restrict the meaning of the words 'directions, orders or writs' as to render them otiose. It is commonplace that effect must be given to every provision of a statute and that no word should be regarded as a surplusage unless that would lead to an absurdity. No absurdity results because of the construction we place on this article."

After emphasising that the power conferred by Art. 226 was discretionary, they went on to add that that being so

> "It would, therefore, not, in our opinion, be right to read limitations in the wide powers conferred by the general words used therein merely because these words are followed by some specific words which connote a restricted power, more so when the article provides that the power conferred by the specific words is included in that conferred by the general words. The contention, therefore, that our powers are limited to the issuing of the specific writs only must fail."

(4) Finally I would refer to the case of — Rashid Ahmad v. Municipal Board of Kairana', AIR 1950 SC 163 (D). In that case the Supreme Court granted relief to the petitioner who had complained that the Municipal Board, Kairana, U. P., had granted a monopoly of wholesale business in vegetables to a third person with the result that the Board had become powerless to grant a licence to the petitioner, there being consequently no bye-law under which the Board could grant a licence. The petitioner was carrying on wholesale business in vegetables before the acts complained of were done. On the above facts the petitioner who had been prohibited from carrying on his business filed a petition under Art. 32 before the Supreme Court for the enforcement of his fundamental right of trade under Art. 19(1)(g). The Supreme Court allowed the petition and made the following observations:

> "The powers given to this Court under Art. 32 are much wider and are not confined to issuing prerogative writs only."

The Supreme Court passed an order directing the Municipal Board not to prohibit the petitioner from carrying on the trade of wholesale dealer etc. within the limits of the Municipal Board, Kairana.

(5) On the facts as gathered from the affidavit, the counter-affidavit and the affidavit in rejoinder, and on the strength of the authorities to which attention has been invited above, I have come to the conclusion that this Court should issue (a) an order quashing the order of the District Magistrate, Kanpur declining to renew the licence of the petitioner and (b) a direction to consider the application on the merits.

(6) For the reasons given above, I concur in the order proposed to be made by my brother Mootham.

MOOTHAM J.:

(7) This is a petition under Art. 226 of the Constitution.

(8) The petitioner carries on business as a cloth dealer at Kanpur under the style of Rameshwar Prasad Kedar Nath. In 1948 the U. P. Controlled Cotton Cloth and Yarn Dealers Licensing Order of that year came into operation, and in 1949 the petitioner applied for and was granted a licence in Form B1, that is a licence to buy and sell controlled cloth, valid up to the 31st October 1950. The licence was renewed for two further periods, each of one year.

(9) On 9-5-1952, the petitioner was informed by the District Magistrate of Kanpur, the first respondent, that his licence had been cancelled; and from the order of cancellation made by the District Magistrate on the 1st May it appears that his action was taken on account of the alleged contravention by the petitioner of cl. 24(1), Cotton Textile (Control) Order, 1948. The operation of this order was subsequently stayed by an order of this Court.

(10) On 25-9-1952, the petitioner applied for a renewal of his licence which would in any event expire on the 31st October of that year. On the 1st December he was informed by the District Supply Officer that the District Magistrate had refused to renew the licence "on account of the malpractices indulged in by you and your bad reputation". This allegation is denied by the petitioner, and it is common ground that he was not afforded any opportunity of making a representation or of being heard before either of the orders cancelling his licence or refusing to renew that licence were made.

(11) The petitioner prays for the issue of a writ of 'certiorari' or other order to quash the order of the District Magistrate refusing to renew his licence. The principal submission made on his behalf is that the District Magistrate in determining whether his licence should be renewed was bound to hear the petitioner and afford him an opportunity of rebutting the allegations made against him. It is also contended that in his order refusing to renew the petitioner's licence the District Magistrate did not state the reasons therefor within the meaning of cl. 11, U. P. Controlled Cotton Cloth and Yarn Dealers Licensing Order, 1948, that the order refusing to renew the licence was made 'mala fide', and finally that cl. 11 of the Order, if it does not require the District Magistrate to give the person concerned a hearing before refusing to renew his licence, is unreasonable and void as being in conflict with Art. 14 of the Constitution.

(12) Clause 11 of the Order is in the following terms:

> "A licence granted under this Order shall, unless previously cancelled or suspended, be valid for 12 months from the date of issue, but may on application made not less than one month before the expiry of the said period be renewed for a year at a time on payment of the fees prescribed in respct of such licence in Schedule II.
>
> Provided that the Licensing Authority may for reasons to be recorded in writing refuse to renew a licence."

(13) The argument on behalf of the State is that the renewal or refusal to renew a licence is purely an administrative act, and reliance is placed on the recent decision of the Privy Council in — 'Nakkuda Ali v. Jayaratne', (1951) AC 66 (E).

(14) In a well known passage in his judgment in — 'The King v. The Electricity Commissioners', (1924) 1 K. B. 171 (F) Atkin, L. J., as he then was, defined the conditions subject to which the King's or Queen's Bench in England could issue a writ of 'certiorari' or prohibition. He said at p. 205:

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

(14A) It has not been contended by the State in this case that the refusal of the Licensing Authority to renew the petitioner's licence did not involve a question affecting the petitioner's rights; the argument was that in determining this question the Licensing Authority had no duty to act judicially. The test, it was urged, was a comparatively simple one: did the enactment which conferred authority on the Licensing Authority to determine whether the petitioner's licence should be renewed impose upon that authority, either specially or by necessary implication, the duty to act judicially? If it did not then the act was ministerial.

In my opinion this argument, in view of the decision of the Supreme Court in — 'Province of Bombay v. Khushaldas S. Advani', AIR 1950 SC 222 (G) must prevail. In that case the Court had to consider the effect of S. 3, Bombay Land Requisition Ordinance, 1947, by which the Provincial Government was given power, if in its opinion it was necessary or expedient to do so, to requisition land for any public purpose. By a majority the Court held that the decision of the Provincial Government that certain property was required for a public purpose was not a judicial or quasi-judicial decision but an administrative act, and that therefore the Bombay High Court had no jurisdiction to issue a writ of 'certiorari' in respect of the order of requisition. The Court approved, as correctly laying down the law, the passage from Lord Justice Atkin's judgment in — 'The King v. Electricity Commissioners' (F) to which I have referred, and all the learned Judges who constituted the majority took the view that as there was nothing to be found in the Ordinance which required the Provincial Government to act judicially in deciding whether the property in dispute was required for a public purpose, the Provincial Government acted in an administrative capacity.

Kania C. J., (with whom Patanjali Sastri J., as he then was, agreed) said at page 226:

> "It seems to me that the true position is that when the law under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi-judicial."

and Das J., said (at p. 260):

> "If a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

(15) It is therefore necessary in the first place to examine the U. P. Controlled Cotton Cloth and Yarn Dealers Licensing Order. It is common ground that there is nothing in the Order which expressly or by necessary implication imposes the duty on the Licensing Authority to act judicially, unless it is to be found in the requirement contained in the proviso to cl. 11 that if the Licensing Authority refuses to renew a licence he must record his reasons therefor in writing. It is also common ground that

there is nothing in the Order which plainly indicates the intention of the legislature that the exercise by the Court of its power to issue a writ of 'certiorari' in appropriate circumstances should be excluded.

I do not think that the fact that the Licensing Authority has to record his reasons when he refuses to renew a licence is, in the absence of any specification of the grounds on which a renewal may be refused, or indeed of any other limitation on his powers in this respect, a sufficient indication that he has to act judicially. I am therefore of the opinion that we are bound to hold that the act of the Licensing Authority in refusing to renew the petitioner's licence was an administrative act and that accordingly this Court cannot interfere with such order by a writ in the nature of 'certiorari'.

(16) I venture to think however that the question whether the Licensing Authority acted quasi-judicially or ministerially is one which is somewhat unreal. This Court has power under Art. 226 of the Constitution to issue directions and orders, as well as writs, for any purpose; and in exercise of that power it can direct that an administrative order be quashed: see — 'AIR 1952 All 836 (A)' and — 'Ram Charan Lal v. The State of Uttar Pradesh', AIR 1952 All 752 (H). The question, therefore, which in my opinion really arises is whether the order complained of in this case is an order made in circumstances which run counter to the elementary principles of justice; for if that question be answered in the affirmative I am of the opinion that whether the order be quasi-judicial or administrative the Court would be justified in directing that it be quashed.

(17) Now there is a line of cases in England which is authority for the general principle that, in the absence of statutory provision to the contrary, no man can be deprived of his property without having the opportunity of being heard. That this is so is established I think by cases such as — 'Cooper v. The Board of Works for Wandsworth District', (1863) 14 C. B. N. S. 180 (I); — 'Hopkins v. Smethwick Local Board of Health', (1890) 24 Q B D 712 (J) and — 'Smith v. The Queen', (1878) 3 AC 614 (K) — the last being a decision of the Privy Council.

In — 'Cooper's case (I)' the Board of Works were empowered by statute to pull down a house if the builder had neglected to give notice of his intention to the Board seven days before beginning to dig or lay the foundations. Whether any notice was given in this case was a matter of dispute, but Cooper admitted that he had commenced digging out the foundations within five days of the day on which he alleged he had sent notice. The house had reached the second storey when the Board, without notice to Cooper, sent their workmen to the site and raised the building to the ground. Cooper brought an action for trespass; the defence was that the Board had acted within its legal rights under S. 76, Metropolis Local Management Act, 1855, Erle, C. J., said:

> "The contention on behalf of the plaintiff has been, that, although the words of the statute, taken in their literal sense, without any qualification at all, would create a justification for the act which the District Board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognised, that no man is to be deprived of his property without having an opportunity of being heard.....I think the power which is granted by the 76th section is subject to the qualification suggested.....I think the Board ought to have given notice to the plaintiff, and to have allowed him to be heard."

Willes J., in the same case laid down the law in these terms:

> "I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice."

(18) The principle laid down in — 'Cooper's case (I)' was approved by the Court of Appeal in — '(1890) 24 Q B D 712 (J)', also an action for damages for trespass.

(19) That principle had indeed been affirmed a few years earlier in — ('1878) 3 AC 614 (K)' decided by the Privy Council in 1878. In that case the appellant had obtained from the Crown a lease of a plot of land measuring some 870 acres in Queensland, Australia, for a term of ten years. The lease was granted under the Crown Lands Alienation Act, 1868, sub-s. 5 of S. 51 of which provided that "the lessee of any agricultural or pastoral land, his agent or bailiff, shall reside on such selection continuously and 'bona fide' during the term of his lease, provided that if at any time during the currency of the lease it shall be proved to the satisfaction of the Commissioner that the lessee has abandoned his selection and failed in regard to the performance of the conditions of residence during a period of six months, it shall be lawful for the Governor to declare the lease absolutely forfeited and vacated."

During the currency of the lease the acting Commissioner reported that it had been proved to his satisfaction that the appellant had abandoned the plot and had failed in regard to the performance of the conditions of residence during a period of six months, and a few days later the Governor issued a proclamation declaring the lease to be absolutely forfeited and vacated. It was contended on behalf of the appellant, 'inter alia', that there had been no proper hearing before the Commissioner which would enable the Crown to assert that there had been proof to the satisfaction of the Commissioner such as is required by the statute of either abandonment or non-residence. The Crown contended that the Commissioner's decision on questions relating to forfeiture was purely ministerial but their Lordships held that sub-s. 5 of S. 51 was not so limited in terms nor was it so limited by reasonable intendment.

The Judicial Committee were disposed to think that there had not been a finding of the Commissioner of abandonment apart from non-residence. "But", their Lordships said,

> "they decide the case upon broader grounds. It appears to them that the defendant has not been heard in the sense in which 'a hearing', has been used in the cases which have been quoted in many others, and in the sense required by the elementary principles of natural justice."

(20) I think these cases are, as I have said authority for the salutary principle that a man must not be deprived of his property without being given the opportunity of being heard.

But does a man's property stand in this respect on a special and exclusive footing? I cannot see in principle why that should be so. The loss of a man's right to carry on his business may be no less serious in its consequences than the loss of his property; and under the Constitution the right to hold property and the right to carry on a business are equally fundamental rights possessed by every citizen. If there be authority—as I think there is, founded upon the plainest principles of justice—that (in the absence of statutory provisions to the contrary) a man be not deprived of his property without being heard, I can see no reason why that principle should not be applied to the protection of another fundamental right, namely the right to carry on business.

(21) '1950 A. C. 66 (E)', was an authority much relied on by the State. Narkudda Ali was a dealer in textiles in Ceylon who had been granted a licence to carry on his business under the Defence (Control of Textiles) Regulations, 1945. In 1947 his licence was revoked under Regulation 62, which provided that:

"Where the controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the controller may cancel the textile licence....."

on the ground that he had falsified paying-in slips in his dealings with the Textile Coupon Bank. The appellant applied for a writ of certiorari, alleging 'inter alia' that he had not been given a proper opportunity of answering the charge against him.

The Privy Council held that the cancellation of the licence was an executive act, the Controller having no duty to act judicially. "In truth", their Lordships said,

"when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because, he believes, and has reasonable grounds to believe, that the holder is unfit to retain it."

(22) I have stated the reasons why in my opinion the fact that an order is an administrative one is not necessarily conclusive against the exercise by the Court of its powers under Art. 226. It has not been the State's contention that the Licensing Authority was not in the present case determining a question; and in my judgment it is clear that, in contrast to Narkudda Ali the present petitioner has by virtue of Art. 19 (1) (g) of the Constitution the fundamental right to carry on his trade or business subject to such reasonable restrictions as may be imposed under Art. 19(6). He is, therefore, 'prima facie', entitled to a licence, and the granting of it cannot therefore appropriately be described as a privilege. — 'Nakudda Ali's case, (E)', is not therefore in my view of assistance in the determination of the main question which arises in this case.

(23) It is common ground that in this case the petitioner was not afforded an opportunity of being heard. I would on that ground and for the reasons which I have endeavoured to state, hold that the order of the Licensing Authority, even though it be an administrative order, is one which we should quash in the exercise of our powers under Art. 226. I can see no harm which would happen to the Licensing Authorities from hearing the person before they subject him to a disadvantage so grievous as the loss of his right to carry on business; and if I may adopt the words of Erle, C. J., in — Cooper's case (I)'.

"I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss".

(24) In the view I take of the petition it is unnecessary for me to express an opinion on the other points which were canvassed before us.

(25) The petitioner is in my opinion entitled to his costs which I would fix at Rs. 250.

(26) BY THE COURT: The order of the District Magistrate, Kanpur, refusing to renew the petitioner's licence for the year 1952-53 is quashed, and a writ in the nature of mandamus will issue to the District Magistrate, Kanpur, directing him to consider the application of the petitioner for the renewal of his licence on its merits. The petitioner is entitled to his costs which we fix at Rs. 250.

A/R.G.D. Order accordingly.

A. I. R. 1954 ALL. 150 (Vol. 41, C. N. 85)

MUSHTAQ AHMAD J.

Radhey Lal, Judgment-debtor-Appellant v. Mt. Lareti, Decree-holder, Respondent.

Ex. Second Appeal No. 1682 of 1948, D/-6-11-1951, from decision of Civil Judge, Mainpuri, D/- 14-7-1948.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 1(3) and 14 — "Date of commencement of this Act."

The date, 1-10-46, being the date on which, according to S. 1(3), the Act is to be deemed to have come into force is for all intents and purposes the date on which the Act must be regarded as having commenced. S. 14 would, therefore, have no application to a decree passed on 2-1-1947. AIR 1951 All 227, Foll.; AIR 1950 All 666, Not foll. (Paras 8 and 9)

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3(a) — Notice given after filing of suit.

Where the notice given by the landlord and the failure of the tenant to pay the amounts demanded thereby are of dates subsequent to the filing of the suit, S. 3(a) cannot come into operation. (Para 12)

(c) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 14 — Applicability — Section has no application to consent decree. AIR 1951 All 227 and AIR 1951 Assam 27, Foll.; AIR 1950 All 666, Not foll. (Para 14)

Baleshwari Prasad, for Appellant; B. C. Saksena, for Respondent.

CASES REFERRED:

(A) ('50) AIR 1950 All 666: 1950 All LJ 817 (Pr 9)

(B) ('51) AIR 1951 All 227: 1951 All LJ 722 (Pr 9)

(C) ('51) AIR 1951 Assam 27: ILR (1952) Assam 175 (Pr 14)

JUDGMENT: This is a judgment-debtor's appeal. The suit in which the decree in execution was passed had been filed on September 17, 1945,

for ejectment and arrears of rent at Rs. 3-8-0 per mensem from June 30, to September 9, 1945. The decree in the suit was passed with the consent of the parties on January 2, 1947. It provided that the judgment-debtor appellant would vacate the house by August 1, 1947, and that, if he did not do so, the decree-holder-respondent would be entitled to execute the decree for ejectment. The decree-holder's right to execute the decree after this date was not subject to any condition whatsoever, inasmuch as he could claim the defendant's ejectment after that date without any restrictions. As regards the rent payable to the plaintiff-decree-holder it was agreed that the defendant was entitled to deduct the amount spent by him on repairs, that the said amount would be determined by one Mr. Raghubar Sahai Raizada, counsel appearing for the plaintiff in the case and, lastly, that, if the amount so determined exceeded the arrears due to the plaintiff, the excess would be set off against future rent, but that, if it was less, it would proportionately reduce those arrears.

Admittedly, no ascertainment of the amount spent by the defendant on repairs was made by Mr. Raghubar Sahai Raizada. The lower appellate Court remarked in its judgment that the plaintiff had filed several applications alleging that her counsel had made various attempts to go to the house in order to estimate the amount spent on repairs but that for some reason or other the defendant evaded the matter. This would at least show that Mr. Raghubar Sahai was not able to ascertain the amount entirely on account of the dilatory tactics of the defendant.

(2) On August 5, 1947, the decree-holder-respondent applied for the execution of the decree for ejectment. Objections were taken to this application on the ground that, under S. 14, U. P. (Temporary) Control of Rent and Eviction Act 3 of 1947, no ejectment could be ordered.

(3) A few days later, on August 25, 1947, the respondent gave a notice to the appellant, demanding Rs. 91/- as rent from June 30, 1945 to August 30, (obviously meaning 31) 1947. On September 15, 1947 the appellant sent to the respondent a money order for Rs. 28/-, which the latter refused to accept.

(4) Obviously the decree-holder claimed the respondent's ejectment by his application of August 5, 1947, referred to above, on the strength of the consent decree of January 2, 1947. After he had served on the respondent the notice of August 25, 1947, just mentioned, he claimed the respondent's ejectment also on the ground that the latter had been guilty of wilful default within the meaning of cl. (a) of S. 3 of the aforesaid Act.

(5) The objections filed by the appellant were allowed by the execution Court but dismissed by the lower appellate Court in appeal.

(6) The main point argued by the learned counsel for the appellant was that he could not be ejected in view of the provisions of S. 14 of the said Act. This section enacts:

> "No decree for the eviction of a tenant from any accommodation passed before the date of commencement of this Act shall, in so far as it relates to the eviction of such tenant, be executed against him as long as this Act remains in force, except on any of the grounds mentioned in S. 3."

(7) The section would apply only if the decree for ejectment was passed "before the date of commencement of this Act." The decree in this case, as already noted, had been passed on January 2, 1947. The Act in question received the consent of the Governor on February 28, 1947 and was published in the official gazette on March 1, 1947. Section 1 (3) of the Act provides:

> it shall be deemed to have come into force on the 1st day of October, 1946.

(8) The question arises: what is the date which can be said to be "the date of commencement of this Act," that is, was this date the 28th February, 1947 or the 1st October, 1946? This date, 1st October, 1946, being the date on which, according to S. 1 (3), the Act is to be deemed to have come into force is for all intents and purposes the date on which the Act must be regarded as having commenced. Once the operation of a statute is made retrospective so as to take effect from a particular date, it must, in my opinion, be taken that the Act was actually passed on that day, no matter if in point of fact it came into existence on a subsequent date, as in the present case. I would find it difficult to hold that when a certain legislative measure is made expressly retrospective as from a specified date, it should still be imagined that the same really began on a later date.

Any other view would involve the anomaly that, although the Act is made retrospective so as to take effect from a prior date, it should be regarded as having commenced on a later date, as in that case it would have to be taken that for the intervening period the Act was actually in abeyance. Such a position may not be easily intelligible, for to say that the Act came into force on a particular date and yet it should be taken to have commenced on a later date is really to suggest a contradiction of ideas.

(9) My attention has been called to two single Judge decisions of this Court bearing on this point but deciding it altogether divergently. One was the case of — 'Abbilak Ram v. Uma Shankar', AIR 1950 All 666 (A) and the other that of — 'Sahabuddin v. Mohan Lal', AIR 1951 All 227 (B). In the former Bind Basni Prasad J. had held that the "date of commencement of this Act" in S. 14 meant the date on which the Act was published, that is, the 1st March, 1947. On the other hand, in the latter case, the Hon. the Chief Justice took the view that the date of commencement was really the date on which the Act had come into force under S. 1(3) of the Act, namely the 1st October, 1946. I am positively inclined to the latter view. The result of this would be that the decree in the present case which was passed on January 2, 1947 would be deemed to have been passed after and not before the date of the commencement of the Act. As such, obviously S. 14 would have no application.

(10) The lower appellate Court did not pay any independent consideration to this question of the applicability or otherwise of S. 14, but, assuming the section to be applicable, proceeded to examine whether there was sufficient ground under Cl. (a) of S. 3 of the Act for the appellant's ejectment, and it answered the question in the affirmative. I shall examine this question now.

(11) Paragraph 2 of the plaint mentioned that the plaintiff had sent a notice to the defendant asking for arrears of rent on July 17, 1945. This allegation was admitted by the defendant in paragraph 3 of his written statement. It is common ground that no rent was ever paid by the defendant to the plaintiff after the date of this notice except that he sent a money order for Rs. 28/-, as already mentioned on September 15, 1947. Later, as also mentioned, the plaintiff sent a notice to the defendant on August 25, 1947 demanding Rs. 91/- in response to which the money

order just mentioned was sent, though refused. The lower appellate Court, while examining this question did not specifically refer to the precise date of the notice which it took into consideration for the purpose of Cl. (a) of S. 3 but there can be no doubt that the learned Civil Judge had in his mind the later notice of August 25, 1947, because the amount of Rs. 91/- mentioned by him as the sum demanded had been demanded only by this notice. Now S. 3 (a) reads:

"No suit shall, without the permission of the District Magistrate, be filed in any civil Court against a tenant for his eviction from any accommodation, except on one or more of following grounds:

(a) That the tenant has wilfully failed to make payment to the landlord of any arrears of rent within one month of the service upon him of a notice of demand from the landlord."

(12) The notice of August 25, 1947, which the learned Civil Judge had in his mind obviously did not satisfy the conditions mentioned in the above quotation. These conditions are that, even prior to the filing of the suit, certain things should have taken place, namely, the demanding of the rent by notice and the wilful failure of the tenant to pay it at least for a month after the date of service of the notice upon him. In the present case, the notice of August 25, 1947, which alone the lower appellate Court was thinking of and the appellant's failure to pay the amount demanded thereby, both were of dates subsequent to the filing of the suit on September 17, 1945. Therefore, on the basis of this notice and this failure it could not be said that cl. (a) of S. 3 had come into operation and that the plaintiff was entitled by the force of it to a decree for ejectment. The position, however, does not stop here, as would be clear from what follows.

(13) On July 17, 1945, as I have above mentioned, the plaintiff had sent his first notice demanding arrears to the defendant. This notice was admitted in defence. Nothing was ever paid in pursuance of it. The suit was filed after the date of this notice and also after the lapse of more than one month from the date of its service. It is this notice and the defendant's failure to respond to it that in fact supply the grounds mentioned in Cl. (a) of S. 3, on the basis of which, the plaintiff could claim the defendant's ejectment. The result, therefore, is that, both because S. 14 of the Act is not applicable at all and also because, assuming it is, the defendant is liable to be ejected under cl. (a) of S. 3 of the Act, the order under appeal must be upheld.

(14) It was argued by the learned counsel for the decree-holder-respondent that the judgment-debtor's contention on the basis of S. 14 is further untenable because it would have no application to a consent decree. That is to say, he stressed that, where the defendant, being presumably aware of his rights, had agreed to vacate the premises by a certain date but failed to do so, the plaintiff was entitled to eject him irrespective of any prohibitive conditions enjoined by this particular Act. Divergence is found on this point also in the two cases referred to above, and here again I am inclined to the view taken in the later decision. In my opinion, there is nothing in law to restrict the freedom of a party to agree to any terms in a compromise to be filed in a pending suit, and this position is in no way controlled or modified by anything in the statute.

I am further supported in this view by a Bench decision of the Assam High Court in — 'Satish Chandra v. Bimalendu Sen', AIR 1951 Assam 27 (C) where the question arose under the Assam Urban Area Rent Control Act of 1949 and it was held that there was nothing in that Act which prevented the tenant from contracting himself out of the privileges allowed to him by S. 6 of the Act. It was held that, in spite of that section, it was open to the tenant to agree to vacate the premises leased by a certain date, the landlord being entitled to claim his ejectment in case he failed to do so.

(15) For these reasons I uphold the decree of the lower appellate Court and dismiss this appeal with costs.

(16) Leave to appeal to a Bench is granted.

B/V.R.B. Appeal dismissed.

A. I. R. 1954 ALL. 152 (Vol. 41, C. N. 86)
(LUCKNOW BENCH)

RANDHIR SINGH J.

Ram Nath and another, Objectors-Appellants v. Ram Prasad, Respondent.

Ex. Appeal No. 6 of 1948, D/- 11-9-1953, against decree of Dist. J., Barabanki, D/- 1-10-1947.

Limitation Act (1908), Art. 182(2) — Starting point — Date of dismissal of appeal.

The date on which the appeal against the decree under execution was dismissed is the date for reckoning the period of limitation under Art. 182(2), Limitation Act. AIR 1951 All 493, Foll. (Para 3)

Anno: Limitation Act, Art. 182 N. 40, 46.

B. K. Dhaon, for Appellants.

CASE REFERRED TO:

(A) ('51) AIR 1951 All 493: 1950 All LJ 565 (Pr 3)

JUDGMENT: This is a second appeal in an execution matter. One Ram Prasad obtained a simple money decree against Ram Asrey. Ram Asrey filed a revision against the decree in the Chief Court as also an appeal before the District Judge of Barabanki. The hearing of the appeal was adjourned on account of the revision. The revision application was ultimately dismissed on 17-1-1944. Thereafter the appeal also came up for hearing before the District Judge. On that date the appellant Ram Asrey did not appear and the District Judge after noting the absence of the appellant Ram Asrey and the presence of the respondent dismissed the appeal with costs.

The decree-holder put his decree into execution. An objection was raised on the ground of limitation and it was urged that the decree having been put into execution more than three years after the date of the trial Court's decree, the execution application was barred by time. On behalf of the decree-holder it was contended that the starting point for the period of limitation would be the date of the final decree passed by the District Judge in appeal. The decree-holder's contention prevailed in the execution Court as also with the District Judge. The judgment-debtor has now come up in second appeal.

(2) The respondent is absent.

(3) The only point which has been pressed in arguments in this case is the point of limitation. There is a recent decision of this Court in — 'Ram Kumar v. Chaube Rudra Dutt', AIR 1951 All 493 (A) in which a similar question of limitation came up for decision. It has held by the Division Bench that the date on which the appeal was dismissed would be the date for reckoning the

period of limitation under Art. 182(2), Limitation Act. The earlier Privy Council cases have also been discussed in this reported case. In view of this Division Bench ruling, the argument of the learned counsel for the appellant has no force. The appeal was rightly decided by the Court below, and the present appeal has no force.

(4) The appeal is dismissed. I make no order as to costs.

C/R.G.D. Appeal dismissed.

A. I. R. 1954 ALL. 153 (Vol. 41, C. N. 87)

DESAI AND BEG JJ.

State v. Kanchan Singh and another, Respondents.

Criminal Govt. Appeal No. 1075 of 1951, D/-25-9-1953, against order of S. J., Banda, D/-14-5-1951.

(a) Evidence Act (1872), Ss. 1, 9 — Identification — Appreciation of evidence.

Deceased mentioning "A" living within limits of Police Station "X" as one of his assailants in dying declaration — Parentage, castes, or residence not given — Prosecution not establishing that there was no other "A" than A, the accused, within limits of police station — Held that the accused A, could not be connected with the assailant A, mentioned by deceased. (Para 12)

Anno: Evi. Act, S. 1 N. 12; S. 9 N. 4.

(b) Evidence Act (1872), S. 32 — Dying declaration — Acceptance in part.

Dying declaration of deceased mentioning A and B as amongst his assailants — No description of A sufficient to identify him given — Description of B sufficient to identify — Accused A held could not be connected with assailant A and dying declaration could not be used against him — Accused B held same as assailant B and that dying declaration could be used against him — It did not amount to accepting dying declaration in part — It was accepting it wholly. (Para 13)

Anno: Evidence Act, S. 32 N. 12.

(c) Evidence Act (1872), S. 32 — Conviction on uncorroborated dying declaration.

A person can be convicted upon a dying declaration of the deceased, without corroboration.

When the deceased said that he was attacked by the respondent and that statement is believed, it follows that the respondent is guilty (in the absence of any mistake of identity); nothing remains to be done to find him guilty. If the dying declaration is not believed, it is a different matter. But once it is believed, it leads to the conclusion of the respondent's guilt. There is no presumption that a dying declaration is false or that it is unworthy of belief. There is no justification for treating it as a piece of tainted evidence as if it were a confession of a co-accused or evidence of an accomplice. 'So it cannot be laid down as a matter of law that no dying declaration should be believed unless it is corroborated'. The law contemplates its being believed and some dying declarations may be believed even though not corroborated. Whether a dying declaration should be believed or not would depend upon the circumstances of the case. It is essentially a question of fact to be determined by the Court on the basis of the circumstances of each case. As far as the credibility is concerned, it is just like the evidence given by a witness. It is for the Court to decide whether to believe it or not and no rule can be laid down either that it should be believed or that it should not be believed. Once it is believed, it is irrelevant and illogical to consider that it is not made on oath and that the maker has not been subjected to cross-examination. When the law had made it a "relevant fact" notwithstanding the absence of oath and cross-examination, it means that it will not be held to be unbelievable merely on account of the absence of these matters. If it is held to be unbelievable, it must be done on the basis of other circumstances. So long as it cannot be predicted in respect of a dying declaration that had its maker been subjected to cross-examination his credibility would have been shaken, it cannot be said that the dying declaration should not be acted upon because there has been no cross-examination. (Paras 21, 24)

(English and American Law considered.) (Para 25)

(Held that when the dying declaration was made, the deceased was under the apprehension of death and that though this was not a condition for admissibility of the dying statement under S. 32, as under the English Law, still the apprehension of the approaching death gave the statement the sanction of an oath). (Para 23)

Anno: Evid. Act, S. 32 N. 9, 11, 8.

(d) Evidence Act (1872), S. 32 — Dying declaration — Expectation of death.

English law admits as dying declaration only such statements of material facts concerning the cause and circumstances of homicide, as are made by the victim under the fixed and solemn belief that his death is inevitable and near at hand. The solemnity of the occasion on which the statements are made is deemed to supply the sanction of oath. The approach of death is deemed to produce a state of mind in which the statements of the dying person are to be taken as free from all ordinary motive to misstate. The law in India does not make the admissibility of a dying declaration dependant upon the person's having a consciousness of the approach of death. Even if the person did not apprehend that he would die, a statement made by him about the circumstances of his death would be admissible under S. 32, Evidence Act. (Paras 22, 23)

Anno: Evid. Act, S. 32 N. 8.

Sri Ram, Deputy Govt. Advocate, for the State; Jagdish Narain Agarwala and Makund Lal Agarwala (for No. 2) and Bishwa Nath Mehrotra (for No. 1), for Respondents.

CASES REFERRED:

(A) (1837) 2 Lewin 147: 168 ER 1109 (Pr 24)
(B) (1892) 146 US 140: 36 Law Ed 917 (Pr 25)
(C) ('46) AIR 1946 Nag 301: 47 Cri LJ 625 (Pr 26)
(D) ('48) AIR 1948 All 170: 1947 All LJ 627: 49 Cri LJ 140 (Pr 26)
(E) ('53) AIR 1953 SC 420: 1953 Cri LJ 1772 (SC) (Pr 26)

DESAI J.:

This is an appeal by the State against a judgment of the Sessions Judge of Banda acquitting the respondents of the offence of S. 396, I. P. C. It was alleged that they in the company of six or seven others committed a dacoity on the evening of 10-7-1950 on the road from Baberu to Kamasin at a place about two miles from Baberu and robbed police constable Phool Singh of police station Baberu of the Government gun and cartridges which he was carrying and murdered him.

(2) On 10-7-1950 the chaukidar of village Satniyaon made a report at police station Baberu that there was a likelihood of a breach of the peace in his village. So the head constable deputed P. Cs. Phool Singh deceased and Hanif to go to Satniyaon at once. The deceased was given a Government gun and cartridges while Hanif carried his own gun. They went on cycles. They stayed in Satniyaon for some hours, found that everything was peaceful and at 4 or 4.15 P. M. left for Baberu. In order to go to Baberu one has to go from Satniyaon to village Gurauli Saphai, which is about two miles from Satniyaon and about five and a half miles from Baberu, on Baberu-Kamasin road. There is no road of any kind between Satniyaon and Gurauli Saphai; the map of the district does not show even a cart track or footpath between the two villages and apparently one has to go through fields.

The two constables reached Gurauli Saphai and as they were going along the road towards Baberu they met P. C. Chandra Bhan who was going with a message to Kamasin. The deceased asked Hanif to proceed and stopped to talk with P. C. Chandra Bhan. After talking with him for 5-10 minutes he proceeded on the cycle towards Baberu. He was not thereafter seen alive by Hanif. As he was cycling along he met Kanchan Singh, respondent 1, who was walking along in the same direction. He knew him from before and got down to talk to him. That place would be three and a half or four miles from Baberu. Kanchan Singh asked him how the gun could be handled and how much it cost.

The deceased after talking to him mounted the cycle and rode on towards Baberu. After he had covered a distance of less than two miles his cycle failed and he had to get down. By that time it had become a little dark. At that place Brij Bhushan Singh, Indra Pal Singh and the chaukidar of Birraon passed him. They were presumably going to Birraon which is seven miles from Baberu on the road to Kamasin. He started walking towards Baberu when he was attacked by the two respondents and six or seven others whom he did not know. Kanchan Singh hit him first with a lathi and he fell down. A number of injuries with lathis and spears were inflicted upon him and his gun and cartridges were snatched away from him. The miscreants left him wounded on the road and went away. They left his cycle also on the road. The place was surrounded by jungle and nobody saw the occurrence. The deceased became unconscious on account of the injuries received by him.

(3) P. C. Hanif arrived at Baberu at 7 P. M. When he woke up at 4.30 A. M. next morning and found that the deceased had not arrived, he became anxious and went in search of him. He found him lying unconscious near the second milestone. He saw his cycle but not the gun and cartridges. He spoke to the deceased several times, but the latter could not respond and kept on groaning. After a short time Hanif saw Sheo Bodhan Sadhu walking along the road and asking him to look after the deceased, returned to the police station where at about 6 A. M. he made a written report to the effect that he had found the deceased lying wounded and unconscious on the road about two miles from Baberu, that his cycle was there but not the gun and the cartridges and that he was unable to speak.

Thereupon the station officer, the second officer and constables including Hanif went to the spot. They found the deceased still unconscious. They also found Sheo Bodhan and Teg Ali there. Teg Ali was at that time going from Baberu to Satniyaon. He also had found the deceased groaning with pain but unable to speak. With the assistance of Sheo Bodhan he had laid him on a 'dari' which he had spread and had kept his canvas bag and cap near him. The station officer started investigation at once. He sent the deceased in a bullock cart with Hanif to Baberu. After preparing the site plan he went in search of the gun and the cartridges in the vicinity.

(4) Hanif brought the deceased to Baberu hospital at about 9 A. M. When he was admitted in the hospital the deceased continued to be unconscious. The medical officer gave him an injection and within 20-25 minutes he regained consciousness. As his condition was serious, the medical officer at once sent for the Tahsildar from Baberu to record his statement. The Tahsildar reached there within twenty minutes and found the deceased fully conscious and able to speak. The Tahsildar recorded his dying declaration at 10-15 A. M. and after getting it verified and signed by him sent it to the Sub-divisional Magistrate at Banda.

In the dying declaration the deceased said that he had met Kanchan Singh 3½ or 4 miles from Baberu, that Kanchan Singh had enquired of him about the price of the gun and the manner in which it could be handled, that his cycle failed when it had become a little dark, that he met Brij Bhushan, Indra Pal and the chaukidar of Birraon going towards Birraon, that subsequently, Kanchan Singh and Phool Singh, a bad character of Kuchendu, along with six or seven others reached there, that first of all Kanchan Singh struck him on the head, felling him down, that he did not know who took away his gun and cartridges and that he did not know the other miscreants but could identify them if he saw them. Hanif heard the dying declaration and also got information about it from the medical officer.

He returned to the spot reaching there at about 1.30 P. M. and informed the station officer that the deceased had named Phool Singh and Kanchan Singh as two of the miscreants. Thereupon the station officer sent the second officer to Kuchendu, which is at a distance of one and a half miles from the spot. The road from Baberu to Kamasin goes from west to east and Kuchendu is to the south of it. The second officer could not find Phool Singh in Kuchendu and returned to the spot and thence to the police station. The station officers went to Kamasin in search of Kanchan Singh who resides in village Narainpur. He searched for him in villages, Narainpur and Sandasani, but not finding him anywhere returned to Baberu on the morning of 12th July.

(5) In the meanwhile the injuries of the deceased were examined by the medical officer at Baberu. There were more than twenty injuries. There were more than six contused wounds on the head. There were multiple contused wounds in an area of 8" x 5" on the top of the head backwards; a considerable portion of skin was miss-

ing. The wounds were causing severe pain and the deceased was vomiting and bleeding from ears. There were nine contusions and contused wounds on both hands. Two contusions, 7" x 3" and 9" x 1¼" were on the upper part of the back.

The medical officer treated the injuries and sent him to Banda hospital, where better treatment was available. On 12th July at 3 or 4 A. M. the deceased died at Banda on that day at 12.35 P. M. On post mortem examination the Civil Surgeon found twenty-five injuries. He found nine incised wounds, five of which were on the head and the rest on the hands. There were five fractures, all being of bones of the two hands. The scalp was absent from the top of the head. The skull bones were in tact. There was congestion and haemorrhage over the surface of the brain. In the opinion of the Civil Surgeon the death resulted from shock and haemorrhage on account of multiple injuries.

(6) When the station officer returned to Baberu from Kamasin on 12th July, he learnt that the deceased had been taken to Banda and followed him. There he received a copy of the dying declaration. On return to the police station on the same day he got the first information report prepared on the basis of the dying declaration.

(7) On 12-7-1950 at 9 A. M. the second officer arrested Phool Singh respondent 2 in the bazar of Baberu and put him in the lock-up. On the same day at 2.30 P. M. he arrested Harpal Singh in Kuchendu on the basis of the information received from some witnesses there that he was seen in the company of the respondents after the occurrence. Kanchan Singh could not be arrested and steps under Ss. 87 and 88, Criminal P. C. had to be taken against him. He surrendered himself in Court on 7-11-50 after he had been sent up for trial as an absconder.

In the morning of 13-7-50 Harpal and Phool Singh were sent in a lorry to Banda District Jail. When Phool Singh's clothes were examined on his admission in the District Jail, his dhoti was found to have blood stains. The Jailor removed the dhoti from his possession, made a bundle of it and sealed it. Later it was sent to the Chemical Examiner who reported that it had three minute blood stains. The Imperial Serologist reported that the blood was human. As the stains were minute no grouping test could be performed.

(8) The respondents pleaded not guilty and denied having attacked, robbed and killed the deceased. Phool Singh stated that he was falsely implicated on account of enmity with Jagmohan Singh, that he was arrested in the bazar of Baberu on 11-7-50 at 8 or 9 P. M. by a constable who locked him up in the police station, that Jagmohan Singh was present there at that time, that he was severely beaten by a Sub-Inspector, that when he reached the jail he was bleeding from the anus, but there was no external mark of injury, that his dhoti had blood stains when it was examined in the jail, that it had got stains when it was worn by his wife who was suffering from small pox and that there might have been some fresh blood stains on account of the beating that he had received at the police station.

Kanchan Singh said that he had been falsely accused because of enmity with the police and Jagmohan Singh, that he had not absconded but had gone away to his brother in Indore and that he had surrendered himself on receiving information from his father about the attachment of his property.

(9) The prosecution relies upon the evidence of P. Cs. Hanif, Jamna Prasad and Chandra Bhan, the station and second officers of police station Baberu, the Civil Surgeon, the medical officer and the Tahsildar of Baberu, the jailor and the Assistant Jailor of District Jail Banda, Ram Dhani chaukidar of Satniyaon, the Sub-divisional Magistrate, Baberu, the station officer of Kamasin and Teg Ali. It is proved that Teg Ali became traceless after his examination in the Committing Magistrate's Court; so his statement recorded there was treated as evidence under S. 33, Evidence Act. The medical officer of Baberu was examined in the Sessions Court also. These witnesses supported the prosecution case set out above.

(10) Kanchan Singh did not examine defence evidence, but Phool Singh examined three witnesses, namely Chunubaddi Singh of Baberu, Ananta chowkidar of Kuchendu and Harpal. Chunubaddi Singh said that Phool Singh was arrested by two constables in the bazar of Baberu on 11-7-50 at about 8 A.M. The chaukidar stated that he was taken to the spot with a cot by another chaukidar on 11-7-50 at about 8-30 A.M., that when he reached the spot he was informed that the deceased had already been sent to the hospital in a bullock cart because he had delayed bringing the cot, that he was taken back to Kuchendu by the second officer who arrested Harpal Singh there, that he escorted Harpal Singh to police station Baberu where they reached at noon and that he found Phool Singh already detained in the lock-up.

Harpal is the man who was arrested but was not prosecuted. He stated that he was arrested on 11-7-50 at about noon in Kuchendu, that he was taken to police station Baberu by Ananta at 3 P. M., that Phool Singh had already been arrested by them, that he and Phool Singh were sent on 13th July at 10 A. M. from Baberu to the district jail at Banda, that Jagmohan Singh had reached the police station on 11th July at 4 or 4-30 P. M. and that he and Phool Singh were beaten by the police in the lock-up. He admitted having met the Sub-divisional Magistrate of Baberu on 12th July and having a talk with him.

(11) The evidence against the respondents is of the dying declaration supported by circumstances. Nobody saw the occurrence. The gun and the cartridges have not been recovered. The learned Sessions Judge held that the dying declaration was genuine, that it was not the result of any tutoring and that the deceased had no reason to name the respondents falsely. But by resorting to unjustified assumptions he thought that the deceased was attacked at about 9 P. M., that it was a dark and cloudy night, that it was drizzling that there was no certainty that the deceased could identify the respondents among the assailants and that the possibility of an honest mistake of identity by the deceased was not excluded. He did not attach any importance to the bloodstains found on Phool Singh's dhoti. He thought there was force in his explanation that he was given a beating at the police station.

He further thought that the stains did not exist before his arrest and had no connection with the crime. As regards the other respondent, he said that the dying declaration did not mention the parentage, or even residence, of Kanchan Singh, that there was no evidence to prove that in the police circle of Kamasin there is no Kanchan Singh other than the respondent and that there was no certainty that the

Kanchan Singh referred to in the dying declaration is the respondent Kanchan Singh. He did not think much of the evidence that Kanchan Singh had absconded after the occurrence.

(12) The learned Sessions Judge was as right in dealing with the case against Kanchan Singh as he was wrong in dealing with the case against Phool Singh. The only description of Kanchan Singh given in the dying declaration is that he is a resident of police circle Kamasin. That description was quite insufficient to fix the identity of the culprit. The station officer had to admit that he did not know how many Kanchah Singh live within the limits of police circle Kamasin. There is evidence to prove that Kanchan Singh respondent was found absconding after the occurrence. That may connect him with the crime and may lend some support to his identity with the Kanchan Singh mentioned in the dying declaration. Still the matter cannot be said to be free from doubt. It is rather unfortunate that the Tahsildar did not care to enquire of the deceased what was the parentage, caste and residence of Kanchan Singh.

The station officer immediately went after the respondent Kanchan Singh because he had received some information from Brij Bhushan and Indra Pal. The information is not available to the Court. Brij Bhushan and Indra Pal had turned hostile to the prosecution and were not examined as witnesses. The chaukidar of Baberu also was not examined as a witness for the same reason. As the description — residence within the limits of police station Kamasin — is too slender to connect the respondent Kanchan Singh with the Kanchan Singh meant by the deceased, it cannot be said that the respondent was one of the miscreants. The appeal against him must, therefore, be dismissed.

(13) The case against Phool Singh stands on a different footing. Shri Shri Rama was not right in contending that either both the respondents should be convicted or neither. He contended that the dying declaration should be accepted in toto and that if it is accepted as against Phool Singh it must be accepted as against the other respondent also. Without meaning to lay down that a dying declaration must be accepted or rejected in toto, I do not think that accepting it against Phool Singh and not against the other respondent amount to accepting it in part and rejecting it in part.

The dying declaration itself makes a distinction between the two respondents; it describes one sufficiently but not the other. I am only having regard to this distinction made in the dying declaration itself; I am accepting the dying declaration wholly and not in part. I accept that one Kanchan Singh was among the assailants of the deceased. Had the deceased said that Kanchan Singh is son of Bhagwan Singh, Thakur, resident of village Narainpur, I would have had no hesitation at all in holding the respondent Kanchan Singh also guilty. Had there been any circumstance to connect the respondent Kanchan Singh with the Kanchan Singh mentioned in the dying declaration then also I might have held that he was one of the assailants.

The identity of Phool Singh is not in dispute at all. He is described as "a bad character of village Kunchendu". The second officer, who arrested Phool Singh, and also the station officer, who had directed him to do so, were not cross-examined with a view to show that they were wrong in thinking that "Phool Singh, a bad character of Kuchendu", is the respondent Phool Singh and none other. No attempt was made by the respondent to show that there were several 'Phool Singhs residing in Kuchendu or that he is not a bad character. On the other hand it was tacitly conceded that the respondent was the Phool Singh meant by the deceased.

(14) There is clear & unimpeachable evidence to prove that the deceased was conscious, in full possession of his senses and in a fit state to make a dying declaration on 11-7-1950 at 10-15 A. M. (His Lordship considered the dying declaration and the evidence and proceeded). No inference of his mental condition not being perfect can possibly be drawn from the fact that he had forgotten to mention this detail at the proper stage in the dying declaration.

(15) The deceased knew the respondents but had no enmity of any kind with them. The respondents themselves did not suggest any possible motive for his involving them in a false case of dacoity and murder. He had taken charge of this police circle only five or six months before the occurrence. He belonged to Hamirpur district. It is impossible to say that he named the respondents not because they were among his assailants but for some other reason, when there is no suggestion of any other reason. Admittedly Phool Singh is on inimical terms with Jagmohan Singh Mukhia of his village. But there was no connection between Jagmohan Singh and the deceased. Kuchendu was not in the beat of the deceased. (His Lordship considered the defence evidence and proceeded). Therefore the evidence of all the three defence witnesses is worthless and not fit for reliance.

(16) The dying declaration contains intrinsic evidence that it is an untutored and spontaneous statement made by the deceased. At one place it mentions that the evening had well advanced and at another place that it had become a little dark when the cycle of the deceased failed. If the deceased had been tutored to make the statement he would have been tutored to say that there was plenty of light when the occurrence took place. Further fuller description of the respondents would have been given. It would not have served the purpose of the person or persons tutoring him to say that the assailants included "Kanchan Singh of P. S. Kamasin and Phool Singh, a bad character of Kuchendu". The natural tendency would have been to give their parentage, caste and residence so that there could not possibly arise any question of identity. It cannot be supposed that the persons who tutored him had no enemies other than Phool Singh and Kanchan Singh; some more names would have been suggested to the deceased. Then the deceased would not have been made to say himself that at the time of the assault there was nobody present because it was jungle. Such a damaging statement would not have been put into the mouth of the deceased; on the other hand, the presence of some witnesses would have been suggested. Then the last statement about his meeting Brij Bhushan Singh, Indra Pal Singh and the chaukidar of Birraon leaves no room for doubt that it was a true statement made by the deceased without any tutoring from outside. These persons were not under the thumb of the police or the deceased. As a matter of fact the evidence is that they have been won over by the respondents and therefore could not be examined as witnesses. The names of such witnesses who could be won over by the persons named in the dying declaration and were not amenable to the influence of

the police or those tutoring the deceased would not have been suggested to the deceased by those tutoring him.

(17) In the result, I find that there was no opportunity for anybody to tutor the deceased to name anybody falsely in the dying declaration, that one respondent has failed to explain who could have a motive to tutor him, that there is no evidence of tutoring and that the statement appears to have been made spontaneously without outside assistance. Since the deceased had no reason to implicate the respondents falsely, it must be taken to be a genuine or true statement.

(18) There was no justification at all for the learned Sessions Judge's feeling doubtful if there was sufficient light at the time of the occurrence. There is no evidence, direct or indirect, to show that the occurrence took place when it was too dark to see the assailants. There is nothing in the circumstances to suggest that it was too dark. The dying declaration itself mentions that the faces of all the assailants were seen, that two of them were actually recognized and that the rest could be identified if the deceased met them face to face. In the face of this statement in the dying declaration, I do not understand how it can be said by anyone that it was too dark to see the faces. The deceased himself said that evening had set in and that it had become a little dark but it is quite different from saying that it was so dark that the faces of the assailants could not be seen. No court would be justified in reading in the dying declaration something which not only does not find place there, but also would be inconsistent with what finds place there. The learned Sessions Judge was wrong in inferring the time of the occurrence from certain data only, ignoring the other data. He mixed up relevant data with irrelevant data. He started a series of arithmetical calculations as if the times given by the witnesses and the deceased were exact times ascertained from watches. There is no evidence that Hanif and Chandra Bhan carried watches. (After considering the appreciation made by the Sessions Judge, His Lordship proceeded:) Naturally one cannot decide a case on the basis of bare possibilities because there are innumerable bare possibilities and one cannot decide a case in innumerable ways. When there was clear evidence, the learned Sessions Judge was still less justified in ignoring it and acting upon bare possibilities. He ought to have acted upon the evidence. He had no justification for disregarding that evidence, even though it was probable, merely because something else was possible. The whole approach of the learned Sessions Judge was wrong. I find that the deceased's recognising the respondents was not improbable, that there was no reason whatsoever for entertaining a doubt about it and for thinking that the deceased might have made a bona fide mistake of identity and that the deceased really saw and recognised the respondents among his assailants.

(19) The above findings are sufficient for finding Phool Singh guilty. When the deceased said that Phool Singh was one of his assailants and there was no reason to disbelieve him and Phool Singh produced no evidence in rebuttal, I do not know what else is required to find him guilty. To find him guilty all that is required is that he must be one of the assailants. And when there is evidence to this effect and there exists no reason for disbelieving that evidence the conviction of Phoolsingh is a foregone conclusion.

(20) The fact that Phool Singh's dhoti had bloodstains, even though minute, supports the dying declaration. Phool Singh himself admitted their presence and therefore it is absolutely irrelevant to consider that they were not detected at the police station. The learned Sessions Judge ignored the admission of the respondent himself and without any evidence said that the bloodstains did not exist at the time of his being detained in the lock up. The head moharrir of police station Baberu failed to detect the blood stains, but it is not surprising when one bears in mind the fact that they were minute and only three. His failure to detect them is not the same thing as their not existing at the time. The respondent admitted that the bloodstains were there and gave an explanation and yet the learned Sessions Judge held that they did not exist. It was not open to him to do so. The explanation does not bear scrutiny. There is no bleeding from small pox. Then it is not easy to believe that his wife used his dhoti when she was suffering from small pox. Then he said that he had got the dhoti washed by a washerman. If so, the stains must have been completely washed off and could not have remained and that too so clearly as to be visible to a naked eye. Phool Singh said not a word about the small pox and the stains being of the blood of his wife in the Magistrate's Court. There he had said that the stains were of his own blood and that the blood had come out of injuries inflicted upon him at the police station. Now the fact is that he was found to have no injuries at the time of his admission in the jail; he himself admits this. He said that though there was bleeding there was no external mark of injury. He says that he bled from the anus; evidently he took this plea because he could not explain the stains otherwise. (After considering the evidence His Lordship continued). I am satisfied that the respondent's dhoti had bloodstains at the time of his admission in the lock-up and that the respondent has not given any reasonable explanation for their existence. Though it is not proved that the stains are of blood of the deceased, their existence does lend some support to the evidence that the respondent was one of the assailants. If he had received the stains, otherwise than while committing the crime, he would have offered an explanation which could bear scrutiny. The learned Sessions Judge referred to some authorities laying down that slight blood stains may result from scratching & it is not possible to draw any very damning conclusion against a man from their mere existence. Here the bloodstains are not sought to prove that the respondent committed the crime; they are simply sought to support or corroborate the dying declaration. Standing alone they may not suffice for finding the respondent guilty, but it cannot be gain said that they support the dying declaration that the respondent was one of the assailants.

(21) 'It was contended that no conviction can rest only upon a dying declaration'. An examination of the relevant provisions of the Evidence Act fails to support the contention. The law is contained in the Evidence Act, and there is no provision which lends support to the contention. A dying declaration is, under S. 32, a relevant fact. This itself means that it can be used for proving the fact in issue. If the dying declaration of A that he was assaulted by B is admitted in evidence it can be only for the purpose of proving that B assaulted him. No other purpose is to be served by admitting it in evidence. It

does not matter if the dying declaration is treated only as a relevant fact in India, and not as direct evidence, as in America.

Motive, subsequent conduct of the accused, etc. also are relevant facts but a dying declaration stands on a different footing from them. One may infer the commission of an offence from the existence of a motive or from the subsequent conduct of the accused but one is not bound to do so. Even if the Court believes that the accused exhibited the subsequent conduct, it may not presume from that that the accused committed the offence. But if the evidence that the dying declaration was made is believed and the dying declaration itself is accepted as genuine, it is bound to hold that the person named in the dying declaration committed the murder (save in case of 'bona fide' mistake of identity of the murderer).

When the deceased said that he was attacked by the respondent and that statement is believed, it follows that the respondent is guilty (in the absence of any mistake of identity); nothing remains to be done to find him guilty. If the dying declaration is not believed, it is a different matter. But once it is believed, it leads to the conclusion of the respondent's guilt. There is no presumption that a dying declaration is false or that it is unworthy of belief. There is no justification for treating it as a piece of tainted evidence as if it were a confession of a co-accused or evidence of an accomplice. 'So it cannot be laid down as a matter of law that no dying declaration should be believed unless it is corroborated'. The law contemplates its being believed and some dying declarations may be believed even though not corroborated. Whether a dying declaration should be believed or not would depend upon the circumstances of the case. It is essentially a question of fact to be determined by the Court on the basis of the circumstances of each case. As far as the credibility is concerned, it is just like the evidence given by a witness. It is for the Court to decide whether to believe it or not and no rule can be laid down either that it should be believed or that it should not be believed. Once it is believed, it is irrelevant and illogical to consider that it is not made on oath and that the maker has not been subjected to cross-examination. The oath is administered simply with the object of making the witness speak the truth so that what he deposes may be believed. The object of cross-examination is to test the veracity of the witness.

But once the dying declaration is held to be believable, the questions that no oath was administered and that the dying declaration was not tested by cross-examination cannot arise. The questions would have to be considered before holding the dying declaration to be believable. When the law has made it a "relevant fact" notwithstanding the absence of oath and cross-examination, it means that it will not be held to be unbelievable merely on account of the absence of these matters. If it is held to be unbelievable, it must be done on the basis of other circumstances. Therefore it would be illegal to say that a dying declaration cannot be acted upon without corroboration; if it is believed, it requires no corroboration.

(22) English law admits as dying declarations only such statements of material facts concerning the cause and circumstances of homicide, as are made by the victim under the fixed and solemn belief that his death is inevitable and near at hand. The solemnity of the occasion on which the statements are made is deemed to supply the sanction of oath. The approach of death is deemed to produce a state of mind in which the statements of the dying person are to be taken as free from all ordinary motives to misstate.

(23) The law in India does not make the admissibility of a dying declaration dependent upon the person's having a consciousness of the approach of death. Even if the person did not apprehend that he would die, a statement made by him about the circumstances of his death would be admissible under S. 32, Evidence Act. It may, therefore, be argued that the same sanctity that attaches to a dying declaration admissible under the English law should not be attached to a dying declaration admissible under our law. I consider that it is not necessary to deal with this argument in the present case because I am satisfied that the deceased must have had the consciousness of approaching death. I gather this not only from the fact that he died soon after twenty-four hours had elapsed, but also from the nature of the injuries and his condition.

It is pointed out by Wigmore on Evidence, Vol. 5, para 1442, (Edn. 3) that recourse should naturally be had to all the attending circumstances in order to ascertain the consciousness of approaching death, that it is not correct to say that the nature of the injuries alone cannot be sufficient and that if in a given case the nature of the injuries is such that the declarant must have realised his situation, our object is sufficiently attained. The injuries were so severe that I do not think the deceased could have expected to live. He knew that he had been unconscious for a long time. The severe pain, vomiting and the bleeding from the ears must have made him lose all hope of surviving the injuries. Therefore, in the present case, the deceased was anticipating speedy death when he made the dying declaration & one should consider it as if it were made on oath.

(24) The fact that the declarant was not subjected to cross-examination remains. It was pointed out by Alderson B. in 'Ashton's case' (1837) 2 Lewin 147 (A) that though a dying declaration made 'in extremis' is considered as one made on oath, it is nevertheless open to observation because though the sanction is the same the opportunity of investigating the truth is very different. This only means that the dying declaration must be subjected to careful scrutiny; it does not mean that it should be considered as sufficient for founding a verdict of guilt. So many statements are believed by Courts even though the makers have been subjected to cross-examination; therefore so long as it cannot be predicted in respect of a dying declaration that had its maker been subjected to cross-examination his credibility would have been shaken, it cannot be said that the dying declaration should not be acted upon because there has been no cross-examination. For all one knows, the cross-examination might have failed to elicit anything shaking the credit of the maker.

(25) One often comes across the statement that a dying declaration should be received with caution in American cases; see Corpus Juris Secundum, Vol. 40, page 287 (a) and — 'Clyde Mattox v. United States', (1892) 146 US 140 (B). But this refers to the admissibility of the evidence and not to the weight to be given to it after admission. The rule of admissibility in evidence of a dying declaration is different in England and

America from what is contained in S. 32, Indian Evidence Act. All that is required under S. 32, Indian Evidence Act, is that the man must have died and there arises no question at all of exercising any caution in admitting in evidence a dying declaration. It has been pointed out that the admonition that a dying declaration is to be admitted with great caution is addressed to the Court in ruling on the admissibility of an alleged dying declaration, a question with which the jury has no concern; see 'Corpus Juris Secundum, Vol. 40 p. 1284, footnote 72'.

It is stated in the same volume, page 1283:

"The credibility of dying declarations is to be determined largely by the same rules as are applied in weighing other testimony. Their value depends on their intrinsic probability, and the candor and truthfulness of the person who made them, ... In weighing dying declarations the jury may consider the circumstances under which they were made, as, whether they were due to outside influence or were made in a spirit of revenge or when declarant was unable or unwilling to state the facts, the inconsistent or contradictory character of the declarations, and the fact that deceased has not appeared and accused has been deprived of the opportunity to cross-examine him, and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled."

The dying declaration made by the deceased sounds quite probable. There is nothing on the record to show that the deceased was not a truthful man. The dying declaration has been found not to be due to outside influence. It has not been made in a spirit of revenge or when the deceased was unable or unwilling to state the facts. There is nothing inconsistent or contradictory in the dying declaration. It is, therefore, entitled to all the credit and weight to which the testimony of the deceased would have been entitled if he had appeared in Court as a witness.

(26) In — 'Provincial Govt. C. P. & Berar v. Jagan Bhat', AIR 1946 Nag 301 (C), the Court refused to lay down a general rule that a partly untrue dying declaration must necessarily be rejected and held that it is always a question of fact whether a dying declaration should be relied upon and that if a part of it is found to be untrue owing to short memory or lack of observation, that is no reason for debarring the jury from accepting the rest.

In — 'Kunwar Pal Singh v. Emperor', AIR 1948 All 170 (D), it was held that a dying declaration made soon after the occurrence or at the time of expected death or at the time when the maker could not consult others or receive hints from others ordinarily deserves great weight. In the "Leader" of 31-1-1953 was published a report of a case, —'Ram Nath v. State', AIR 1953 SC 420 (E). It was held in that case that it is not safe to convict an accused merely on the evidence furnished by a dying declaration without further corroboration. There the facts were different. The deceased was the leader of one of the two parties existing in the village and the dying declaration was not only vague, but also did not admittedly represent the whole truth. In the circumstances it was held to be unsafe to rely upon the dying declaration.

There is no reason for thinking that it would be unsafe to rely upon the dying declaration in the instant case. Further, there is some corroboration. What is stated in it about the visit to village Satniyaon, stopping near village Gurauli Saphai to talk to P. C. Chandra Bhan and Mohammad Hanif's proceeding on the cycle in advance is corroborated by the evidence of Mohammad Hanif and Chandra Bhan. The blood stains on the dhoti of Phool Singh respondent corroborate the accusation made against him in the dying declaration.

(27) I have considered the question of genuineness of the dying declaration with great care and am convinced that the dying declaration is genuine and contains the truth. Therefore Phool Singh respondent was one of the assailants of the deceased. There can be no doubt that the assailants were guilty of dacoity punishable under S. 396, I. P. C. They wanted to rob the deceased of the Government gun and the cartridges and killed him while committing the robbery.

(28) The proper sentence to be inflicted for the offence is of transportation for life. Though the deceased was murdered, I do not think that the respondent deserves the death sentence because he is not said to have taken any leading part. There is no evidence that he inflicted any injury even on the deceased. At the same time he must be held responsible for the murder of the deceased along with the others.

(29) I think the appeal should be dismissed as against Kanchan Singh and should be allowed as against Phool Singh and he should be convicted under S. 396 I. P. C. and sentence to transportation for life.

(30) BEG J.: I agree.

BY THE COURT:

(31) We allow the appeal as against Phool Singh, respondent 2, set aside the order of acquittal and convict him under S. 398, I. P. C. and sentence him to transportation for life. We dismiss the appeal as against Kanchan Singh, respondent 1; his bail bonds are discharged.

Leave to appeal to Supreme Court refused.

B/R.G.D. Order accordingly.

A. I. R. 1954 ALL. 159 (Vol. 41, C. N. 88)

DESAI J.

Mohan Lal and others, Accused-Applicants v. The Surpunch, Punchaiti Adalat, Ugaipur and another, Opposite Party.

Criminal Misc. Writ No. 236 of 1953, D/- 8-9-1953.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 49(2) — Non-compliance with — Effect — Waiver of defect.

The defect in the constitution of a bench of Panchayati Adalat caused by non-compliance of the provisions of S. 49 (2) of the Act is not a jurisdictional defect and is waived if no objection is raised against it. Therefore when the accused do not object to the bench that it was improperly constituted, they are estopped from objecting to it after their conviction. AIR 1954 All 81, Foll. (Para 1)

(b) U. P. Panchayat Raj Act (26 of 1947), S. 77A(1) — Absence of chairman — Effect.

There is no provision in the Panchayat Raj Act which expressly makes it obligatory upon the chairman to be present on every date. On the contrary, the effect of S. 77A(1) is that if any Panch is absent at any hearing the remaining Panches may

try the case. There is no reason for holding that the words "any Panch" in the section do not include the chairman, especially when he is one of the Panches and not the Sarpanch. (Para 2)

Further, the Proviso to the section also does not mean that the Chairman must be present on every date. The words "including the chairman" in the Proviso govern the preceding words "three panches". What is meant is that if three Panches are present then the chairman must be one of them; the case of there being four Panches present is not at all dealt with by the proviso. If four Panches are present, they can try the case as permitted by S. 77A(1) even though the Chairman is not one of them. The absence of the chairman on some dates is, therefore, by itself no irregularity or illegality. (Para 2)

(c) Constitution of India, Art. 226 — Writ of certiorari — When issued — (U. P. Panchayat Raj Act (26 of 1947), S. 110 — Rules under — R. 95).

The defect of not explaining the complaint to the accused in compliance with Rule 95 is one of procedure and not jurisdiction, and cannot justify the issue of certiorari. AIR 1953 All 531, Ref. (Para 3)

Further, if a Panchayati Adalat having jurisdiction over the subject-matter and the accused, does not follow the correct procedure, that would be no ground for setting aside an order, which was within its jurisdiction to pass, by certiorari. That would not be an error on the face of the record and no certiorari can issue. (1952) 1 All ER 122, Ref. (Para 3)

Kedar Nath Sinha, for Applicants; H. L. Kapoor, for Opposite Party.

CASES REFERRED:

(A) ('54) AIR 1954 All 81: 1953 All LJ 265 (Pr 1)

(B) ('53) AIR 1953 All 531: 1953 All LJ 488 (Pr 3)

(C) (1952) 1952-1 All ER 122 (Pr 3)

ORDER: The applicants have been convicted by a Panchayati Adalat under Ss. 447 and 426, I.P.C. They apply for the order of the Panchayati Adalat being quashed on three grounds. The first ground is that the bench, which tried the applicants did not include any Panch residing in the area of the Gaon Sabha in which the applicants reside. The applicants, as well as the opposite-party, Shrimati Partabi, reside in village Ashrafganj & it is stated in the affidavit that the Bench did not include even one Panch from the Gaon Sabha of Ashrafganj. It is not alleged that the applicants objected to the constitution of the bench when they appeared before it. It is said that they objected to the constitution after their conviction, when they applied to the Sub-divisional Magistrate under S. 85, Panchayat Raj Act. But the order of the Sub-divisional Magistrate dismissing their application makes no reference to any objection that the bench did not include any Panch from the Gaon Sabha of Ashrafganj.

Even if they did raise this question before him, the fact remains that they did not raise it while the case was pending in the Panchayati Adalat. It has been held by a bench of this Court in — 'Mohar Singh v. State', AIR 1954 All 81 (A) that the defect in the constitution of a bench of Panchayati Adalat caused by non-compliance of the provisions of S. 49 (2) of the Act is not a jurisdictional defect and is waived if no objection is raised against it. Therefore when the applicants did not object to the bench that it was improperly constituted, they are estopped from objecting to it now, after their conviction. If there was any irregularity committed in the constitution of the Bench it is waived.

(2) The second ground is that the Chairman of the bench did not take part in the proceedings on certain dates. Now there is no provision in the Panchayat Raj Act which expressly makes it obligatory upon the chairman to be present on every date. On the contrary, the effect of S. 77 A (1) is that if any Panch is absent at any hearing the remaining Panches may try the case. A chairman is also Panch and if he happens to be absent the remaining Panches may try the case. There is no reason for holding that the words "any Panch" in the section do not include the chairman, especially when he is one of the Panches and not the Sarpanch.

Shri Kedarnath Sinha relied upon the proviso to the section e.g. "provided, however that at least three Panches, including the chairman, are present." This proviso does not mean that the chairman must be present on every date. If all the five Panches are present, it means that the chairman is also present because without him the number of the Panches present cannot possibly be five. If only three Panches are present, the proviso applies and one of them must be the chairman in order that they may try the case. But if four Panches are present then there is nothing in the proviso to suggest that one of them must be the chairman. The words "including the chairman" govern the preceding words "three Panches". What is meant is that if three Panches are present then the chairman must be one of them; the case of there being four Panches present is not at all dealt with by the proviso. If four Panches are present, they can try the case as permitted by S. 77 A(1) even though the chairman is not one of them. If the Legislature intended the chairman to be present on every date, it would have used some such words as "provided, however, that the chairman and at least two Panches are present". It is not alleged by the applicants that on some dates only three panches were present. The only allegation made is that the chairman was not present on some dates, but that by itself is no irregularity or illegality.

(3) The third ground is that the charge or complaint was not explained to the applicants. Though there is an affidavit in support of this allegation, I place no reliance upon it because it is my experience that this allegation is often made frivolously and falsely. Moreover, the defect of not explaining the complaint to the accused in compliance with Rule 95 is one of procedure and not jurisdiction, and cannot justify the issue of certiorari. — 'See Firm Dewan Sugar Mills v. The Government of U. P.', AIR 1953 All 531 (B). If a Panchayati Adalat having jurisdiction over the subject matter and the accused does not follow the correct procedure, that would be no ground for setting aside an order, which was within its jurisdiction to pass, by certiorari. That would not be an error on the face of the record and no certiorari can issue; — 'Vide R. v. Northumberland Compensation Appeal Tribunal', (1952) 1 All ER 122 (C).

(4) The application is dismissed.

A/D.R.R. Application dismissed

AIR 1954 All 161 (Vol. 41 C. N. 89)

MOOTHAM AND SAPRU JJ.

The Maheshwari Devi Jute Mills Ltd. Kanpur, Applicant v. The Labour Appellate Tribunal, Opposite Party.

Civil Misc. Writ No. 335 of 1953, D/- 15-9-1953.

(a) Constitution of India, Art. 226 — Interlocutory order — Interference.

The High Court will not ordinarily interfere by 'certiorari' or prohibition with an interlocutory order which may be challenged in appeal or revision. But that rule does not apply when the statutory provision under which the interlocutory order is made is itself attacked as being void under the Constitution. (Para 4)

(b) Constitution of India, Art. 21 — "Established by law".

It is not for the Court to question the wisdom and policy of the Constitution; and by adopting the phrase 'established by law' in preference to 'due process of law' the Constitution gave the Legislature the final right to determine a law when acting within the jurisdiction assigned to it. (Para 7)

†(c) Industrial Disputes (Appellate Tribunal) Act (1950), S. 14, Proviso — Proviso does not contravene provisions of Art. 14 of Constitution — (Constitution of India, Art. 14) (Para 9)

G. S. Pathak and R. S. Pathak, for Applicant; B. M. L. Srivastava and G. Mehrotra, for Opposite Party.

CASES REFERRED:

(A) ('51) AIR 1951 All 746: 1951 All LJ 576 (FB) (Pr 4)
(B) (1923) 67 Law Ed 659: 261 US 290 (Pr 7)
(C) (1924) 68 Law Ed 975: 265 US 196 (Pr 7)
(D) (1932) 76 Law Ed 1226: 286 US 461 (Pr 7)
(E) (1884) 28 Law Ed 569: 111 US 701 (Pr 7)
(F) ('50) AIR 1950 SC 27: 1950 SCR 88: 51 Cri LJ 1383 (SC) (Pr 7)

ORDER: This is a petition under Article 226 of the Constitution. The petitioner is a public limited company which carries on at Kanpur the business of manufacturing and selling jute goods. It paid to its workmen for the year ending 30-9-1951, a bonus of four annas in the rupee of their net basic earnings during the year. The workmen were not however satisfied, and they claimed payment of an additional bonus of the same amount, namely four annas in the rupee, in respect of the same year. As no amicable settlement could be arrived at, the State Government referred the claim to the Additional Regional Conciliation Officer, Kanpur, who by an award dated 29-12-1952, found in favour of the workmen and ordered that they be paid a further sum of four annas in the rupee as bonus. The amount which the company is required to pay under this award was approximately Rs. 1,10,000.

(2) The company preferred an appeal to the Labour Appellate Tribunal and at the same time it applied for a stay of the operation of the award. That application was refused on 7-4-1953, and a subsequent application made by the company to the Tribunal on 10th April for a review of its earlier order was summarily rejected.

(3) The company's application for stay of the award was made under Section 14, Industrial Disputes (Appellate Tribunal) Act, 1950, which provides that:

"Where an appeal is preferred, the Appellate Tribunal may, after giving the parties an opportunity of being heard, stay, for reasons to be recorded, the implementation of the award or decision or any part thereof for such period and on such conditions as it thinks fit.

Provided that no such order for stay shall be made unless the Appellate Tribunal is satisfied that the implementation of the award or decision may have serious repercussions on the industry concerned or other industries or on the workmen employed in such industry or industries".

The company contends that the proviso to this section is 'ultra vires' of the Constitution as it contravenes the provisions of Articles 14 and 19; and the reliefs which it seeks by this petition are, first, a writ in the nature of 'certiorari' quashing the order of the Labour Appellate Tribunal made on 7-4-1953, and, secondly, a writ in the nature of 'mandamus to be issued to the Tribunal directing it to decide the company's application for stay in accordance with law.

(4) This Court will not, of course, ordinarily interfere by 'certiorari' or prohibition with an interlocutory order which may be challenged in appeal or revision see — 'Asiatic Engineering Co. v. Achhru Ram', A. I. R. 1951 All 746 (FB) (A); but that rule does not apply in a case such as the present when the statutory provision under which the interlocutory order is made is itself attacked as being void under the Constitution.

(5) The order of the Labour Appellate Tribunal of 7-4-1953, is in the following terms:

"This is an application for stay of the implementation of an award for bonus. The Company, which is the applicant before us, has voluntarily paid three months' basic wages as bonus for the year under review, that is, 1951. The Adjudicator has awarded further three months' basic wages as bonus, that is, in all the employees have been awarded six months' basic wages as bonus out of which three months' basic wages amounting to Rs. 1,10,000 has already been paid. The present application is for stay of the implementation of the award in so far as bonus for the remaining period of three months' basic wages involving an additional sum of Rs.1,10,000 is concerned. It is strenuously contended on behalf of the applicant that there will be serious repercussions on the industry concerned if stay of implementation of the award is not granted because there is no available fund at present out of which this sum may be paid, and if the Company is compelled to pay the business will have to be closed.

In our opinion we are not concerned with what has happened subsequent to the year for which the bonus has been awarded. In the year under review, an amount of Rs. 5,77,000 was reserved for replacement and rehabilitation of machinery. This amount is with the Company and if Rs. 1,10,000 is paid out of this amount there cannot be any repercussions because Rs. 4,67,000 will still be left in the hands of the management for the replacement and rehabilitation of machinery. We may observe that the minimum basic wage for the unskilled labour in this Company is Rs. 14 per month. The total sum awarded as bonus does not 'prima facie' seem to be unreasonable. Under the circumstances we do not see any reason for stay of the implementation of the award. The application is accordingly dismissed with cost to the opposite party which we assess at Rs. 25".

It is said on behalf of the respondents that this is an order made wholly under the first part of S. 14

of the Act and that the conclusion arrived at by the Labour Appellate Tribunal would not have been different had the section contained no proviso. Under the section the Appellate Tribunal could not order a stay unless it was satisfied that its failure to do so would have "serious repercussions within the meaning of the proviso. We do not think it can be said that had that proviso not existed the Tribunal would not have taken into consideration other circumstances which might have led it to reach a different conclusion; the terms of the order are not such in our view as would exclude the possibility, for example, that if it had been free to do so the Tribunal might have allowed a stay upon payment of the amount of the award into Court. In our opinion the Tribunal made its order under Section 14 as a whole.

(6) The company claims that the proviso constitutes an unreasonable restriction on its right to hold property; and discriminates between employers and workmen in a manner which cannot be justified. The challenge to the validity of the sub-section rests primarily upon the contention that whereas Section 20 (1), Industrial Disputes (Appellate Tribunal) Act provides that any money due from an employer under any award or decision of an industrial tribunal may be recovered as arrears of land revenue, no provision is made in the Act or elsewhere for the recovery of any money due under an award from a workman to the company. In particular it is pointed out that the Act contains no provision for restitution such as is to be found in Section 144, Civil P. C. In such circumstances it is argued that unless the company can obtain an order of stay its appeal to the Labour Appellate Tribunal will for all practical purposes be useless, for even should its appeal be successful it will be practically impossible for it to recover the money already paid.

(7) It is contended, in the first place that the proviso to Section 14 of the Act contravenes Art. 19 (5) of the Constitution as it is not a reasonable restriction in the interests of the general public on the petitioner's right to hold property. In support of this argument our attention has been invited to three decisions of the United States Supreme Court, namely — 'Oklahoma Natural Gas Co. v. Russel', (1923) 67 Law Ed 659 (B), — Specific Telephone and Telegraph Co. v. Kuykendall', (1924) 68 Law Ed. 975 (C) and — 'Potter v. Investors Syndicate', (1932) 76 Law Ed 1226 (D). In these cases it was held that a statute which precludes the granting of a stay pending the final decision of a review in Court is invalid as it contravenes the provisions of the "due process clause" of the Fifth Amendment. Now the essence of the "due process clause" as developed in the United States is that by virtue of it the judiciary can declare a law invalid not only on the ground that it is in excess of the express authority conferred on the legislature but also on the ground that it violates certain principles which the Judges deciding the case regard as fundamental. As Field J. said in — 'Hagar v. Reclamation District No. 108', (1884) 28 Law Ed. 569 (E).

> "By 'due process' is meant one which, following the forms of law, is appropriate to the case and just to the parties to be effected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justness of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

The position is summarised by Willis in his work on Constitutional Law in the following words:

> "The guarantee of due process of law is so all-inclusive that all the constitutional guarantees could be abolished and there still would be sufficient protection to personal liberty..... Due process of law applies to personal liberty, to social control, to procedure, to jurisdiction, & to substantive law..No better scheme could have been evolved to permit the Supreme Court to strike the proper balance between personal liberty and social control. Legislatures may have reasons for the enactment of laws, but the United States Supreme Court measures the legislature's reasons by its own intellectual yardstick". (p. 642).
>
> "In the United States the Judges not only declare statutes invalid if in violation of prohibitions in the written constitution, but if in violation of doctrines read into the Constitution by the United States Supreme Court. Therefore in the United States the role of the written constitution is very insignificant, and the role of the due process clause and the Supreme Court is very significant". (p. 645).

This is not the position in this country; for all that is required here is that a person shall not be deprived of his liberty or property except in accordance with the procedure established by law. Their Lordships of the Supreme Court have held in the well known case of — 'Gopalan v. State of Madras', AIR 1950 SC 27 (F), that the American doctrine cannot be imported into Indian law. We think it to be the opinion of the Supreme Court that it is not for the Court to question the wisdom and policy of the Constitution; and that by adopting the phrase 'established by law' in preference to 'due process of law' the Constitution gave the legislature the final right to determine a law when acting within the jurisdiction assigned to it.

(8) The company's contention in the case before us is based on the assumption that it is by virtue of the proviso to S. 14 that it has been deprived of its right to retain the sum of Rs. 1,10,000. We do not think that to be correct. The company has lost its right to retain that sum by virtue of the award of the Regional Conciliation Officer; all that the proviso to S. 14 does (in the circumstances of this case) is to prevent that award being held in abeyance pending the decision of the appeal. An appeal is a creature of the statute and had there been no appeal provided from the order of the Conciliation Officer to the Labour Appellate Tribunal, it could not have been urged that the legislature was incompetent to attach finality to the order of the Conciliation Officer. In our opinion Art. 19 has no application to the facts of this case.

(9) It is then argued that the proviso contravenes the provisions of Art. 14. It is urged that where the law allows an appeal there must be mutuality of remedy, and that the proviso operates so harshly that in substance it is only the workman and not the employer who has an effective right of appeal. The only authority cited in support of this argument is a passage in Vol. I of 'Nichols on Eminent Domain at page 368' that "if the right of appeal is granted by statute there must be mutuality of remedy", the statement being based on a decision of an American State Court the report of which is not available. It is, it would appear, a further application of the principle embodied in the due process clause. We

do not think that the petitioning company's contention is well founded. Section 14 is not on the face of it discriminatory for its provisions apply with equal force to all parties to the appeal.

It is, we think, true that the proviso is likely to operate harshly against the party who appeals from an award directing him or it to pay a sum of money and that it is not easy to conceive of circumstances in which the payment will be one which will have to be made by a workman to the employer; but the fact that the section operates or may operate harshly against the employer is not, it appears to us, due to the terms of the section itself but is due wholly to another factor, namely the absence of a provision in the Act of a speedy and effective means of recovering from the workmen the amount of an award in their favour which is subsequently reversed on appeal. We are, therefore, unable to accede to the view that the proviso to S. 14 contravenes the provisions of Art. 14 of the Constitution.

(10) For these reasons we are of opinion that this petition fails, and must be dismissed with costs, which we assess at Rs. 250/-, of which respondent 4 will be entitled to Rs. 125/-.

A/V.R.B. Petition dismissed.

AIR 1954 All 163 (Vol. 41 C. N. 90)

MUKERJI J.

Sri Dulap Singh and others, Applicants v. State through Sri Har Nandan Singh, Opposite Party.

Criminal Revn. No. 781 of 1952, D/- 24-9-1953, from order of Deputy Commr., Nainital, D/- 15-1-1952.

Criminal P. C. (1898), Ss. 437, 439 and 347 — Illegal order under S. 437 — Interference in revision — Nature of.

Where in a trial for offences under Ss. 147 and 323/149, Penal Code a date was fixed for defence evidence but the District Magistrate, on being moved by the complainant, directed the trial court under S. 437, Cr. P. C. to commit the accused to the Sessions Court for trial of offences under Ss. 147 and 307/149, I. P. C.

Held (1) that the District Magistrate had no jurisdiction to pass the order under S. 437, Cr. P. C. as the accused were not discharged and as such the order was illegal. AIR 1952 All 231 (FB), Foll. (Para 2)

(2) That even though the accused 'prima facie' appeared to have committed an offence under S. 307, I. P. C. it was not proper for the High Court to order commitment to the court of session in exercise of its revisional powers, as it would amount to validating the order of the District Magistrate which was palpably illegal and without jurisdiction. (Para 2)

(3) That it was open to the Magistrate at any stage of the trial before signing judgment, to make a commitment to the court of session under S. 347, Cr. P. C. (Para 3)

Anno: Cr. P. C., S. 437 N. 1, 5; S. 439 N. 25; S 347 N. 2, 3.

L. M. Pant, for Applicants; P. C. Chaturvedi and Sri Ram, Dy. Govt. Advocate, for the State.

CASE REFERRED:

(A) ('52) AIR 1952 All 231: 1952 All LJ 67. 1952 Cri LJ 440 (FB) (Pr 2)

ORDER: This is a revision by seven persons against whom an order has been made by the Deputy Commissioner of Naini Tal, acting of course as a District Magistrate, on 15-1-1952 directing the lower court to order the commitment of the applicants to the court of session for a trial under Ss. 147 and 307/149, I. P. C. The applicants were charged by a Magistrate for having committed offences punishable under Ss. 147 and 323/149, I. P. C. in respect of a beating which they gave to the complainant of the case viz., Harinandan Prashad. It appears that Harinandan Prashad received serious injuries. Four of these at least were contused wounds on the head of some significance. Harinandan Prashad also received large contusions on his back. A 'prima facie' examination of the injury report indicates that Harinandan Prashad received a very sound beating. The trial proceeded before the Magistrate after the charge had been framed by him against the applicants. 3-12-1951 was fixed by the Magistrate for the production of defence evidence. On that date an application was made before the Magistrate to stay further proceedings in the case. On 5-12-1951 the complainant moved the District Magistrate under S. 437, Criminal P. C. and it is as a consequence of this that the order dated 15-1-1952, an order which is the subject-matter of this revision, was made by the Court.

(2) It has been contended on behalf of the applicants that the District Magistrate had no jurisdiction to make the order of commitment which he has made. It was pointed out that there was no discharge by the Magistrate under section 307, I. P. C. and consequently in view of the decision of the Full Bench in — 'Nahar Singh v. State', AIR 1952 All 231 (FB) (A) the order of the District Magistrate was without jurisdiction. There can be no doubt after decision of the Full Bench referred to above that the order of the District Magistrate dated 15-1-1952 was an illegal order. On behalf of the opposite party Mr. Chaturvedi contended that although the order of the District Magistrate was legally unsustainable yet it was open to me in the exercise of my revisional powers to order a commitment of the accused to the Court of session in the same manner in which their commitment has been made by the District Magistrate because on the facts of the case the applicants, 'prima facie' at any rate, appear to have committed an offence punishable under Section 307, Penal Code. In my view I should not resort to this course of action which is suggested by counsel for the opposite party. In my opinion it is not proper in the exercise of revisional jurisdiction to validate by a round-about method what the law declares as invalid. If I were to do what Mr Chaturvedi wants me to do then I would in fact be validating the order of the District Magistrate, an order which was palpably illegal and without jurisdiction.

(3) The circumstances of the case appear to me to be such as to call for the pointed attention of the trial Magistrate to the desirability or otherwise of framing a charge under Section 307, I. P. C. The learned Magistrate does not appear to have considered this aspect of the matter at all when he framed the charges against the applicants. It is open to a Magistrate at any stage of a trial, before signing judgment, to make a commitment to the court of session - this power is given to the Magistrates by Section 347, Criminal P. C. I am therefore of the opinion that it would be better if the learned Magistrate should consider this matter afresh in the light of the observation which I have made as to whether or not there should be a charge under Section 307, I. P. C. and a commitment to

the court of session of the applicants on that charge.

(4) In the result I set aside the order of the Deputy Commissioner, Naini Tal, dated 15-1-1952 as also the consequential order of commitment made by the Magistrate on 4-6-1952. This order of commitment by the Magistrate had been made by him after an order of stay had been passed by this Court while admitting this petition in revision on 29-5-1952. The record of the case will be sent down to the court of the Magistrate for disposal of the case in accordance with what has been stated by me and in accordance with law.

B/D.R.R. Order accordingly

AIR 1954 ALLAHABAD 164 (Vol. 41, C. N. 91)
(LUCKNOW BENCH)

AGARWALA AND RANDHIR SINGH JJ.

Sri Prakash Singh and others, Plaintiffs-Appellants v. Madhusudan and others, Defendants-Respondents.

First Civil Appeal No. 97 of 1946, D/- 12-8-1953, against decree of Civil Judge, Sitapur, D/- 27-7-1946.

(a) U. P. Court of Wards Act (4 of 1912), S. 45 — Scope.

Section 45 applies to property which has legally vested in the Court of Wards by reason of the declaration under S. 10 of the Act and the superintendence of which has been continued by them even after the death of the ward. It is immaterial that an item of property was either in the possession of the ward or of his transferee or heirs. In the eye of law, unless such property was released from superintendence, it would remain under the superintendence of the Court of Wards even after the death of the ward. (Para 10)

(b) U. P. Court of Wards Act (4 of 1912), S. 49(2) — Applicability.

Section 49 clearly deals with the property, the superintendence of which has been retained by the Court of Wards under the provisions of S. 45. If the superintendence over a property would be deemed to have been retained by the Court of Wards under the provisions of S. 45 the provisions of Cl. (2) of S. 49 would apply to that property also. (Para 10)

H. D. Srivastava, for Appellants; R. N. Shukla and J. S. Trivedi (for No. 1), B. K. Dhaon (for Nos. 2 to 6) and Suraj Sahai (for No. 17), for Respondents.

AGARWALA J.:

This is a plaintiffs' appeal arising out of a suit for possession over a bungalow situated in Sitapur and for some other reliefs. The facts are a little complicated but briefly stated are as follows:

(2) The plaintiffs are the grandsons of Raja Sripal Singh, a Taluqdar of Tikra Basaidih. In the year 1911 Raja Sripal Singh purchased a bungalow called Churamau Bungalow in Sitapur. The sale deed was however executed in the name of Rajendra Singh, son of Raja Sripal Singh and father of the plaintiffs-appellants. Raja Sripal Singh was declared a ward of the Court sometime in 1925. Raja Sripal died in October 1930. On 1-10-1930 Rajendra Singh, his son, applied under S. 10, U. P. Court of Wards Act that his property be taken under the superintendence of the Court of Wards. On 31-10-1931 the Court of Wards made a declaration to that effect, and actually took over the property under their superintendence, but left the bungalow in dispute in possession of Rajendra Singh as he used to reside therein.

On 14-2-1938 Kunwar Rajendra Singh sold the bungalow in dispute to Pt. Madhusudan, defendant-respondent No. 1 for a sum of Rs. 10500/-. Kunwar Rajendra Singh died on 7-11-1939, and after his death his property was retained by the Court of Wards under their superintendence under S. 45 of the Act. In 1940 a grandson of Rajendra Singh, namely Ajai Prakash Singh, son of Kunwar Sri Prakash Singh, plaintiff-appellant No. 1, filed a suit under the guardianship of his mother for possession over the bungalow in dispute on the ground that the sale-deed was void having been executed by Kunwar Rajendra Singh while he was a ward of the Court and thus incompetent to transfer any property. The Deputy Commissioner of Sitapur, the Manager of the Court of Wards, applied for being impleaded as a party to the suit. The application was granted and he was impleaded as a co-plaintiff in the suit. Thereafter on 5-4-1941 a notification was issued under S. 10, Court of Wards Act in respect of the property of Ajai Prakash Singh and his brothers, defendant-respondents Nos. 4 to 6.

The result of this notification was that Ajai Prakash Singh and his brothers lost their right of suit which now vested in the Court of Wards. The present plaintiff-appellants who had been impleaded as defendants in that suit and who had not put in any appearance before then came forward and applied that they may be allowed to continue the suit as plaintiffs. This was, however, not allowed and the suit was ultimately withdrawn. Then they brought the suit which has given rise to this appeal on 8-1-1946 for the reliefs already stated.

(3) The case set up by the plaintiffs in the plaint was two-fold. According to them, in the first place, the property was the joint Hindu family property of Rajendra Singh and his sons and grandsons. They alleged that Raja Sripal Singh, their grandfather, had purchased this property in the name of Rajendra Singh and after Raja Sripal Singh's death the property became ancestral in the hands of Rajendra Singh and was coparcenary property and as such Rajendra Singh could not transfer it except for legal necessity. They alleged that there was no legal necessity for the sale made by Rajendar Singh in favour of Pandit Madhusudan, defendant-respondent No. 1.

In the second place, they urged that even if the property was separate property of Rajendra Singh, it was under the management of the Court of Wards and Rajendra Singh being a ward was not capable of transferring the property, and that the transfer was, therefore, void. They alleged that afterwards the Manager of the Court of Wards who was arrayed as defendant No. 2 in the case and is now respondent No. 2 in the appeal, was attempting to rectify the transaction by executing a fresh sale-deed on behalf of the Court of Wards in favour of defendant-respondent No. 1. They prayed for an injunction to be issued against him forbidding him from taking this step. To the suit certain other defendants were also impleaded. These were defendants 7 to 20 and were transferees of the property in dispute from defendant-respondent No. 1. It also appears that after the purchase of 1938, defendant-respondent No. 1 had acquired free-hold rights in the site

of the bungalow which was at the time of the sale a lease-hold property. The plaintiffs offered to pay the amount incurred by the defendant-respondent No. 1 in acquiring the free-hold rights in the site of the bungalow.

(4) The defence of defendant No. 2, the Manager of the Court of Wards, was also two-fold. In the first place, it was urged that the property in dispute was the private property of Rajendra Singh, that the sale-deed which was in his name was for his own benefit and that the Court of Wards never took over the management of this property, with the result that Rajendra Singh was fully entitled to make a transfer of it as he likes. In the second place it was pleaded that, if the property was taken over by the Court of Wards and was under their management, then the property having continued to be in their management after the death of Rajendra Singh, the plaintiffs who were the heirs of Rajendra Singh, were not entitled to bring any suit in respect of any property the management of which was continued by the Court of Wards after the death of the original ward. Certain other pleas were also raised with which we are not concerned at this stage. The defence of defendant No. 1 was similar.

In one of the paragraphs of the plaint the plaintiffs admitted that the property was part of the Tikra estate which was under the superintendence of the Court of Wards under S. 45, Court of Wards Act. At the trial also their counsel made a similar statement. He said that the plaintiffs are not the wards of the Court of Wards but their property is under the superintendence of the Court of Wards under S. 45(1) since the death of Rajendra Singh. It appears, however, that in arguments before the court below the position taken up by the plaintiffs was that the property not having been taken actual possession of by the Court of Wards could not be deemed to be property in respect of which there was a bar of suit by the heirs of the original ward under S. 49 (2), Court of Wards Act. It further appears that no reference was made in the arguments before the court below about the position taken up by the plaintiffs in the plaint that the property was ancestral property and therefore joint Hindu family property of the plaintiffs and Rajendra Singh.

The court below framed three preliminary issues.

(1) Has the suit been wrongly valued and is the court-fee paid insufficient?

(2) Can the plaintiffs not maintain this suit on account of this property being under the superintendence of the Court of Wards? and

(3) Can an injunction be issued against the defendant 2, as prayed?

(5) It would thus appear that the court below did not frame any issue as to whether the property was the joint Hindu family property of the plaintiffs and Rajendra Singh deceased.

(6) The lower court came to the conclusion that the court fee was duly paid but that the plaintiffs were not entitled to maintain the suit because the property being under the superintendence of the Court of Wards, S. 49(2) of the Act was a bar to the suit. Further it held that no injunction could be issued against the Deputy Commissioner of Sitapur, the Manager of the Court of Wards, because such an injunction would be contrary to the provisions of S. 54, Specific Relief Act. In the result it dismissed the suit.

(7) In this appeal by the plaintiffs the points raised before the court below have been reagitated before us & it has further been urged by them that the property was the joint Hindu family property of the plaintiffs and of Rajendra Singh, with the result that when Rajendra Singh was declared a ward of the Court and his property was taken under the superintendence of the Court of Wards, the interest of the plaintiffs remained outside the jurisdiction of the Court of Wards and consequently when Rajendra Singh died and his property continued to remain under the superintendence of the Court of Wards under S. 45, Court of Wards Act, section 49(2) of the Act could only apply to the interest of Rajendra Singh and not to the interests of the plaintiffs which they had in the property by reason of their being co-parceners with Rajendra Singh.

(8) So far as the plea involved in issue No. 2 framed by the court below is concerned, we are of opinion that the judgment of the Court below is perfectly correct. The plaintiffs' case before the Court below was that the property in dispute remained in the possession of Rajendra Singh in spite of Rajendra Singh having been declared a ward under S. 10, Court of Wards Act and in that view of the matter the property did not pass to the Court of Wards under S. 45 of the Act and S. 49 (2) could not apply to such property.

(9) Now when Rajendra Singh made an application under section 10 of the Act praying that his property may be placed under the superintendence of the Court of Wards he did not make any exception in the case of the bungalow in dispute and did not exclude it from his application. A declaration was made by the Court of Wards as prayed for by Rajendra Singh. The declaration had the effect to put all the property of Rajendra Singh under the superintendence of the Court of Wards. The mere fact that the bungalow in dispute was not actually taken possession of by the Court of Wards and the Court of Wards allowed the bungalow to remain in the occupation of Rajendra Singh did not mean that the bungalow had not passed in the eye of law under the superintendence of the Court of Wards. That being so, on the death of Rajendra Singh the entire property, which was in the eye of law under the superintendence of the Court of Wards continued to be under their superintendence because the Court of Wards did not release the property but retained it under their superintendence for the reason that the debts and liabilities had not been discharged.

Section 45 reads:

"When a ward dies, or when a ward disqualified under clause (a) or clause (c) of sub-s. (1) of section 8, ceases to be disqualified before the liquidation is completed of the debts and liabilities with which the property is charged, the Court of wards may either release property or may retain it under its superintendence until such debts and liabilities have been discharged..

(2) If the Court of Wards retains the superintendence, the person who has succeeded to the property or the person who has ceased to be disqualified shall not be competent to transfer or create any charge on, or interest in, any part of such property while it remains under the superintendence of the Court of Wards, nor shall any debts or liabilities previously incurred by any person who was so succeeded be chargeable on such property until the debts and liabilities due by the Court of Wards have been discharged."

(10) The section applies to property which has legally vested in the Court of Wards by reason

of the declaration under section 10 of the Act and the superintendence of which has been continued by them even after the death of the ward. It is immaterial that an item of property was either in the possession of the ward or of his transferees or heirs. In the eye of law, unless such property was released from superintendence, it would remain under the superintendence of the Court of Wards even after the death of the ward. The mere fact of the Court of Wards not having come into possession of the property in dispute is in our opinion immaterial. The test to determine whether a property has or has not passed under the superintendence of the Court of Wards is whether a declaration under section 10 has or has not been made in respect of it. If a declaration has been made or if the declaration covers the property in dispute, the Court of Wards is entitled to recover possession of it according to law.

Such being the case, it cannot be said that because the Court of Wards did not take possession of an item of property, the property did not legally vest in it. In our opinion section 45 covers the case of property which, though not in the actual possession of the Court of Wards is liable to be taken possession of by them by virtue of the declaration under section 10 provided the superintendence is retained even after the ward's death under section 45. Section 49 bars a suit relating to the property, the superintendence of which has been retained by the Court of Wards after the death of the ward. This section reads:

"when the Court of Wards retains superintendence of any property under the provisions of section 45, section 46 or section 48, it may exercise all or any of the powers conferred by this Act in respect of such property and may do all such things requisite for the proper care and management of the property as the proprietor thereof if not disqualified might do for its care and management, and may pay such allowances to relatives and dependents of a deceased ward as may seem to it reasonable; all acts done by the Court of Wards in exercise of the powers conferred by this sub-section shall be binding on the person who succeeds to such property.

(2) All suits relating to the said property shall be brought or defended in the name of the Collector in charge of such property or of such other person as the Court of Wards may appoint in this behalf."

The section clearly deals with the property, the superintendence of which has been retained by the Court of Wards under the provisions of section 45. If the superintendence over a property would be deemed to have been retained by the Court of Wards under the provisionos of section 45 the provisions of clause (2) of section 49 would apply to that property also. If the property in dispute was the property of Rajendra Singh the claim of the plaintiffs was clearly barred under section 49 (2).

(11) The decision of the court below on the second point raised before it, namely that no suit would lie for an injunction against the Court of Wards forbidding it to execute a sale-deed in respect of the property under its superintendence, is not material because it is admitted before us that as the suit was dismissed by the court below and the temporary injunction issued by the court below was discharged and no temporary injunction was issued by this Court, the sale-deed was in fact executed by the Court of Wards in favour of defendant No. 1. This brings us to third point raised before us, namely whether the suit was maintainable in view of the fact that the property, according to the plaintiffs, was the joint Hindu family property of Rajendra Singh and of the plaintiffs.

The plaint makes it perfectly clear that the plaintiffs claimed reliefs not only on the ground that Rajendra Singh being a ward of the Court was incompetent to execute the sale-deed in question but also because the property was the ancestral co-parcenary property belonging to Rajendra Singh and the plaintiffs, and as such Rajendra Singh could only sell the property if there was legal necessity for the same. The plaintiffs further alleged that there was no such legal necessity and the sale was not binding on them. No issue was framed on this aspect of the case. It was strongly urged by the learned standing Counsel who appeared for the Court of Wards that this plea was not raised before the Court below and having been raised now for the first time should not be allowed to be raised. It is true that this point was not argued before the court below, but it cannot be said that the plea was not raised by the plaintiffs in the pleadings.

It is also true that the plaintiffs' counsel stated before the court below that the property of the plaintiffs was under the superintendence of the Court of Wards by virtue of section 45 of the Court of Wards Act, but the learned counsel never said that the property in dispute was also under the superintendence of the Court of Wards. Indeed their whole argument was that the whole property was not under the superintendence of the Court of Wards because it was not taken possession of by them. No doubt, again, no issue was framed in the court below upon the point now raised before us, but it does not appear that the point was given up.

(12) Having considered all the circumstances of the case, we think that in the interest of justice an issue should have been framed upon this part of the plaintiffs' case.

(13) Consequently we allow this appeal, set aside the decree of the court below and remand the case to that court with directions to re-admit it to its original number and decide the case according to law after framing proper issues that arise upon the pleadings of the parties.

(14) Costs here and hitherto shall abide the result.

B/D.H.Z. Appeal allowed.

AIR 1954 ALLAHABAD 166 (Vol. 41 C. N. 92)
(LUCKNOW BENCH)

KIDWAI J.

Mt. Rajiya and another, Appellants v. Mt. Sukhrani and others, Respondents.

Second Appeal No. 507 of 1948, D/- 23-2-1953, against decree of Dist. J., Rae Bareli, D/- 3-8-1948.

Court-fees Act (1870), S. 7(iv-A) (U. P.) — Applicability — (Succession Act (1925), S. 381).

Succession certificate granted to A — Suit by B claiming amount of money left by deceased — S. 7(iv-A) does not apply — Order granting succession certificate is not decree — It is not instrument securing money or other property having market value — B's suit does not involve cancellation of Succession Certificate. (Para 1)

Anno: Succ. Act, S. 381 N. 1; Court-fees Act, S. 7(iv)(c) N. 26.

N. Banerji, for Appellants; Standing Counsel, for the State.

CASE REFERRED:
(A) ('71) 16 WR 259 (Cal) (Pr 1)

JUDGMENT: This is an office report to the effect that there is a deficiency in court-fee amounting to Rs. 250/- not only in this Court but in each of the courts below. Office, therefore, asks for a direction to the appellant to pay a sum of Rs. 750/-. This report is contested by Mr. Banerji and is supported by the learned Standing Counsel.

The facts are that a succession certificate has been granted to the defendant by the Civil Judge, Partapgarh. Subsequently the plaintiff appellant instituted a suit claiming the amount of money left by the deceased as his heir. Office has reported that this involves a cancellation of the succession certificate.

It has relied upon a case of — 'Mokhoda Dossee v. Nobin Chunder Mitter', 16 WR 259 (Cal) (A). That case can have no reference to S. 7, cl. (iv-A), which was inserted into the Court-fees Act by the United Provinces legislature in 1938. This clause involves payment of court-fee for cancellation of or adjudging void instruments and decrees. An order granting a succession certificate is not a decree nor can it be said to be an instrument securing money or other property having a market value. It is only a summary decision of a right of a person to obtain payment of debts due to the deceased. It does not create any title in the person in whose favour it is granted, but only indemnifies the debtor if he pays the money to the person to whom the succession certificate is granted. Even if the plaintiff's suit is decreed, it cannot mean the cancellation of the succession certificate because the debtor will still be liable to pay the money due to the person to whom the succession certificate has been granted, that is to say the succession certificate will still continue operative and will indemnify the debtor who has paid or who pays the money to which it relates. I, therefore, reject the office report. The court-fee paid is sufficient and no further fee is required.

B/R.G.D. Order accordingly.

AIR 1954 ALLAHABAD 167 (Vol. 41 C. N. 93)

MALIK C. J. AND CHATURVEDI J.

Bisuntha and others, Applicants v. The State of Uttar Pradesh and another, Respondents.

Criminal Misc. No. 1202 of 1951, D/- 9-9-1953.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 85 — Court cannot quash partially order or jurisdiction.

Where there has been a miscarriage of justice or if there is an apprehension of it, the officers mentioned in S. 85 in their respective spheres, have the jurisdiction to quash the decree or order, or cancel the jurisdiction of the Panchayati Adalat, as the case may be. The cancellation of the jurisdiction refers to a stage where the case has not been decided and miscarriage of justice is apprehended; and the quashing of the decree or order refers to a stage where the case has been decided and the officer is of the opinion that the miscarriage of justice has occurred. (Para 6)

As far as the power of cancelling the jurisdiction is concerned there can be no cancellation of the jurisdiction with respect to some of the accused or with respect to some of the offences committed by the same accused. In case, miscarriage of justice is apprehended the Sub-Divisional Magistrate is authorised to cancel the jurisdiction of the Panchayati Adalat with regard to the case; which means with regard to the whole case and not to a portion of it. (Para 14)

The same interpretation should be given to the word "quash" also. When an order or a decree is only modified or altered it is not said to have been quashed. The word "quashing" has been applied generally to the setting aside of the entire proceedings. (Para 14)

Thus, the Magistrate has jurisdiction either to leave the order intact or to quash the whole of it. Partial quashing of the order or the jurisdiction is not the intention of the Legislature. AIR 1952 All 668; AIR 1953 All 564 and Cri. Misc. Case No. 539 of 1951 (All.), Rel. on. (Para 15)

(b) U. P. Panchayat Raj Act (26 of 1947), S. 89 — S. 89 is redundant.

The provisions of sub-section (5) of S. 85 are so very clear and emphatic that they make it impossible to hold that any further powers of revision have been conferred on the same officers by section 89. Thus, S. 89 seems to be wholly redundant and enacted under some misapprehension. (Para 8)

Gopal Behari, for Applicants; D. P. Uniyal, Dy. Govt. Advocate, for Opposite Party.

CASES REFERRED:
(A) ('52) AIR 1952 All 668: 1952 All LJ 18: 1952 Cri LJ 1185 (Prs 4, 11)
(B) ('51) Cri Misc Case No 539 of 1951, D/- 27-7-1951 (All) (Pr 12)
(C) ('53) AIR 1953 All 564: 1953 Cri LJ 1295 (Pr 13)

CHATURVEDI J.:

This is an application under Article 226 of the Constitution praying that the judgment of the Panchayati Adalat Satnyao, police station Baberu, district Banda dated 5-1-1951 be quashed.

(2) The complaint was filed by one Sarju before the Panchayati Adalat against seventeen persons. His allegation was that the six applicants before us had given him a beating, and they along with four others had restrained him from proceeding towards his house. The allegations made in the complaint show that the six applicants were accused of having committed offences under S. 323 & also S. 341, I. P. C., but the other four were accused only of the offence under S. 341, I. P. C., that is, wrongful restraint. As stated above the complainant had mentioned seven more persons as accused before the Panchayati Adalat, but the Panchayati Adalat acquitted these seven and it will not be necessary to mention them any more in this judgment.

(3) A revision against the order of the Panchayati Adalat convicting the other ten was filed before the Sub-Divisional Magistrate under S. 85, U. P. Panchayat Raj Act. The Sub-Divisional Magistrate appears to have been under a slight misapprehension as to the offence under which the ten applicants before him had been convicted & also as to the fines imposed upon them under the two sections. What the Panchayati Adalat did was that it sentenced the six applicants before us to a fine of Rs. 40/- each under S. 323,

I. P. C. and to a fine of Rs. 25/- each under S. 341, I. P. C. The other four accused were convicted only under S. 341, I. P. C. and sentenced to a fine of Rs. 25/- each under the said section. The Sub-Divisional Magistrate in his order dated 19-3-1951 says that it appeared from the statement of the prosecution witnesses that the six applicants assaulted the complainant. He appears to have totally ignored their conviction under S. 341, I. P. C. As there was no case of assault against the other four he acquitted them saying that no charge was established against them. As regards the six appellants the Magistrate thought that the fines imposed upon them were excessive and, therefore, reduced them to Rs. 40/- each. Here again the Magistrate omitted to notice the fact that the fine against the applicants under S. 323, I. P. C. was only a fine of Rs. 40/- each, and the rest of the fine of Rs. 25/- each was with respect to their conviction under S. 341, I. P. C. The Magistrate wrongly thought that the applicants had been sentenced to Rs. 65/- each under S. 323, I. P. C. and he was reducing the sentence from Rs. 65/- to Rs. 40/- under S. 323, I. P. C.

(4) The result of the decision of the Magistrate was that the sentences passed against all the ten accused under S. 341, I. P. C. were set aside. Only the fines imposed upon the applicants under S. 323, I. P. C. were maintained. The six applicants then came to this court and filed a writ petition which came up for hearing before a learned Single Judge. The learned counsel for the applicant cited before him the case — 'Raghunandan Singh v. State', AIR 1952 All 668 (A). After hearing the parties the learned Single Judge was not inclined to agree with the decision mentioned above and has referred the case for decision to a Bench of two Judges. The mistakes committed by the Sub-Divisional Magistrate have led to similar mistakes in the referring order of the learned Single Judge; but the mistakes are not of any real consequence and the correct facts have already been mentioned by us above.

(5) There is only one point that arises for consideration in this case, and that point is whether under section 85, U. P. Panchayat Raj Act a Sub-Divisional Magistrate can legally quash a part of the order maintaining the rest or he is bound to leave the whole of it intact or to quash the whole of it, if he finds that any miscarriage of justice has occurred in the proceedings before the Panchayati Adalat. The relevant portion of S. 85, U. P. Panchayat Raj Act is as follows:

85(1) "If there has been a miscarriage of justice or if there is an apprehension of miscarriage of justice in any case, suit or proceeding the Sub-Divisional Magistrate in respect of any case and the Munsif in respect of any suit and the Sub-Divisional Officer in respect of any proceeding under the United Provinces Land Revenue Act, 1901 may on the application of any party or on his own motion, at any time in a pending case, suit or proceeding, as the case may be and within sixty days from the date of a decree or order, call for the record of the case, suit or proceeding, as the case may be from the Panchayati Adalat and may for reasons to be recorded in writing

(a) cancel the jurisdiction of the Panchayati Adalat with regard to any suit, case or proceeding, or

(b) quash any decree or order passed by the Panchayati Adalat at any stage.....

(5) Except as aforesaid, a decree or order passed by a Panchayati Adalat in any suit, case or proceeding under this Act shall be final and shall not be open to appeal or revision in any Court."

(6) It would appear from the above provisions that if there has been a miscarriage of justice or if there is an apprehension of it, the officers mentioned in this section, in their respective spheres, have the jurisdiction to quash the decree or order, or cancel the jurisdiction of the Panchayati Adalat, as the case may be. The cancellation of the jurisdiction refers to a stage where the case has not been decided and miscarriage of justice is apprehended; and the quashing of the decree or order refers to a stage where the case has been decided and the officer is of the opinion that the miscarriage of justice has occurred. Sub-section (5) then provides that except as aforesaid a decree or order of the Panchayati Adalat shall be final and shall not be open to appeal or revision. If this sub-section had stood by itself there would have been no difficulty in interpreting it, but under S. 89 of the same Act we find that a general power of revision has again been conferred on the same Officers.

(7) Section 89 runs as follows:

"A revision from any order or decree passed by a Panchayati Adalat shall in a case lie to the Sub-Divisional Magistrate, in a suit to the Munsif and in a proceeding under the U. P. Revenue Act, 1901, to the Sub-Divisional Officer having jurisdiction in the matter."

This section comes just three sections after section 85, and it is difficult to understand the utility of the section if the idea was not to give a general power of revision to the officers mentioned therein, apart from the powers given to them under S. 85 in cases of miscarriage of justice. In case sub-s. (5) of S. 85 did not exist, a clear interpretation of the two sections would have been that in the case of miscarriage of justice the officer could cancel or quash the decree or order under S. 85, and a general power of revision was conferred by S. 89. But this interpretation has been rendered impossible by sub-s. (5) of S. 85, which specifically says that the order of the Panchayati Adalat shall be final and shall not be open to appeal or revision "except as aforesaid", that is, except as already provided.

(8) It has been argued that S. 89 only provides for the forum for a revision, and the powers and conditions are all laid down in S. 85. But it is impossible to accept this contention because S. 85 itself gives the forum, and there was no point in giving the forum again in S. 89. We have further to take into consideration the fact that S. 89 does not confer any power on the court of revision, nor does it lay down any conditions under which revisions under that section would be maintainable. In other statutes providing for revisions, the appropriate sections mention also the powers of the revising courts, and the conditions under which a revision would be entertainable. See for example S. 115 C. P. C. and S. 439, Cr. P. C. The absence, therefore, of both these matters from S. 89 lends support to the view that S. 89 is wholly redundant and enacted under some misapprehension. We are conscious of the fact that a statute should not generally be interpreted so as to make any provision of it nugatory, but in this case, the provisions of sub-s. (5) are so very clear and emphatic that they make it impossible to hold that any further powers of revision have been conferred on the same officers by S. 89.

(9) There is another section, namely, S. 71 in the same Act which also provides for a revision in revenue cases referred to under S. 70, to the

Sub-Divisional Officer. This section simply says that the Sub-Divisional Officer shall have powers of revision either upon reference made to him or upon his own motion. It was the contention of the learned counsel for the applicants that the matters referred to under S. 70 were all matters concerning the entry of names in the village registers excepting a matter concerning the determination of the boundary disputes. He said that in all these cases, where they are contested, the Tahsildar is authorised to record the evidence and to send his report to the Assistant Collector. He is not authorised to pass any order, and the same powers have by S. 70 been given to the Panchayati Adalat. If this is so, it is difficult to understand what orders in the exercise of the power of revision the Sub-Divisional Officer can pass in proceedings referred to under S. 70, which had been transferred to the Panchayati Adalat. Instead of the Tahsildar the Panchayati Adalat would send a report to the Sub-Divisional Officer who is the Assistant Collector in charge of the Sub-Division, and the Sub-Divisional Officer has the power to either accept the report or to reject it. This power of acceptance or rejection is not a power of revision at all but the power of the original court.

(10) This section also does not lay down the conditions under which a revision would lie nor mentions the powers of the revising authority but it simply says that the Sub-Divisional Officer shall have powers of revision. The Sub-Divisional Officer has the powers of cancelling the jurisdiction or quashing the order under S. 85, and this section also may be as superfluous as S. 89; but we need not finally adjudicate upon this point because we are loath to curtail the powers conferred upon a Sub-Divisional Officer to interfere with the orders of the Panchayati Adalat. It is possible to say that the expression "except as aforesaid" in sub-section (5) of section 85 includes within its ambit the provisions of S. 71 also. In the present case the question whether the provisions of S. 71 are superfluous or not does not arise for decision and we refrain from deciding that question in this case.

(11) Only three cases on the interpretations of Ss. 85 and 89 have been brought to our notice. The first case is a Single Judge case — 'AIR 1952 All 668 (A)'. In this case the Panchayati Adalat convicted the applicants and two other persons and passed a cumulative sentence of fine of Rs. 20/- each for commission of both the offences under S. 24, Cattle Trespass Act and S. 323, I. P. C. A revision was filed against this order and the learned Magistrate acquitted two persons and reduced the fine of the three applicants. It was held by the learned Single Judge that the Magistrate had to quash the entire order passed by the Panchayati Adalat if he came to the conclusion that a miscarriage of justice had taken place. The order was either to be confirmed in tact or it was to be quashed. It was further held that the finding acquitting two of the accused amounted to saying that there had been a miscarriage of justice in this case, and the proceedings against all the accused should, therefore, have been quashed.

(12) The other case is an unreported Bench decision — 'Ramnaresh Tewari v. Mahadeo', Cri. Misc. Case No. 539 of 1951, D/- 27-7-1951 (All) (B). In this case the Panchayati Adalat had convicted the applicant under S. 506, I. P. C. and sentenced two of them to a fine of Rs. 100/- each and others to a fine of Rs. 50/- each. The Sub-Divisional Magistrate in exercise of his powers under S. 85 altered the conviction from one under S. 506 to one under S. 504, I. P. C. and reduced the sentence to Rs. 10/- in each case. It was held by the Bench that the learned Magistrate had no power to modify the order. The learned Magistrate could quash the order of the Panchayati Adalat; but he had no power to substitute a fresh order in place of the order passed by the Panchayati Adalat. The view of the learned Judges was that no final orders could be passed by the Sub-Divisional Magistrate to which it was the exclusive jurisdiction of the Panchayati Adalat to pass. The Magistrate could only confirm or quash the order, or cancel the jurisdiction.

(13) The last case on the point is another single Judge case — 'Shafi Ahmed v. State', AIR 1953 All 564 (C). In this case it was held that it was not open to the Sub-Divisional Magistrate to maintain the convictions of the applicants for one offence, and to set aside the jurisdiction of the Panchayati Adalat with respect to the proceedings concerning the other offence. In this case the applicants were convicted by the Panchayati Adalat for commission of offences under Ss. 445 and 352, I. P. C., but the Sub-Divisional Magistrate set aside the conviction under S. 352, I. P. C. and maintained the conviction under S. 447, I. P. C. The learned Judge was of the view that the word "case" means a criminal proceeding and where there is only one proceeding with respect to more than one offence the entire proceeding is a "case". It was, therefore not open to the Sub-Divisional Magistrate to set aside the conviction with respect to one offence and maintain it with respect to the other.

(14) We have already held that the powers of revision are confined within the ambit of the provisions of S. 85, U. P. Panchayat Raj Act. In the case of apprehended miscarriage of justice the jurisdiction is cancelled, and in the case of miscarriage of justice which has already occurred the decree or order is quashed. The question that arises for consideration is whether the quashing can be of a part of a decree or order apart from quashing it as a whole. Further, if quashing of a part is possible whether the order can be quashed with respect to some accused and maintained with respect to the others and even in the case of the same accused whether it can be quashed with respect to one offence and maintained with respect to the other. As far as the power of cancelling the jurisdiction is concerned we do not think that the legislature meant the cancellation of the jurisdiction with respect to some of the accused or with respect to some of the offences committed by the same accused. In case, miscarriage of justice is apprehended the Sub-Divisional Magistrate is authorised to cancel the jurisdiction of the Panchayati Adalat with regard to the case; which obviously means with regard to the whole case and not to a portion of it. Cancelling the jurisdiction with regard to one portion and maintaining the jurisdiction with regard to the other cannot be taken to be the likely intention of the legislature. We think that the same interpretation should be given to the word "quash" also. When an order or a decree is only modified or altered it is not said to have been quashed. The word "quashing" has been applied generally to the setting aside of the entire proceedings. Then the result of the cancellation or quashing is that the jurisdiction of the Panchayati Adalat is taken away, and the jurisdiction is conferred on the ordinary courts the party having been given a right to obtain an adjudication from the regular courts.

(15) We, therefore, respectfully agree with the view taken in the above cases, and hold that the

Magistrate has jurisdiction either to leave the order intact or to quash the whole of it. Partial quashing of the order of the jurisdiction was not the intention of the Legislature.

(16) We may, however, point out that the quashing of the jurisdiction at times may result in great hardship to the accused where some of them had been acquitted, or those who had been convicted had been acquitted on some of the charges. It is also unfortunate that a magistrate should have no option but to quash the whole jurisdiction when he might be of the opinion that the conviction was right but either the sentence was inadequate or was too severe. We have, however, to interpret the law as we find it and the remedy lies in the hands of the Legislature itself. As the revision of the Act is under consideration, a copy of this judgment may be sent to the Government for such action as it may consider necessary.

(17) In view of the matter the application must be allowed: & because the Magistrate must be taken to be of the opinion that there had been a miscarriage of justice not only with respect to some of the accused persons but also with respect to one out of the two offences said to have been committed even by the applicants, we think the proper order to pass in this case would be to quash the entire proceedings of the Panchayati Adalat, which we hereby do. The Magistrate's order is also set aside. The fines, if paid, shall be refunded.

B/V.S.B. Application allowed.

AIR 1954 ALLAHABAD 170 (Vol. 41 C. N. 94)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Shankerpal Singh and another, Defendants-Appellants v. Hari Shanker Singh and others, Plaintiffs-Respondents.

Second Appeals Nos. 745 to 747 of 1947, D/-22-9-1953. from order of Civil J., Sultanpur, D/- 17-7-1947.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 291 — Scope.

Suit by persons claiming to be the nearest reversioners of the deceased, who was possessed of certain under-proprietary and occupancy plots, against the defendants on the allegations that the property had passed to the plaintiffs and the defendants had taken unlawful possession of the plots in collusion with the Zemindars, also impleaded as defendants — Trial court dismissing suit on ground that suit did not lie under S. 183 as the defendants were in possession in their own right as heirs of the deceased and not through the landlords — Civil Judge in appeal holding that the material on record was sufficient for disposal of suit and giving his decision on merits — Held that in view of S. 291 the Civil Judge was competent to do so and the question whether the suit was within the cognizance of the revenue courts or not was immaterial. (Para 7)

K. N. Tandon, for Appellants; H. D. Srivastava (for Nos. 1 to 6 and 28), for Respondents.

JUDGMENT: These three appeals have been heard together. They arise out of three suits in which the parties were the same and the facts were also similar.

(2) One Srimati Chaurasa Kunwar died on 1-11-1944 possessed of certain under-proprietary and occupancy holding plots. The plaintiffs claiming to be the nearest reversioners instituted three different suits, as the plots were situate in three different mohals, against the defendants on the allegations that the property had passed to the plaintiffs and the defendants had taken unlawful possession of the plots in collusion with the zamindars who were also impleaded as defendants in these suits. It was alleged on behalf of the plaintiffs that Srimati Chaurasa Kunwar had inherited the property as a limited heir from her son, Jagdamba Singh, who died issueless.

(3) The main contesting defendants who are the appellants in this case contested the suits mainly on the ground that they had been holding the property in their own right and that the suit was not maintainable under S. 183, U. P. Tenancy Act. They further alleged that Srimati Chaurasa Kunwar had acquired full proprietary rights by adverse possession in the property in suit and that the defendants being her nephews, were entitled to succeed to her property on her death. Some of the defendants other than those who are appellants in the present appeals also raised a plea that the suit was barred by the provisions of S. 34, sub-s. (5), U. P. Land Revenue Act. It was also denied by the defendants that the plaintiffs were the nearest reversioners to the estate.

(4) As a plea of proprietary possession in respect of under-proprietary plots was raised by the defendants, an issue was referred to the civil court on this point. The Munsif who tried the issue found that the plaintiffs were the nearest reversioners, that Srimati Chaurasa Kunwar had not acquired full proprietary rights in the property by adverse possession and that the plaintiffs were entitled to succeed to the property left by Srimati Chaurasa Kunwar. On receipt of this findings the revenue court proceeded to decide the issue on the question of jurisdiction. It came to the finding that the suit did not lie under S. 183, U. P. Tenancy Act as the defendants did not claim to be in possession of the property through the landlord but held it in their own right as heirs of Srimati Chaurasa Kunwar. The revenue court, therefore, dismissed the suit. The plaintiffs then went in appeal to the civil Judge who allowed the appeal and decreed the suits. The defendants 3 and 4 have now come up in second appeal.

(5) The first point which has been urged on behalf of the appellants is that the plea that the suit was not maintainable in view of the provisions of S. 34(5), U. P. Land Revenue Act had been raised in these suits and no finding had been given by either of the two Courts below on this point. It has been urged that the plaintiffs did not make any report for mutation of their names on the death of Srimati Chaurasa Kunwar and they were thus not entitled to maintain any suit of any kind in the revenue court.

It appears from the written statement filed by Harpal Singh and from the joint written statement filed by defendants 6, 7, 9, & 11 to 14 that a plea of S. 34(5), U. P. Land Revenue Act was in fact raised. No issue, however, was framed on this point and it appears that this plea was not pressed in the trial Court. In the appellate Court also when this plea was raised, the learned Civil Judge rejected the plea on the ground that

it had not been raised in the trial court and no issue was framed on this point by that Court. If the plea could have been decided only on a point of law, it may perhaps have been allowed to be raised in this Court, but the plea involves questions of fact on which no evidence has been led by either party. If the plea has been pressed in the trial Court the plaintiffs would have been in a position to lead evidence to show whether or not a report had been made for mutation of their names. It appears, therefore, that the plea was virtually abandoned and no evidence was led on this point.

(6) Moreover the defendants 3 and 4 who are appellants in the present appeals did not raise this plea and it is, therefore, not open to them to raise this plea for the first time in second appeal. The defendants who had raised the plea did not come up in second appeal. I am unable, therefore, to entertain this plea at this stage and it is not necessary to discuss whether the suit would be barred in view of S. 34(5), U. P. Land Revenue Act.

(7) The second point which has been urged on behalf of the appellants is that the suit was not maintainable under S. 183, U. P. Tenancy Act and as such should have been thrown out by the revenue court. If the assertion made on behalf of the appellants would have been held to be well-founded, the result of it would have been that the suit should have gone to the civil court.

Section 291, U. P. Tenancy Act provides that if in any suit an objection on the ground of jurisdiction is taken in the court of first instance and if the necessary materials for a proper determination of the suit are before the Court it shall be competent to dispose of the appeal. In the present case even if the suit had gone to the civil court, an appeal would lie to the District Judge and the District Judge was, therefore, competent to dispose of the appeal even if there was some substance in the objection raised about jurisdiction by the defendants. The learned Civil Judge who heard the appeal pointed out that the material on the record was sufficient for the disposal of the suit and has, therefore, given his decision on merits. In view of the provisions of S. 291, U. P. Tenancy Act, it is immaterial whether the suit was within the cognizance of the revenue court or not. The argument advanced on this point has, therefore, no force.

(8) The last point which has been canvassed on behalf of the appellants is that the finding of the Court below that the plaintiffs were the nearest reversioners to the estate of Srimati Chaurasa Kunwar is not based on sufficient evidence on the record. It appears from the judgments of the lower appellate Court and of the Munsif who decided the issue about proprietary rights that it had been proved that the plaintiffs were the nearest reversioners. There was the evidence of Hari Shankar a witness to prove that all those who were nearer to the deceased last male holder of the property as compared to the plaintiffs were dead. He also deposed that he had seen some of the persons mentioned by him in the pedigree and had heard about others from his father who was dead. The lower appellate Court also concurred with this finding of the trial Court and came to the conclusion that it had been found that the plaintiffs were the nearest reversioners to the estate of Srimati Chaurasa Kunwar. This is a finding of fact which is binding on this Court. Even apart from this the evidence appears to be satisfactory on the point.

(9) No other point has been raised in arguments on behalf of the appellants.

(10) As a result all the three appeals fail and are dismissed with costs to the respondents.

B/M.K.S. Appeals dismissed.

AIR 1954 ALLAHABAD 171 (Vol. 41 C. N. 95)
(LUCKNOW BENCH)

BEG AND RANDHIR SINGH JJ.

Ludur, Defendant-Appellant v. Ram Raj and others, Plaintiffs-Respondents.

Second Appeal No. 239 of 1947, D/- 16-9-1953, against decree of Civil Judge, Partabgarh, D/- 23-1-1947.

(a) Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 183.

A suit instituted in 1945 (i.e. before S. 183 amended in 1947) for possession of some plots of land which were a part of the tenancy holding of the plaintiffs but which had been taken possession of unlawfully by the defendant could be instituted in civil court under the provisions of the Act as it stood then. AIR 1947 Oudh 104 (FB), Foll.; AIR 1946 All 379 (FB), Not foll. (Paras 1, 3)

(b) Civil P. C. (1908), S. 9 — Forum of suit how to be determined.

Primarily the forum is to be decided on the allegations made in the plaint. A finding on the plea raised in defence may also affect the jurisdiction, but mere allegations made by a defendant should not be enough to decide the forum of a suit. (Para 3)

Anno: C. P. C., S. 9 N. 7.

1953 Mulla: (Topic not discussed).

(c) Limitation Act (1908), S. 29 — Limitation under special or local Acts — (U. P. Tenancy Act (17 of 1939), Sch. IV, Group B, S. 138) — (Civil P. C. (1908), S. 9).

The period of limitation provided in Sch. IV, Group B, column 4 against suits under S. 183, U. P. Tenancy Act do not apply to suits brought under the provisions of S. 9, Civil P. C. Therefore, the rule that where a period of limitation provided by the Limitation Act for a certain suit or suits has been varied or curtailed by any special enactment, the period of limitation provided by the special enactment shall prevail, and the period of limitation provided in the Limitation Act would not be available, will not apply to a suit for possession of immovable property which was a part of a tenancy holding of the plaintiff but which had been taken possession of unlawfully by the defendant. (Para 4)

Anno: Limit. Act, S. 29 N. 3; C. P. C., S. 9 N. 17.

B. K. Dhaon, for Appellant; N. Bannerji, for Respondents.

CASES REFERRED:

(A) ('46) AIR 1946 All 379: ILR (1946) All 692 (FB) (Pr 3)

(B) ('47) AIR 1947 Oudh 104: 1947 OACC 7 (FB) (Pr 3)

RANDHIR SINGH J.:

This appeal originally came up for hearing before a learned single Judge of this Court who thought that the points involved in this case reserved consideration by a Division Bench. The case was therefore listed before this Bench. It arises out of a suit instituted by the plaintiffs respondents for possession of some plots of land which were a part of the tenancy holding of the plaintiffs but which had been taken possession of unlawfully by the defendant appellant. The defendant contested the suit on the ground that the plots were given to him under a private partition and as such he was a tenant of the plots. Pleas of limitation and jurisdiction were also raised and it was contended that the suit should have been instituted in the revenue court and that it was barred by limitation.

(2) As the defendant raised a plea of tenancy, an issue about tenancy was referred to the revenue Court. The revenue Court before deciding the issue remitted to it by the Civil Court, impleaded the landlord. The revenue Court ultimately came to the conclusion that the defendant was not a tenant and this finding was sent back to the Civil Court. On receipt of this finding the Civil Court decreed the suit. It also found that the suit was within the cognizance of the Civil Court and was not barred by limitation. The defendant went in appeal to the District Judge. The Civil Judge who heard the appeal concurred with the findings of the trial Court and dismissed the appeal. The defendant has now come up in second appeal.

(3) Two points have been urged on behalf of the appellant. Firstly it was urged that the suit was covered by S. 183, U. P. Tenancy Act and as such the suit should have been instituted in the revenue Court and not in the civil Court. Section 183 was amended in 1947, and after the amendment there is no doubt that a suit such as the one which has been instituted by the plaintiffs, ought now to be instituted in the revenue Court. The suit which has given rise to the present appeal, however, was instituted in 1945 and we have to see whether such a suit could be instituted in the civil Court under the provisions of the Act as it stood in 1945.

There has been a conflict of opinion between the Allahabad High Court and the erstwhile Oudh Chief Court on a matter of jurisdiction in such suits. The Allahabad view was that a suit by a tenant could not be instituted in the Civil Court and that the only forum for such a suit was the revenue Court, vide — 'D. N. Rege v. Muhammad Haider', AIR 1946 All 379 (FB) (A). The matter came up before a Full Bench of the Oudh Chief Court in 1947 and it was held that it was open to a tenant to institute a suit against a trespasser in the Civil Court, vide — 'Ori Lal v. Ganeshi', AIR 1947 Oudh 104 (FB) (B). The plaintiffs belonged to Oudh and were governed by the laws prevailing in Oudh. We are, therefore, not concerned with the disagreement on this point between the two Courts and on the view of the Oudh Chief Court the plaintiffs were entitled to maintain the suit in the Civil Court. Originally it was argued on behalf of the appellant that even before the amendment of S. 180, the suit should have been instituted in the revenue Court inasmuch as the defendant in his defence pleaded that he was a tenant and the landlord also, when he was impleaded in the revenue Court, supported him. Primarily the forum is to be decided on the allegations made in the plaint. It may also perhaps be conceded that a finding on the plea raised in defence may also affect the jurisdiction, but mere allegations made by a defendant should not be enough to decide the forum of a suit. Learned counsel for the appellant did not, therefore, towards the close of his arguments, press this point.

(4) The other point which is more important is about limitation. The present suit was instituted on 27-8-1945, and it was mentioned in the plaint that the defendant had entered into wrongful possession of the plots in dispute without rights or title sometime in September, 1942. This suit was, therefore, instituted about three years after the cause of action for the suit arose. The U. P. Tenancy Act has provided a period of limitation for such suits to be brought under the U. P. Tenancy Act and the period provided for such a suit under S. 180 or 183, U. P. Tenancy Act is two years in certain cases, and it has been argued that this period of limitation should be made applicable to all suits whether brought under the U. P. Tenancy Act or under the Code of Civil Procedure by tenants so long the suits are covered by the description given in the Fourth Schedule, Group B, appended to the U. P. Tenancy Act.

The argument on behalf of the respondents on this point is that this special period of limitation provided in the U. P. Tenancy Act is limited in its application to suits brought under the U. P. Tenancy Act and not to suits brought under any other provision of law. No authority bordering on the question in issue has been cited, but the learned counsel for the appellant has cited some rulings to show that the limitation provided in a special enactment shall override the enactment in the Indian Limitation Act. There can be no dispute that where a period of limitation provided by the Indian Limitation Act for a certain suit or suits has been varied or curtailed by any special enactment, the period of limitation provided by the special enactment shall prevail, and the period of limitation provided in the Indian Limitation Act would not be available. The main point for decision, therefore, is whether the special enactment relied on by the learned counsel for the appellant has curtailed the period of limitation for certain kinds of suits to be brought under the Code of Civil Procedure. The argument for the learned counsel for the appellant is that we should look to the description of the suit given in the schedule and not to the section under which the suit has to be brought.

We are unable to agree with this contention. A plain reading of the Fourth Schedule, Group B column 4, shows that the period of limitation in this column is provided for suits which are to be brought under the provisions of the section mentioned in column 2. With the policy of the legislature underlying this special enactment, or with the wisdom of it, we are not concerned. All that we are concerned with is the intention of the legislature to be gathered from the phraseology & wording of the statute. It would, therefore, be difficult to agree with the contention that the period of limitation provided in column 4 against suits under S. 183 would apply also to suits brought under the provisions of S. 9 of the Code of Civil Procedure. We are, therefore, clearly of opinion that a suit such as the one which has

given rise to this appeal and which was within the cognizance of the Civil Court, and was brought presumably under the provisions of S. 9 of the Code of Civil Procedure, is to be governed by the provisions of the Indian Limitation Act. The only articles which apply to such a case are Arts. 142 or 144 and in either case the suit would be within limitation, as it was instituted less than three years of the date on which the cause of action arose.

(5) No other point has been pressed in arguments.

(6) As a result the appeal is dismissed with costs.

B/H.G.P. Appeal dismissed.

AIR 1954 ALLAHABAD 173 (Vol. 41 C. N. 96)

MALIK C. J. AND CHATURVEDI J.

State v. Mt. Dukhtari, Respondent.

Appeals Nos. 374 and 375 to 380 of 1952, D/- 27-8-1953, from judgment of Sub-Divisional Magistrate, Terai and Bhabar, Nainital, at Haldwani, D/- 2-11-1951.

(a) Influx from Pakistan (Control) Act (1949), Ss. 3 and 4 — Permit System Rules under S. 4, R. 31(2)(d) — "Persons domiciled in India" — Meaning of.

The expression "persons domiciled in India" in cl. (d) of sub-r. (2) of R. 31 is not confined only to cases of persons who had acquired a new domicile. The words include both, persons who had acquired domicile by birth and had retained that domicile and persons who were not of Indian domicile by birth but had acquired Indian domicile as defined in S. 10, Succession Act. (Para 7)

(b) Influx from Pakistan (Control) Act (1949), Preamble — Act is not ultra vires — (Government of India Act (1915), Sch. VII, List I, Item 17). (Para 10)

Sri Rama, Dy. Govt. Advocate, for Appellant; Krishna Das Jain, for Respondent.

MALIK C. J.:

The respondents were prosecuted under S. 5, Influx from Pakistan (Control) Act, 1949, (Act No. 23 of 1949) but were acquitted by the learned Magistrate. The State has filed these appeals and the point urged on behalf of the State is that the order of acquittal was incorrect.

(2) The facts are really not in dispute. The respondents were all residents of various villages in Haldwani, district Naini Tal presumably of parents who were also residents there. In the year 1948 Samvat Dukhtari, who is the respondent in Government Appeal No. 374 of 1952, went from Haldwani to West Pakistan. She went with her parents and left behind her husband in Haldwani. The other respondents in the other six cases left in May 1950, except Nabi Raza Khan who left in July 1950. All the seven accused persons admittedly went to West Pakistan without a permit and then came back to India 'via' East Pakistan. Four of them, namely, Smt. Dukhtari, Nabi Jan Khan, Abdul Rauf and Smt. Rais, wife of Abdul Rauf, returned to India on 8-11-1950, while three of them viz. Abdul Hamid, S. K. Ifran and Nabi Raza Khan returned to India in October, 1950. They were prosecuted on the ground that having entered Indian Union without a valid permit, as required by S. 3 of the Act and the rules framed thereunder, the respondents were guilty under S. 5 of the Act.

(3) The learned magistrate acquitted them as he was of opinion that the accused were not persons domiciled in India to whom cl. (d) of R. 31(2) applied. The magistrate's reasoning was that they were not persons domiciled in India as they had not acquired a domicile by residence but by birth. In other words, the learned magistrate was of the opinion that the words "persons domiciled in India" did not include persons whose "domicile of origin was India". On behalf of the State it is argued that there is no warrant for this interpretation and the decision of the learned magistrate is, therefore, wrong.

(4) Section 3, Influx from Pakistan (Control) Act, 1949, hereafter called "the Act", provides:

"No person shall enter India from any place in Pakistan whether directly or indirectly unless—

(a) he is in possession of a permit, or

(b) being a person not domiciled in India or Pakistan, he is in possession of a valid passport as required by the Indian Passport Act 1920, or

(c) he is exempted from the requirement of being in possession of a permit by or in accordance with rules made under this Act."

It cannot be disputed that the accused persons do not come under cl. (b) of the Act. Unless therefore it can be pointed out that the accused were exempted under some rule made under this Act, cl. (a) will apply to them and it will have to be held that they were not entitled to enter India from any place in Pakistan without the necessary permit.

(5) Section 4 gives the Central Government power to make rules. Under the powers given under that section the Central Government has made certain rules which are known as Permit System Rules, 1949. Rule 31 is the only rule that need be referred to, the relevant portion of which is as follows:

"Subject to the provisions of sub-r. (2) a person entering India from any place in East Pakistan shall be exempt from the requirement of being in possession of a permit."

The accused person entered India from East Pakistan so they would be exempt from the requirement of a permit, if the provisions of sub-r. (2) applied to them. The relevant portion of sub-r. (2) is as follows:

"Notwithstanding anything contained in sub-r. (1), the following classes of persons entering India from any place in East Pakistan, shall be required to be in possession of a permit, that is to say:

(a) persons whose domicile of origin is in West Pakistan:"

(It is not necessary to refer to the provisos under the sub-rule.)

"(b) Persons whose domicile of origin is in East Pakistan but who are residing in West Pakistan by reason of any employment or in the exercise of any trade, profession or calling;

(c) Persons whose domicile of origin was in India but who have acquired a new domicile in West Pakistan;

(d) Persons domiciled in India, who after a temporary visit to, or stay in West Pakis-

tan, return to India through East Pakistan."

It will be noticed that in this sub-rule the words "domicile of origin", "new domicile" and "persons domiciled in India" have been used. Sub-rule (3) of rule 31 lays down that—

"the expressions "domicile of origin" and "new domicile" have the same meaning respectively as these terms have in sections 7 and 10, Succession Act."

Section 7, Succession Act (Act 30 of 1925) lays down that —

"The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death".

while S. 10 lays down that—

"A person acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile or origin".

It will be noticed that while sub-r. (3) of R. 31 provides that the expressions "domicile of origin" and "new domicile" have the same meaning as in the Indian Succession Act, no attempt has been made to define the word 'domicile' itself.

(6) The contention of the learned counsel for the accused is that the word "domicile" in "persons domiciled in India" means a "new domicile", as defined in S. 10, Succession Act, 1925. There is absolutely no warrant for this argument. In fact, a reference to S. 7 itself of the Indian Succession Act makes it clear that the contention of learned counsel has no force. The section lays down that —

"the domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled;.'

The words 'father was domiciled' cannot mean that his father had acquired his domicile by residence only and not by birth. The words 'father was domiciled' in S. 7, Succession Act, must clearly include both 'domicile of origin' i.e. a 'domicile by birth' or a 'domicile by acquisition' by giving up the domicile by birth and acquiring a fresh domicile by residence.

(7) The learned magistrate fell into the error of thinking that the expression "persons domiciled in India" in cl. (d) of sub-r. (2) of R. 31 was confined only to cases of persons who had acquired a new domicile and did not apply to cases of persons whose "domicile of origin" was India. It is now well settled and it is not necessary to give any authority for the proposition that a man cannot have more than one domicile. His domicile by birth is regulated in India by various provisions of the Indian Succession Act. Sections 7 and 8 apply to the cases of legitimate & illegitimate children. Section 9, Succession Act provides that 'the domicile of origin prevails until a new domicile has been acquired', and section 10 makes a provision how a new domicile can be acquired.

In the various clauses of sub-r. (2) R. 31, separate provision has been made for cases where it was intended that the rule should apply to persons whose 'domicile of origin' or 'new domicile' was in India or Pakistan. Having used the words 'new domicile' in cl. (c) there was no reason why the same word or similar words should not have been used in cl. (d) if it was intended that the words "persons domiciled in India" should not include persons born here but only those who were born outside India and acquired a new domicile in India. In our view the words "persons domiciled in India" in cl. (d) of sub-r. (2) of R. 31 include both, persons who had acquired domicile by birth and had retained that domicile and persons who were not of Indian domicile by birth but had acquired Indian domicile as defined in S. 10, Succession Act. We are, therefore, of the opinion that the accused were not granted exemption under R. 31 and they were guilty under S. 5 of the Act.

(8) Two arguments have been advanced by the learned counsel — one is that S. 7 of the Act is 'ultra vires' and the Central Government has no power to direct by a general or special order the removal of a citizen of India from India even if he might have committed an offence under S. 5. It is not necessary for us to go into this question as the question does not arise. The question of removal would not arise till the conviction has been made and at present there is no order directing the deportation of any of these accused persons. Moreover, Mr. Sri Ram, Deputy Government Advocate, has stated on behalf of the State that the State has no intention of deporting any of the accused persons outside India and these appeals were filed merely for the clarification of the law.

(9) Learned Deputy Government Advocate has pointed out that the word "migration" in the charge as also in the judgment of the lower court has been loosely used. It was not the case of any of the accused that they had migrated in the sense that they had left India without any intention of coming back to India and with the intention of settling in West Pakistan. Their case was that they had gone on a temporary visit with the intention of coming back to India when the conditions were more peaceful.

(10) The last point urged by the learned counsel for the accused is that the Act is ultra vires, as the legislature had no right to pass such an enactment. Reliance is placed on the Government of India Act, 1935, Seventh Schedule, List I, Paragraph no. 17 which is as follows—

"Admission into, and emigration and expulsion from India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India, or subjects of any Acceding State; pilgrimages to places beyond India."

Section 100 of the Government of India Act gave the Dominion Legislature power to make laws with respect to any of the matters enumerated in List I. It is said that correctly interpreted this paragraph does not give any power to the Dominion Legislature to pass an enactment controlling the admission into and emigration and expulsion from India of British subjects domiciled in India.

We do not think that this argument has any force. The punctuation given in the paragraph clearly indicates that after giving the general power of admission into and emigration and expulsion from, India, the Act goes on to provide that this power will include the regulation of the movements in India of persons who are not British subjects domiciled in India, or subjects of any Acceding State. These words do not control the general power given in the first sentence of the paragraph.

(11) The result, therefore, is that these appeals are allowed and the orders passed by the lower courts are set aside. The respondents are convicted under S. 5 of the Act and are sentenced

to pay a fine of Rs. 10/- each. In case of default in the payment of fine, the applicants shall undergo rigorous imprisonment for a period of 14 days.

B/R.G.D. Appeals allowed.

AIR 1954 ALLAHABAD 175 (Vol. 41, C. N. 97)
(LUCKNOW BENCH)

RANDHIR SINGH J.

Lachman Singh, Applicant v. Ghanshiyam and another, Opposite Party.

Criminal Revn. No. 115 of 1953, D/- 10-9-1953, against order of Sub-Divisional Magistrate, Hardoi, D/- 14-2-1953.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 83 — Record of proceedings.

There is no provision in the Panchayat Raj Act or in the rules framed thereunder that a Panchayati Adalat shall keep a complete record of the proceedings. All that is enjoined by R. 95 is that the prosecution evidence shall be recorded. The omission in the record of proceedings about the charge having been explained does not lead to the conclusion that the charge had not been explained or that oath was not administered. (Paras 3, 4)

(b) U. P. Panchayat Raj Act (26 of 1947), S. 83 — Questions to accused — (U. P. Panchayat Raj Act Rules, R. 95).

No doubt cross-examination of the accused is not to be allowed because of the effect it may have in the minds of the parties and thereby prejudice the accused. But the Court is entitled to question the accused and when those questions especially are not in reference to the offence itself no question of prejudice to the accused thereby arises. AIR 1953 All 144, Distinguished. (Para 5)

(c) U. P. Panchayat Raj Act (26 of 1947), S. 53 — Nature of proceedings.

Proceedings under S. 53 are independent proceedings and it is not open to a Panchayati Adalat to pass an order for furnishing security in the operative part of the judgment of a case when the opposite party has never been called upon to show cause under S. 53 of the Act. A judgment, however, containing a suggestion or recommendation in the operative part that the accused should be ordered to furnish bail bonds and not an executable order to the effect is not vitiated by the insertion of that recommendation. (Para 6)

B. L. Shukla, for Applicant; K. S. Verma, for Opposite Party No. 1; M. L. Trivedi for Addl. Govt., for the State.

CASE REFERRED:

(A) ('53) AIR 1953 All 144: 1952 All LJ 565: 1953 Cri LJ 392 (Pr 5)

ORDER: This is an application in revision under Art. 227 of the Constitution against an order of the Panchayati Adalat of village Barwan district Hardoi.

(2) It appears that a complaint under Ss. 323 and 325, I. P. C. was instituted in the Court of a Magistrate against the applicant by one Ghanshyam. As the Magistrate found that the case was triable by a Panchayati Adalat it was transferred to the Panchayati Adalat for disposal. It held the charge under S. 323, I. P. C. proved against the applicant and he was convicted and sentenced to a fine of Rs. 80/-. Towards the close of the judgment of the Panchayati Adalat it was also mentioned that the accused should be ordered to furnish bail bonds. The applicant was aggrieved by this order and went in revision to the Sub-Divisional Magistrate but the revision was dismissed. He has now come up to this Court in revision.

(3) The first point which has been urged on behalf of the applicant is that no oath was administered to the witnesses for the prosecution and as such the evidence relied upon by the Panchayati Adalat could not be taken into consideration in finding the applicant guilty. The only basis on which this plea has been raised is that there is no mention in the record of the evidence of the witnesses that oath had been administered except in the case of one witness. From this omission it is sought to be inferred that no oath had been administered to the witnesses. This point was taken up before the Sub-Divisional Magistrate but was given up and was not pressed. An affidavit has been filed by the complainant that oath had actually been administered to the witnesses and the contention that no oath had been administered to the witnesses was not correct. There is a mention in the record of the proceedings dated 7-10-1952, that the chaukidar Murli refused to take oath. This shows that the Panchayati Adalat was alive to the question of administering oath to witnesses and there is, therefore, no reason to believe that oath was not administered to the witnesses.

(4) The second point which has been pressed in arguments on behalf of the applicant is that the charge had not been explained to him. It was a simple case of marpit and the case was originally instituted in the Court of a Magistrate whence it was transferred to the Panchayati Adalat. This argument again is based on the omission of any mention of the charge having been explained to the applicant in the proceedings. There is no provision in the Panchayat Raj Act or in the rules framed thereunder that a Panchayati Adalat shall keep a complete record of the proceedings. All that is enjoined by R. 95 is that the prosecution evidence shall be recorded. The omission in the record of proceedings about the charge having been explained does not lead to the conclusion that the charge had not been explained. Evidently no prejudice could be caused to the applicant as the case was a simple case of marpit and evidence was led on behalf of the prosecution and the defence. There is, therefore, no force in this contention also.

(5) The third point taken up in arguments is that the accused was allowed to be cross-examined. Rule 95 of the Panchayat Raj Act Rules lays down that each party shall be allowed to cross-examine any other party except the accused. The accused could not, therefore, be cross-examined. It has been pointed out by the learned counsel for the appellant that two questions were put to the accused after his examination had been recorded and they were to the effect whether he was a cultivator and whether his uncle had borrowed Rs. 100/- from the father of the complainant. To the first question the reply of the accused was that he was a cultivator and to the second question the answer was

that he did not know. It is not apparent from the record if these questions were put by the Panchayati Adalat or by the complainant and learned counsel relied on the forms of the questions for inferring that they must have been put by the complainant. It is possible that these questions might have been put at the request of the complainant and they were, therefore, noted in that form.

There is no doubt that cross-examination of an accused is not to be allowed and in support of this contention learned counsel has cited a ruling of this Court, — 'Pati v. Dubari', AIR 1953 All 144 (A). In this reported case a similar question arose for consideration. It was argued in that case that it was not possible to gauge the effect of cross-examination on the minds of the panches and as such it would be difficult to find out exactly if there was or was not prejudice caused to the accused. In the present case, however, the two questions and the answers given by the accused are on the record and they are of such a nature that no inference against the accused or in favour of the complainant could be derived from the answers. Moreover a Court is entitled to put questions to the accused and the questions in the present case were not in reference to the offence itself. The principle laid down in the reported case does not therefore apply to the facts of the present case.

(6) The last and only remaining submission on behalf of the applicant was that the order of the Panchayati Adalat with regard to the security bonds was invalid inasmuch as the period for which the bonds were to be executed and the amounts in which the bonds were to be furnished are not mentioned in the order. The learned counsel for the applicant has cited S. 53, Panchayat Raj Act wherein it is necessary that the period for which the bond has to be executed and the amount of the bond should be mentioned. It appears to me that S. 53 is wholly inapplicable to the present case. Proceedings under S. 53 are independent proceedings and it is not open to a Panchayati Adalat to pass an order for furnishing security in the operative part of the judgment of a case when the opposite party has never been called upon to show cause under S. 53 of the Act. A perusal of the judgment however shows that it was in the nature of a suggestion or recommendation which the Panchayati Adalat had made. It was not an executable order nor was any effect given to this order. The judgment is, therefore, not vitiated by the insertion of a recommendation of this nature in the operative part of it.

(7) No other point has been pressed in arguments. As a result the application in revision is dismissed.

B/R.G.D. Revision dismissed.

AIR 1954 ALLAHABAD 176 (Vol. 41 C. N. 98)

WALI ULLAH AND SAPRU JJ.

B. Chotey Lal, Appellant v. Fazlul Rahman Khan, Respondent.

Ex. First Appeals Nos. 457 of 1941, and 224 of 1942, D/- 4-4-1950, against order of Civil J., Moradabad, D/- 30-8-1941.

(a) Debt Laws — U. P. Debt Redemption Act (13 of 1940), S. 8 — Decree creating joint and several liability.

Where a mortgage decree passed on a mortgage executed by father and son jointly, creates a joint and several liability against the father and son, it is not possible to amend the decree separately in favour of father and son limiting the liabilities of each. The orders of the Special Judge thus amending the decree cannot stand. (Para 18)

(b) Debt Laws — U. P. Debt Redemption Act (13 of 1940), Ss. 8 and 2(3), Expl.—"Agriculturist" — Relevant time.

Application under S. 8 — Applicant must show that he was "agriculturist" on date of application. (Paras 25, 38)

(c) Debt Laws — U. P. Debt Redemption Act (13 of 1940), S. 21 — Applicability.

First mortgage — Decree passed on its basis — Amount can be realised only from property mortgaged — No personal decree can be passed. AIR 1942 All 390 (FB); AIR 1945 All 346; AIR 1946 All 497, Rel. on. (Para 25)

(d) Debt Laws — U. P. Debt Redemption Act (13 of 1940), Ss. 2(3)(a) and 8 — "Agriculturist".

Application under S. 8 — On date of application applicants paying Rs. 2/- and Rs. 13/- each, as "local rate" — Each is an agriculturist. (Paras 29, 30 and 44)

(e) Debt Laws — U. P. Debt Redemption Act (13 of 1940) S. 2 (3), Expl. — Construction — Benefit of remission to waqf estate — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Remedial Statutes) — (Interpretation of Statutes — Remedial Statutes).

The Courts must construe the provisions of Explanation II to S. 2(3), U. P. Debt Redemption Act and in particular, the expression "temporary remission has been made in the land revenue payable by a proprietor" as it occurs in that Explanation, bearing in mind that the U. P. Debt Redemption Act being a remedial statute its words must be construed so far as they reasonably admit so as to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved. The provisions of the Debt Redemption Act have to be interpreted liberally so as to promote the object which the legislature had in view in enacting the Act. Therefore, the proper interpretation of Explanation II attached to the definition of an "agriculturist" in S. 2(3) is that the benefit of a temporary remission of land revenue goes both to the landlord (proprietor) who actually pays land revenue as well as to the landlord or proprietor who is assumed to pay land revenue. Consequently the 'waqf estate' as represented by the 'Mutwali' is also entitled to claim a reduction in the local rate payable in respect of non-revenue paying items of property comprised in the 'waqf'. (Paras 42 & 44)

(f) Debt Laws — U. P. Debt Redemption Act (13 of 1940), S. 8 — Mortgage by father and son jointly — Mortgage decree — Father creating waqf of mortgaged property — Provision that debt to be satisfied out of dedicated property — Son made mutawalli — Only the mutawalli held entitled to apply under S. 8 as mutawalli — Father and son (in his personal capacity) held "not liable to pay under

mortgage decree", the property having passed out of their hands — Liability to pay held was on the waqf estate. **(Para 46)**

Gopi Nath Kunzru and J. N. Chatterji, for Appellant; Mushtaq Ahmad, P. L. Banerji, M. H. Beg and Jagnandan Lal, for Respondent.

CASES REFERRED.

(A) ('42) AIR 1942 All 390: 1942 All LJ 578 (FB) (Prs 25, 26)
(B) ('45) AIR 1945 All 346: 1945 All LJ 211 (Pr 26)
(C) ('46) AIR 1946 All 497: 1946 All LJ 271 (Prs 27, 41)
(D) ('44) AIR 1944 PC 35: 1944 All LJ 162 (PC) (Pr 40)

WALI ULLAH J.:

These are two appeals against two orders of the Civil Judge of Moradabad dated 30-8-1941, and 28-3-1942, by which a decree was amended under S. 8, U. P. Debt Redemption Act (Act 13 of 1940).

(2) The facts cover a long period and are rather complicated. Abdul Karim and his son Fazlul Rahman hold considerable property. On 11-1-1924 the father and the son granted a simple mortgage in favour of the respondent, Rai Bahadur Chotey Lal, for a sum of Rs. 40,000/-. It was in respect of some house property as well as some zamindari property in three villages viz. Ichaura Kamboo, Dalpatpur and Papri. Between 1927 and 1928 certain payments were made in part satisfaction of the debt. The mortgage was put in suit—suit No. 169 of 1928—and on 28-1-1929, a decree was passed on the basis of this mortgage for a sum of Rs. 59,878-14-6. In satisfaction of this decree as well (?) substantial payments were made with the result that by 21-7-1931, the judgment debtors had discharged the debt to the extent of Rs. 36,014-7-0. On 22-7-1931, a fresh mortgage was executed, practically on the same lines as the earlier mortgage by the father and the son for a sum of Rs. 29,500/- in lieu of the balance due under the decree.

Thereafter another suit viz., suit No. 113 of 1932 was instituted for sale on the basis of a mortgage of 22-7-1931 with the result that a decree for a sum of Rs. 49,531-6-6 was passed on 31-1-1933, against the father and the son. On 29-4-1933, both the judgment-debtors made a payment of a sum of Rs. 14,500/- towards the amount due under the decree. It thus came about that for the original debt of Rs. 40,000/-, the father and the son had by this date paid in all a sum of Rs. 50,514-7-0. Next it appears that the judgment-debtors applied for reduction of interest under the Agriculturists' Relief Act (U. P. Act 27 of 1934) and on 4-1-1936 the mortgage decree was amended and the sum declared to be due under the amended decree was Rs. 34,881-14-6.

(3) Thereafter on 1-10-1936 an application was made by the judgment-debtors under S. 4, Encumbered Estates Act (U. P. Act 25 of 1934). It is not necessary to go into details, but as the result of these proceedings on 15-2-1939, the Special Judge, 1st Grade, Moradabad, passed a decree in favour of Chotey Lal against Abdul Karim alone for a sum of Rs. 35,845/- as the amount due under the mortgage decree in Suit No. 113 of 1932. The decree of the special Judge went on to apportion the liability between Abdul Karim and Fazlul Rahman and it was provided that the liability of Abdul Karim was to the extent of seven-eighths and the liability of Fazlul Rahman was to the extent of one-eighth. On 2-2-1940 Abdul Karim executed a waqf 'alal-aulad' appointing his son, Fazlul Rahman, as the sole 'Mutwalli'. The 'waqf' was subject to the payment of the debts of the 'waqif'.

(4) Subsequent to this the decree-holder applied for execution of the decree to the extent of one-eighth against Fazlul Rahman. This was before the Collector. On 5-4-1941 (1348 Fasli Rabi) Fazlul Rahman presented an application in his personal right under S. 8, Debt Redemption Act (U. P. Act 13 of 1940) for amendment of the decree in respect of his one-eighth share. It is interesting to note that for the first time on this date some attempt was made at specification of liability of the father and the son. We have emphasized this inasmuch as this application may have some bearing on the question of apportionment of liability between the two judgment-debtors.

(5) On 30-8-1941, Fazlul Rahman's application was allowed by the Civil Judge and a sum of Rs. 684/14/- only was found payable by Fazlul Rahman. Against this order the mortgagee-decree-holder has come up in appeal to this Court. It is Execution First Appeal No. 457 of 1941.

(6) Next we find that on an application made by Abdul Karim under S. 20, Encumbered Estates Act, the proceedings under that Act were quashed on 15-11-1941.

(7) On 27-11-1941 (:1349 Fasli Kharif) Abdul Karim and Fazlul Rahman both jointly presented an application for amendment of the decree under S. 8, Debt Redemption Act. Curiously enough, although it was a joint application, it was in respect of seven-eighths share of the liability under the decree. Apparently Fazlul Rahman joined in this application as he was the Mutawalli under the waqf 'alal-aulad' created by Abdul Karim on 2-2-1940. This application also proceeded upon the basis of the decree granted by the Special Judge in proceedings under the Encumbered Estates Act although, in point of fact, those proceedings had been quashed on 15-11-1941. The decree-holder objected to this application (paper No. 16 C of the record). The decree-holder challenged the right of the judgment-debtors to claim any apportionment of their liability.

(8) On 14-3-1942 (:1349 Fasli Rabi) another application was made by Abdul Karim and Fazlul Rahman for amendment of the decree under Section 8, Debt Redemption Act. This was in respect of the entire decree. On 20-3-1942, the Court directed that the application be put on the file. On 28-3-1942, the learned Civil Judge allowed the application dated 27-11-1941, with the result that the decree to the extent of seven-eighths share only was amended. This order of the learned Judge has been challenged by the decree-holder in Execution First Appeal No. 224 of 1942.

(9) We have thus two appeals before us made by the decree-holder, Chotey Lal, against Fazlul Rahman and Abdul Karim, and they are directed against the two orders mentioned above, by one of which, Fazlul Rahman's petition for the amendment of the decree was granted and by the second of which the joint application of Abdul Karim and Fazlul Rahman for amendment of the decree was allowed.

(10) These two appeals came up for hearing in the first instance before a Bench of this Court on 5-4-1944. Two main questions arose for consideration before that Bench: (i) whether Abdul Karim and Fazlul Rahman are agriculturists within the meaning of the Debt Redemption Act and are entitled to take the benefit of that Act and (ii) whether on taking account and determining the amount

due to the decree-holder under Section 9 of the Debt Redemption Act the principal sum of the loan is to be determined with reference to the mortgage of 21-7-1931, or it is to be determined with reference to the mortgage of 11-1-1924.

By their order dated 5-4-1944, the learned Judges appear to have decided the second question about the method of accounting thus: that the accounts would be re-opened from the date of the first mortgage i. e. 11-1-1924. With regard to the first question, however, the learned Judges felt some difficulty in deciding the matter inasmuch as the relevant facts had not been correctly ascertained by the Court below. Consequently they remitted two issues to the Court below. They are these:

"(1) Whether Abdul Karim and Fazlul Rahman were agriculturists within the meaning of the U. P. Debt Redemption Act on 11-1-1924, and on 21-7-1931, the date of the mortgages, and on the date when they made an application for the amendment of the decree and whether they are jointly or separately entitled to apply for the amendment of the decree under S. 8, U. P. Debt Redemption Act"

"(2) In case only one of these two persons being (sic) (is) entitled to the benefit of the Debt Redemption Act how is the loan to be apportioned between them in view of Section 11 of the Act and for what amount the decree is to be amended in favour of such a person."

(11) It may be mentioned here that the learned Judges gave the judgment-debtors leave to present a fresh petition to the Court below, before investigation was made of the issues, amending their former applications; the fresh application was to be treated as a supplementary application and not a substantive application. Such an application appears to have been made on 13-1-1945.

(12) The learned Civil Judge returned his findings by his order dated 10-4-1945. He treated all the three dates i. e., 11-1-1924, 21-7-1931 and the date of the application i. e. 27-11-1941 as the crucial dates. He found that on 11-1-1924, Fazlul Rahman was an agriculturist but Abdul Karim was not inasmuch as he paid a local rate of Rs. 119/12/6. On 21-7-1931, also he found the position to be exactly the same. As regards the position on the date of the application he found, however, that after the execution of the 'waqf' the capacity of Fazlul Rahman was that of a 'Mutwalli' and it was not open to him to take advantage of the provisions of the Debt Redemption Act.

He further found that Fazlul Rahman as a 'Mutwalli' paid a local rate of more than Rs. 100/- and was, therefore, not entitled to claim any benefit under the Debt Redemption Act. In conclusion he also found that it was difficult, if not impossible, to arrive at any apportionment as regards the liability of the father and the son. In the result, he recorded his opinion that neither the father nor the son could make an application for amendment under the Act.

(13) To these findings objections were filed by learned counsel for the parties.

(14) Next, these appeals came up for hearing before another Bench of two learned Judges. This Bench by an order dated 12-11-1946, remitted a fresh issue to the Court below for a finding. It was:

"Was the 'Mutwalli', Fazlul Rahman, an "agriculturist" on the date of the application i. e. 27-11-1941, and 14-3-1942?"

(15) The learned Civil Judge by his order dated 8-2-1937, has recorded the finding that the 'Mutwalli', Fazlul Rahman, paid Rs. 105/4/- as local rate and was therefore not an agriculturist on the two dates mentioned in the issue remitted.

(16) Against this finding as well objections have been filed by learned counsel for the parties under Order 41 Rule 26, Civil P. C.

(17) We have heard learned counsel for the parties at length. The questions involved in these appeals are not free from difficulty. Two cardinal questions emerge from the discussions in these cases. They are (i) whether Abdul Karim and Fazlul Rahman or either of them was an "agriculturist" at the relevant date and (ii) whether Abdul Karim and Fazlul Rahman or either of them could be considered to be "liable to pay the amount due under the decree" in question at the relevant date.

(18) Before I proceed to deal with these questions it is convenient to state at once that the two orders under appeal in these two cases are orders passed by the Court below on the footing that the decree passed in proceedings under the Encumbered Estates Act was in force and so was the apportionment of liability between the two judgment-debtors to the extent of seven-eighths and one-eighth.

As mentioned above, in an earlier part of this judgment, on 15-11-1941 the proceedings under the Encumbered Estates Act were quashed. The result was that with those proceedings the decree passed in the course of those proceedings also came to an end. Thereafter the only decree which could be amended by means of the applications made under Section 8 of the Debt Redemption Act is the decree which was passed in Suit No. 113 of 1932 as subsequently amended by proceedings under the Agriculturists' Relief Act on 4-1-1936. This decree creates a joint and several liability against Abdul Karim and Fazlul Rahman and it is not possible to amend the decree separately in favour of Abdul Karim and Fazlul Rahman limiting the liability of one to seven-eighths & that of the other to one-eighth. In this view of the matter, it is obvious that the orders of the Court below dated 30-8-1941, and 28-3-1942, cannot stand.

(19) In case the judgment-debtors-respondents to these appeals are found to be "agriculturists" and entitled under Section 8 to apply for amendment of the decree, the case will have to go back to the Court below for decision on the merits.

(20) I now proceed to deal with the two cardinal questions involved in these appeals.

The relevant provisions of law are these:
Section 8 (1) of the Debt Redemption Act stand thus:

"Notwithstanding the provisions of any decree or of any law for the time being in force, an agriculturist..... liable to pay the amount due under a decree to which this Act applies passed before the commencement of this Act, may apply to the Civil Court ..... for the amendment of the decree by reduction according to the provisions of this Act of the amount due under it.."

(21) Under these provisions the applicant must first of all be an "agriculturist". Next, he must be under a liability to pay the amount due under the decree.

(22) The term "agriculturist" is defined in Section 2, Sub-section (3) of the Act thus:

"Agriculturist" means a proprietor of a mahal or of a share in or portion of a mahal or a tenant: Provided that no such proprietor or tenant shall be deemed to be an agriculturist if—

(a) the aggregate of the rent, if any, and of ten times the local rate if any, payable by him exceeds one thousand rupees, or .....

Explanation II.— If on account of a fall in the price of agricultural produce a temporary remission has been made in the 'land revenue payable by a proprietor', or in the rent payable by a tenant the local rate payable by such proprietor, shall, for the purposes of this sub-section, be deemed to have been reduced in the same proportion as the land revenue and the rent payable by such tenant shall be deemed to be the rent as reduced by such temporary remission in rent." The rest of the definition is not material for our present purpose.

(23) The expression "local rate" is defined in S. 2(10) thus :

"Local rate" means the rate which under the U. P. Local Rates Act, 1914, is payable by, or recoverable from an agriculturist possessing heritable and transferable rights."

(24) This definition was substituted for the original definition, contained in the original Act, by the Amending Act (U. P. Act 6 of 1942).

(25) The first question is whether Abdul Karim and Fazlul Rahman or either of them, was an "agriculturist" at the relevant date. The relevant date at which the applicants have to show that they were agriculturists is the date of the application made by them under Section 8 of the Debt Redemption Act. The first application made by them jointly was on 27-11-1941. On 14-3-1942, both of them made another application praying, in effect, that the entire decree might be amended under the provisions of the Debt Redemption Act. Both these dates fall within the same Fasli year i. e. 1349 Fasli. The relevant date in this connection, therefore, is the year 1349 Fasli. It is the first mortgage on the basis of which the decree in dispute has been passed. Therefore by reason of the provisions of Section 21 of the Debt Redemption Act, no personal decree can be passed, nor has it been passed against any of the two judgment-debtors.

It follows, therefore, that the amount due under the decree in the present case can be realised only from the property mortgaged. The Full Bench decision of this Court in — 'Ketki Kunwar v. Ram Swarup', AIR 1942 All 390 (A), has laid down these propositions

"Where the advance is recoverable from the property of an agriculturist the proviso to Section 2 (9) of the Debt Redemption Act has no application and the case is governed by the main clause of S. 2 (9).

Where the advance is recoverable only from the property of an agriculturist, it is not necessary that the advance should have been also made to an agriculturist."

(26) Following the decision in the case of — 'Ketki Kunwar, (A)', in the case of — 'Shil Gange v. Manohar Lal', AIR 1945 All 346 (B), a Bench of this Court has held :

"To attract the application of Section 8 all that is necessary is that the advance should be recoverable only from the property of an agriculturist; it is not necessary that the advance should have been also made to an agriculturist."

(27) To the same effect is the decision of another Bench of this Court in — 'Benaras Bank Ltd. v. Dwarka Nath', AIR 1946 All 497 (C), which held :

"Where the advance is recoverable only from the property of an agriculturist or workman, it is not necessary that the advance should have been also made to a workman or an agriculturist."

(28) The relevant date, therefore when an applicant in a case like the present has to show that he is an agriculturist is the date of the application. It is, therefore, not material to consider whether the applicant or applicants was or were agriculturists at the time of the loan either in the year 1924 or the year 1931.

(29) In the present case admittedly we are not concerned with the payment of "rent". Abdul Karim as well as Fazlul Rahman claim to be "agriculturists" by reason of the fact that they are proprietors of a 'Mahal' or a share in or portion of a Mahal; but by reason of the 'proviso' attached to the definition, neither of them would be deemed to be an "agriculturist" if ten times the local rate, if any, payable by him, exceeds one thousand rupees. The crucial question, therefore, is : What was the "local rate" payable by each of them at the relevant date? If it was less than a hundred rupees each one would, according to the definition, be an "agriculturist".

(30) According to the findings recorded by the Court below, which we have accepted, it would appear that at the time of the first mortgage i. e., 11-1-1924, Abdul Karim paid a local rate of Rs. 119/8/6 whereas Fazlul Rahman paid only Rs. 13/-. Exactly the same was the position on 21-7-1931, when the second mortgage was executed. On 2-2-1940, Abdul Karim executed the 'waqf alal-aulad', Thereafter Abdul Karim paid only Rs. 2/- as local rate in respect of the property held by him in village Mohammadganj. Fazlul Rahman, in his personal right, paid, as before, Rs. 13/- as local rate; but Fazlul Rahman as the 'Mutwalli' under the waqf alal aulad' paid in respect of all the waqf properties, a total amount of 'local rate' amounting to Rs. 119/7/-. This amount of local rate, however, does not take it out of the "remissions" which were made by the Provincial Government in rent as well as Land Revenue on account of the fall in the price of the agricultural produce. Thus the position was that on 27-11-1941, as well as on 14-3-1942 — both these dates fall within the same year, 1349 Fasli — Abdul Karim was an "agriculturist" inasmuch as he paid only Rs. 2/- as local rate. Similarly, Fazlul Rahman, in his personal capacity was also an "agriculturist" inasmuch as he paid Rs. 13/- as local rate.

(31) As Mutwalli Fazlul Rahman would normally be liable to pay Rs. 119/7/- as local rate.

(32) The important question, therefore, is whether Fazlul Rahman as 'Mutwalli' is entitled to the benefit of "remissions" in rent and land revenue made by the Provincial Government; if so, to what extent? The remissions made by Government in the land revenue in the Tahsils and the Mahals of the various villages in the Moradabad district were allowed on account of the fall in the price of the agricultural produce. This was notified by Government under notification No. 620B/1B dated 7-11-1931, (Ext. 31 on the record). According to the findings recorded by the Court below, it is clear that the rate of remission continued from the 1st of July, 1931, to 30th of June, 1942. The remission was to the extent of one-sixth of the land revenue and there was a corresponding remission in the rent as well.

(33) There are altogether six items of property comprised in the deed of waqf as would appear from 'Ext. PP', "the chart" prepared on the basis of village papers, which is admitted by the parties to be correct. Land revenue is actually paid in respect of some of these items of property, but some others are 'muafi' lands in respect of which no land revenue is paid. The Court below has in calculating the amount of local rate payable by the 'Mutwalli' taken into consideration the remission in respect of the items of property where

land revenue is actually payable, but it has declined to take into account such remission in respect of the items of property where land revenue is not actually payable i.e., the items of property which are 'muafi' lands.

The question is whether that is a correct view of the matter. In this connection, the provisions of explanation 2 attached to the definition of an "agriculturist" in sub-s. (3) of S. 2, Debt Redemption Act and, in particular, the expression "temporary remission has been made in the land revenue payable by a proprietor" have to be carefully considered.

(34) Explanation II provides:

"If on account of a fall in the price of agricultural produce a temporary remission has been made in the land revenue payable by a proprietor, or in the rent payable by a tenant the local rate payable by such proprietor, shall, for the purposes of this sub-section, be deemed to have been reduced in the same proportion as the land revenue and the rent payable by such tenant shall be deemed to be the rent as reduced by such temporary remission in rent."

(35) It has been contended on behalf of the respondent-judgment-debtor that there were remissions in revenue where it was payable and in rent where no revenue was payable, so in accordance with the provisions of Explanation II proportionate remissions should be allowed in the local rate payable by him. It has been contended on behalf of the decree-holder that, on a proper construction of Explanation II, "local rate" would be deemed to have been reduced only when remission has been actually made in the land revenue payable by a proprietor. If no land revenue is paid by a proprietor and consequently no remission could be made in such revenue no question of a reduction in the amount of "local rate" arises.

On the other hand, it is argued on behalf of the judgment-debtor that actual remission of 'land revenue' is not the sole criterion for determining the reduction that may be deemed to have been made in the 'local rate'. In this connection, it is pointed out by learned counsel for the judgment-debtor-respondent that in the definition of an "agriculturist" no prominence has been given to "land revenue", rather prominence has been given to "local rate", inasmuch as it was contemplated by the legislature that there were lands which paid no land revenue. But that every kind of land paid "local rate".

Reference is made in this connection to the definition of "local rate" in S. 2(10) of the Debt Redemption Act. Next, reference is made to the provisions of S. 2, U. P. Local Rates Act (Act 1 of 1914) which show that in order to determine the "local rate" in the case of land of which revenue has been wholly or in part released the revenue that would have been assessed, but for the complete or partial release, is taken into account. In the present case "local rate" is payable in respect of all the six items of property comprised in the deed of 'waqf'. It is thus argued that the basis for the assessment of "local rate" is land revenue, 'actual or assumed'. And "local rate" is to bear a certain proportion to the land revenue 'assessed or assumed'.

(36) Next, reference is made to the definition of "revenue" in S. 3(19) of the U. P. Tenancy Act:

" 'Revenue' means land revenue and includes revenue assessed only for the purpose of calculating the local rate payable under the United Provinces Local Rates Act (Act 1 of 1914)".

(37) In this connection, reference is made to S. 2(1) of the Debt Redemption Act which, 'inter alia', incorporates the definition of "land revenue" as given in the U. P. Tenancy Act, 1939. Reference is also made to S. 3(c) of the Debt Redemption Act which provides:

"For the purposes of this case .....(c) 'local rate' in respect of which a notification of exemption has been issued under the provisions of S. 15, U. P. Local Rates Act, 1914, 'shall be deemed to be payable' ."

(38) The effect of this provision is that a "local rate" would still be deemed to be "payable" for purposes of this Act even though the proprietor of the land may have been granted an exemption by the Provincial Government under S. 15, U. P. Local Rates Act, 1914. The idea underlying this provision undoubtedly is that even though a proprietor may have been exempted from the payment of local rate under S. 15 of the Local Rates Act, he will nevertheless be deemed to be paying the local rate from the payment of which he has been exempted so that he may be able to take advantage of the Debt Redemption Act and be entitled to the benefits thereof.

(39) On the strength of these statutory provisions it has been contended on behalf of the judgment-debtor that "local rate", even where no land revenue is payable assumes a certain amount of land revenue for purpose of calculation and the said assumed land revenue should be taken into consideration wherever such calculation is necessary for determining the amount of "local rate".

(40) Next, reference is made to S. 123, U. P. Tenancy Act which, in effect, provides that in cases of agricultural calamities the Provincial Government may remit or suspend the rent payable by tenants in accordance with the provisions contained in sch. 6. It also provides that in such an event the land revenue shall also be remitted or suspended in the same proportion.

It is argued that it is clear from the aforementioned provisions that what the legislature contemplates is that whenever there is a remission in rent, there will necessarily be a reduction, in the same proportion of land revenue payable. In the present case admittedly there has been a remission of 'rent' as well as 'land revenue'. It is, therefore, argued that even in respect of the items of property for which no land revenue is payable actually there has been a reduction in the rent payable. That being so, the proprietor should have the benefit of a corresponding reduction in the 'local rate' payable by him.

We have given careful consideration to all these arguments. The crux of the whole matter is whether the expression "land revenue payable by a proprietor" in Explanation II means only land revenue 'actually payable' or it includes land revenue which may be 'assumed to be payable' by a proprietor. Stress has been laid by learned counsel for the judgment-debtor-respondent that the Debt Redemption Act being a remedial statute should be construed liberally. Reference has been made to the decision of the Judicial Committee of the Privy Council in the case of — 'Raghu Raj Singh v. Hari Kishan Das', AIR 1944 PC 35 (D), where it was laid down at page 38:

"The words of a remedial statute must be construed so far as they reasonably admit so as to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved.

(41) These observations were made by their Lordships of the Judicial Committee in connec-

tion with the Agriculturists' Relief Act, but they have equal cogency with reference to the provisions of the U. P. Debt Redemption Act, which is also an Act for granting relief from indebtedness to agriculturists and workmen in the United Provinces. This view has been taken by a Bench of this Court in the case of — 'AIR 1946 All 497 (C)' where it was held:

"The U. P. Debt Redemption Act being a remedial statute its words must be construed so far as they reasonably admit so as to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved."

(42) Bearing in mind these principles, we have to construe the provisions of Explanation II and, in particular, the expression "temporary remission has been made in the land revenue payable by a proprietor" as it occurs in that Explanation. The principles underlying the provisions of the Local Rates Act (U. P. Act 1 of 1914) clearly indicate that there is a very real connection between the land revenue assessed on an estate (where land revenue is actually payable or paid) and the land revenue assumed to be assessed on an estate (where land revenue is not payable or paid). In both these cases, the amount of "local rate" payable is assessed with direct reference to the amount of such land revenue. In either case if land revenue is reduced in respect of an estate there would be an automatic reduction of the amount of local rate payable. Conversely, if 'land revenue' is enhanced, there would be an automatic increase in the amount of 'local rate' as well. The determination of the amount of 'assumed land revenue' (in the case of land not subject to land revenue) is directly based upon land revenue actually payable for similar land. When the 'liability' is measured by an assumed standard the 'corresponding relief', in case of a temporary remission, should not be measured by a different standard; benefit of remission available in one case should be available in the other case as well.

On principle, therefore, there appears no reason why benefit of the temporary remission in the amount of land revenue should not go to the landlord or proprietor who is equally liable for payment of the local rate. The provisions of the Debt Redemption Act have to be interpreted liberally so as to promote the object which the lagislature had in view in enacting the Act. Therefore, the proper interpretation of Explanation II attached to the definition of an "agriculturist" in S. 2(3) is that the benefit of a temporary remission of land revenue goes both to the landlord (or proprietor) who actually pays land revenue as well as to the landlord or proprietor who is assumed to pay land revenue. In either case the landlord (or proprietor) has to pay "local rate" at the same rate.

The object of this Explanation is that the effect of a temporary remission in land revenue should be a reduction in the amount of the "local rate" payable. In my view, therefore, the 'waqf estate', as represented by the 'Mutwalli' Fazlul Rahman is also entitled to claim a reduction in the local rate payable in respect of four non-revenue paying items of property comprised in the 'waqf'. In this view of the matter, admittedly the amount of local rate payable by all the six items of the zamindari property comprised in the 'waqf' would be less than a hundred rupees. The result, therefore, is that the 'waqf estate' as represented by the Mutwalli Fazlul Rahman, is an "agriculturist" within the meaning of the definition of the term as contained in S. 2(3), Debt Redemption Act.

(43) Another argument addressed to us on behalf of the judgment-debtor-respondent, Fazlul Rahman, the 'Mutwalli', is that the 'waqf' represented by him in his capacity as a 'Mutwalli' does not pay any "local rate" such as is contemplated by the definition of the term "agriculturist". The contention is that "local rate" referred to in the definition means the "local rate" as it is defined in S. 2(10) of the Debt Redemption Act. That definition is set out above in an earlier part of this judgment. The argument is that the 'waqf' represented by the 'Mutwali' does not come within the category of an "agriculturist" possessing heritable and transferable rights.

This argument has force. Considering the nature of the 'waqf' property, it seems to me clear that the 'waqf' estate which has been found by the court below to pay a "local rate" of Rs. 105/4/- cannot be looked upon as an agriculturist which possesses heritable and transferable rights. It is well settled that 'waqf' property is neither heritable nor transferable. The "local rate" payable by the 'waqf' estate, whatever may be the amount of such local rate, would not therefore, affect the character of the 'waqf' estate as an "agriculturist".

(44) In the result, therefore, I would hold that both Abdul Karim & Fazlul Rahman were "agriculturists" at the date of the application under S. 8, Debt Redemption Act. Similarly the 'waqf' estate as represented by Fazlur Rahman was an "agriculturist" at the date of the application.

(45) The next question which has to be considered is whether, at the relevant date, Abdul Karim and Fazlur Rahman, or, either of them, could be considered to be "liable to pay the amount due under the decree" within the meaning of that expression in S. 8, Debt Redemption Act. The decree in question is a mortgage decree passed on 31-1-1933. This decree was modified in proceedings under the Agriculturists Relief Act on 4-1-1936. On 2-2-1940 Abdul Karim created a 'waqf' 'alal aulad' in respect of six items of the zemindari property which were comprised in the mortgage. Thenceforward he ceased to have any interest in such property.

(46) As mentioned above there is no personal liability attaching to Abdul Karim or Fazlur Rahman in respect of the mortgage decree in question. All the property from which the amount due under the mortgage decree can be realised, passed out of the hands of Abdul Karim by reason of the waqf created by him in February 1940. It follows that Abdul Karim cannot be considered to be "liable to pay the amount due under the mortgage decree" within the meaning of S. 8, Debt Redemption Act. For the same reason Fazlur Rahman in his personal capacity cannot be said to be liable to pay the amount due under the decree. But the 'waqf' represented by Fazlur Rahman as its 'mutawalli', is liable to pay the amount due under the decree. As a matter of fact, the deed of 'waqf' makes an explicit provision for the payment of the mortgage debt out of the dedicated property. Therefore, the result is that Abdul Karim was not liable to pay the amount due under the decree and was, therefore, not competent to apply under S. 8, Debt Redemption Act for reduction of the amount of the decree. But the 'waqf' estate undoubtedly is liable to pay the amount due under the decree. Fazlur Rahman as 'mutawalli' is, therefore, fully competent to make an application under S. 8, Debt Redemption Act. Obviously it is an application in the name and on behalf of the 'waqf'.

(47) For the reasons given above, I would allow both the appeals, set aside the orders of the Court below dated 30-8-1941, and 28-3-1942, and direct that the case shall be sent back to that Court with directions to dispose of the applications made on 27-11-1941 and 14-3-1942 (as modified subsequently by the application dated 13-1-1945) by Fazlur Rahman on their merits, bearing in mind the observations made in this judgment. The accounts will be re-opened and the Court will determine the amount after going into the accounts from the date of the first mortgage i.e. 11-1-1924. Costs here and hitherto will abide the result.

(48) SAPRU, J.: I agree.

BY THE COURT:

(49) We allow this appeal, set aside the orders of the Court below dated 30-8-1941 and 28-3-1942, and direct that the case shall be sent back to that Court with directions to dispose of the applications made by Fazlur Rahman on 27-11-1941 and 14-3-1942 (as modified subsequently by the application dated 13-1-1945) for amendment of the mortgage decree, on their merits, bearing in mind the observations made in this judgment. The accounts will be re-opened and the Court below will determine the amount after going into the accounts from the date of the first mortgage, i.e., 11-1-1924.

(50) Costs here and hitherto shall abide the result.

B/R.G.D. Appeal allowed.

A.I.R. 1954 ALLAHABAD 182 (Vol. 41, C. N. 99)

DESAI J.

Krishna Behari Goel, Defendant-Applicant v. Raj Mangal Persad and others, Plaintiffs-Opposite Party.

Civil Revn. No. 1055 of 1953, D/- 18-9-1953, from order of Addl. Civil J., Gorakhpur, D/- 3-6-1953.

(a) Civil P. C. (1908), O. 22, R. 10 — Assignee from legal representative of deceased party is entitled to apply under R. 10. AIR 1922 PC 304 and AIR 1946 Nag 164, Distinguished. **(Para 3)**

Anno: C. P. C., O. 22, R. 10 N. 2 Pts. 8 and 9.

(b) Civil P. C. (1908), O. 22, R. 10 — Application under Rule — Question of validity of assignment need not be decided at that stage. **(Para 4)**

Anno: C. P. C., O. 22, R. 10 N. 2.

(c) Civil P. C. (1908), O. 22, R. 1 — Suit claiming injunction for restraining defendant from interfering with plaintiff's possession over property in dispute — Suit does not abate on plaintiff's death. 5 Ind Cas 937 (Mad), Distinguished. **(Para 5)**

Anno: C. P. C., O. 22, R. 1 N. 7.

Vindheshwari Pd., for Applicant.

CASES REFERRED:

(A) ('22) AIR 1922 PC 304: 1 Pat 581 (PC) (Pr 3)
(B) ('46) AIR 1946 Nag 164: ILR (1946) Nag 43 (Pr 3)
(C) ('10) 5 Ind Cas 937: 7 Mad LT 195 (Pr 5)

ORDER: The applicant challenges the order of the trial Court impleading the opposite parties as plaintiffs along with the original plaintiff.

(2) The suit was instituted by Sukhhu against the applicant for an injunction to restrain him from interfering with his possession over certain occupancy tenancy. During the pendency of the suit Sukhhu died and Shrimati Surjita and others applied for being brought on the record as his legal representatives. While that application was pending they transferred their interest in the property in dispute to the opposite parties. Thereupon the opposite parties applied for leave of the Court to carry on the suit under O. 22, R. 10. Their application was opposed by the applicant who contended that the assignment of occupancy rights in their favour by Surjita and others was invalid, that under O. 22, R. 10 an assignee from the original plaintiff or defendant can be granted permission, but not an assignee from a legal representative of the original plaintiff and that the right that the plaintiff had claimed was a personal right which did not survive his death. The application of the opposite parties was allowed by the trial Court and the opposite parties have now been added as plaintiffs.

(3) The view taken by the trial Court is correct. There is no justification for holding that the provision in O. 22, R. 10 applies to a devolution, assignment or creation of an interest by the original plaintiff and not by his legal representative. The words "plaintiff" and "defendant" are not used in that provision at all. It simply refers to assignment, creation or devolution of any interest; this means that it applies in the case of every assignment, creation or devolution of an interest, whether by the original parties to the suit or by their legal representatives. There would have been no justification for making any distinction between an assignment, creation or devolution of an interest by the original parties to the suit and an assignment etc. by legal representatives of the original parties. Therefore, it could not have been contemplated by the Legislature that the words "an assignment etc." refer to an assignment by the original parties and not by their legal representatives.

Reliance was placed upon —'Manindra Chandra Nandi v. Ram Kumar Lal Bhagat', AIR 1922 P.C. 304 (A). The question whether the provision of O. 22, R. 10 applies to an assignment etc. by the original parties or also an assignment by their legal representatives did not arise before their Lordships of the Judicial Committee and their Lordships never held that it applies to an assignment by the original parties and not to an assignment by their legal representatives. In the case before their Lordships there was only a lease granted by a defendant and that lease was held to be not an assignment, creation or devolution of any interest within the meaning of O. 22, R. 10. When there was no assignment etc. in that case the other question, whether an assignee from a legal representative of an original party can apply or not, did not arise. When their Lordships, while explaining the provision, remarked on p. 306 that:

> "The order contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon some one else",

they did not intend to say that it contemplates cases of devolution of interest only from the original parties to the suit and not from their legal representatives. In —'Champalal Bansilal v. Mt. Sona Bai', AIR 1946 Nag 164 (B), the above quoted observation of their Lordships was relied upon. In that case the application under O. 22, R. 10 was made by an assignee from one claiming to

be an heir of the deceased plaintiff, but the so-called heir had not applied for substitution of his name in place of that of the deceased plaintiff. It was found by the Courts that the so-called heir was not the heir of the deceased plaintiff and that consequently the applicants were not entitled to be substituted under O. 22, R. 10.

Thus in that case also the question whether an application under O. 22, R. 10 by an assignee from a legal representative of a deceased party can be made or not did not arise. The application of the so-called assignees would have been dismissed on merits even if it was found that he was entitled to apply under O. 22, R. 10. He would have failed on merits because there was no devolution of interest in his favour at all. No other case was referred to in support of the contention. I hold that one claiming to be an assignee from a legal representative of a deceased party is entitled to apply under O. 22, R. 10.

(4) The next contention was that the assignment in favour of the opposite parties was invalid. Though this question was raised before the trial Court, it has not given any finding on it. It is not known if the applicant pressed this objection before it. The appellate Court does not mention anything about this objection and evidently it was not pressed before it. The occupancy rights were transferred by Surjita etc. in favour of the opposite parties on 16-7-1952. Leaving aside the question whether on 16-7-1952 occupancy rights could be transferred or not, I am of the opinion that it was not obligatory upon the trial Court to decide the question. At the moment it was concerned only with the question whether the opposite parties should be given permission to continue the suit or not. They claimed to be assignees & as assignees they could be granted permission. Whether they could get the relief or not was a different question to be answered after the suit was tried.

At that time the question would arise whether the assignment in their favour was valid or not. If the assignment was found to be invalid they would not be granted the relief even if they were added as plaintiffs. The addition of their names in the title of the suit did not mean that the assignment in their favour was valid and that they must get the relief. Consequently it appears to me that it was not essential for the trial Court to decide the question of the validity of the assignment at this stage. On their being impleaded as plaintiffs, it will be open to the applicant to raise the question of the validity and to plead that they were not entitled to the relief as assignees. Whether the assignment was valid or not would then be an issue in the suit itself.

(5) The suit was not of a personal nature at all. Sukhhu did not claim any personal right. The injunction sought was that the applicant should not interfere with his possession over the property in dispute. A suit claiming injunction of this nature did not abate on the death of the plaintiff. The cause of action survived to his legal representative who came in possession of the property in dispute. In —'Josiam Thiruvengada v. Sami Iyengar', 5 Ind Cas 937 (Mad) (C), the injunction sought was to restrain the defendant from interfering with the plaintiff's right to stand at a particular place in a certain temple and that was held to be a personal action which died with the plaintiff. The injunction sought in the present case was of a different nature.

(6) There is no force in this application and it is dismissed.

B/V.R.B. Application dismissed.

A.I.R. 1954 ALL. 183 (Vol. 41, C. N. 100)

DESAI J.

Bishamber Dayal, Applicant v. State.

Criminal Revn. Nos. 867 and 868 of 1952, D/- 18-9-1953, against order and judgment of Sess. J., Bulandshahr, D/- 30-4-1952.

(a) Essential Supplies (Temporary Powers) Act (1946), S. 7 — U. P. Flour, Rice and Dal Mills Control Order (1948), Cls. 3, 8 — Contravention of Cl. 3 — No person can be punished.

When the prohibition under Cl. 3 is on a flour mill, infringement of that prohibition cannot be punished under Cl. 8. As it is a flour mill that is prohibited from doing a certain act, the prohibition can be infringed only by a flour mill. In other words, the order is so worded that its provisions can be contravened only by a flour mill, but a flour mill is not a person who can be prosecuted. It is not like a company or a firm which is a compendious name for group of persons.

When in the whole order there is no reference to any human being connected with a flour mill or otherwise, it is impossible to say that any particular person has contravened any provision of the Order and is liable to the punishment provided under S. 7, Essential Supplies Act. (Para 2)

(b) U. P. Flour, Rice and Dal Mills Control Order (1948), Cl. 3 — 'Flour mill' does not mean its owner.

There is no reason for holding that the words "Flour Mill" in Cl. 3 should mean the owners of a flour mill even if they are not present in it, and not some other person connected with it, such as a manager or a lessee or a servant or the owner's son or brother. (Para 3)

(c) Interpretation of Statutes — Penal Clause — (U. P. Flour, Rice and Dal Mills Control Order (1948), Cl. 3).

An order of a penal nature must be clear and specific in its language and must not leave anything to presumption. If a member of the public is prohibited from doing an act, he must be prohibited clearly and in an unambiguous language. The prohibition cannot be left to be implied from some fact. (Para 3)

Held that if the State wanted to hold the proprietor of a flour mill responsible for any grinding of controlled foodgrains without a licence, whether the grinding was done by himself or by his servant in his absence, it should have used clear language in Cl. 3 of the Order. (Para 3)

P. C. Gautam, for Applicant; H. N. Seth, Brief holder, for the State.

ORDER: The applicants have been convicted u/s. 7, Essential Supplies (Temporary Powers) Act read with cl. 8, U. P. Flour, Rice and Dal Mills Control Order, 1948. It has been held by the Courts below that they contravened cl. 3 of the Order by allowing "bajra" and wheat to be ground in their flour mill without having a licence.

The applicants are the owners of a flour mill situated in Kakore and it was inspected by a Marketing Inspector who found that the mill was being worked by Mahboob, a servant of the applicants and that 'bajra' and wheat were being ground. He also found that the applicants had not obtained a licence for grinding controlled foodgrains in the mill. "Bajra" and wheat are controlled foodgrains. Clause 3 of the Order is:

> "No flour mill x x x shall grind or hull x x x any controlled foodgrain except under and in accordance with the terms of a licence granted under this Order".

(2) I am surprised at the language used in this clause. I never expected such words as "no flour mill shall grind" in a formal Order of a penal nature issued by the State in exercise of the powers conferred by an Act. Something may be ground in a flour mill but a flour mill cannot be said to grind anything — an inanimate object cannot do an act and it seems to me meaningless to prohibit a flour mill from grinding anything. There is no reference to any human being in this clause. "Flour Mill" is defined in cl. 2 to mean "a power driven flour mill other than a roller mill". With that definition staring in one's face, one cannot possibly hold that a "flour mill" is not an inanimate object commonly known as a flour mill but a person owning a flour mill, or managing or working it. If the State wanted to prohibit an owner or a manager or a servant from grinding controlled foodgrains in a flour mill without obtaining a licence, it should have said so in so many words so that the public could know whose responsibility it is to see that the prohibited act is not done.

Clause 4 of the Order refers to applications for licences; this also does not refer to any human being. It does not say by whom an application should be made. Merely because the forms given in the schedule suggest that it should be made by an owner, it cannot be said that the words "flour mill" in cl. 3 mean its owner. Clause 8 is to the effect that:

> "If any person contravenes any provision of this Order or any of the terms of the licence granted under this Order, he shall be liable to the punishment provided under Section 7, Essential Supplies (Temporary) Powers Act."

This is the only provision in the Order which refers to a person. When the prohibition under cl. 3 is on a flour mill, infringement of that prohibition cannot be punished under cl. 8. As it is a flour mill that is prohibited from doing a certain act, the prohibition can be infringed only by a flour mill. In other words, the Order is so worded that its provisions can be contravened only by a flour mill, but a flour mill is not a person who can be prosecuted. It is not like a company or a firm which is a compendious name for group of persons. A company or a firm can be included in the meaning of the word "person" but a flour mill cannot be, the State may hold the applicants and flour mill guilty of contravening cl. 3 of the Order, but cannot hold them guilty. When in the whole Order there is no reference to any human being connected with a flour mill or otherwise, it is impossible to say that any particular person has contravened any provision of the Order and is liable to the punishment provided under S. 7, Essential Supplies Act.

(3) In the present case it has been found that Mahboob was working the mill and that the applicants were not present there. There is nothing in the Order to justify holding the applicants responsible for that act of Mahboob. There is no reason for holding that the words "Flour Mill" in cl. 3 should mean the owners of a flour mill even if they are not present in it, and not some other person connected with it, such as a manager or a lessee or a servant or the owner's son or brother. At the most Mahboob, who did the actual act of grinding 'bajra' and wheat in the flour mill, can be said to have contravened the provision of cl. 3 of the Order but not the applicants. It is not the prosecution case that they had abetted Mahboob in the doing of the act; therefore they cannot be prosecuted as abettors also. If the State wanted to hold the proprietor of a flour mill responsible for any grinding of controlled foodgrains without a licence, whether the grinding was done by himself or by his servant in his absence, it should have used clear language in the Order. An order of a penal nature must be clear and specific in its language and must not leave anything to presumption. If a member of the public is prohibited from doing an act, he must be prohibited clearly and in an unambiguous language. The prohibition cannot be left to be implied from some facts.

(4) I hold that there is nothing in the U. P. Flour, Rice and Dal Mills Control Order casting any liability upon the applicants and that they cannot be punished for contravening any provision of it. The applications are allowed. The convictions and sentences of the applicants are set aside and they are acquitted. The fines, if realised from them, should be refunded.

(5) Leave to appeal to the Supreme Court is refused.

B/D.R.R. Application allowed.

A.I.R. 1954 ALL. 184 (Vol. 41, C. N. 101)

C. B. AGARWALA AND DESAI JJ.

Smt. Shanti Devi, Plaintiff-Appellant v. Mt. Kubra Begum and another, Defendants-Respondents.

First Appeal No. nil of 1951, D/- 22-9-1953, against decree of Addl. Civil J., Farrukhabad, D/- 14-4-1951.

Court-fees Act (1870), Sch. I. Art. 1 and Art. 2B (as amended by U. P. Act 19 of 1938), Sch. II Art. 11 — Dismissal of application under S. 12, U. P. Agriculturists Relief Act on merits — Appeal — Court-fee — (Debt Laws — U. P. Agriculturists' Relief Act (1934), Ss. 12 and 23).

The dismissal of an application under S. 12 of the Agriculturists' Relief Act on the merits on the finding that the transaction was not a mortgage but a sale is as much a decree as the order allowing the application. There is a conclusive determination of the rights of the parties with regard to the matter in controversy in the application so far as regards the Court expressing it is concerned. It is, therefore, a decree as defined in the Civil Procedure Code. Even if it is an order in form it has the force of a decree. An appeal both against the dismissal of an application under S. 12, U. P. Agriculturists' Relief Act as well as against the order allowing the application is maintainable under S. 23 of the Act. Under Art. 2B of Schedule I, Court-fees Act, as amended by U. P. Act 19 of 1938,

the memorandum of appeal filed under S. 23, U. P. Agriculturists' Relief Act 1934 has to be stamped with the same fee as would be leviable on the memorandum of appeal as under Art. 1, Sch. I, Art. 11, Sch. II does not apply. (Para 2)

Anno: Court-fees Act, Sch. I. Art. 1 N. 24a; Sch. II Art. 11 N. 14.

Shabd Saran, for Appellant.

JUDGMENT: This is a court-fee matter. It has come up before us in this way. The appellant filed an application under S. 12, Agriculturists Relief Act. His application was dismissed on the merits on the ground that the transaction of which the redemption was sought was not a mortgage but was a sale. The applicant then filed the above appeal in this Court with a court-fee stamp of -/15/-. The stamp reporter's report showed that the court-fee paid on the memorandum of appeal was deficient by Rs. 802/3/-. The applicant objected to the deficiency report. He also made an application for amendment of the memorandum of appeal praying that the heading of the appeal may be amended from F. A. (First Appeal) to F. A. F. O. (First Appeal From Order). The application came up for orders before one of us and it was rejected on the ground that even if the application were allowed, the court-fee payable on the memorandum of appeal would be an 'ad valorem' court-fee. The applicant was directed to pay the court-fee within a fortnight. This order was passed on 20-2-1952. The applicant failed to do so and the Joint Registrar has listed the appeal before us for orders.

(2) The contention of learned counsel is that the order of the learned Single Judge may be reviewed. He urges that if an application under S. 12, Agriculturists' Relief Act were allowed & the mortgage was ordered to be redeemed then the order would be decree no doubt and 'ad valorem' court-fee would be payable thereon, but the same cannot be said when the application is dismissed, because in that case there is no final decision and the applicant can file a suit for redemption.

The contention of the learned counsel is not correct. The dismissal of an application under S. 12, Agriculturists' Relief Act 'on the merits' is as much a decree as the order allowing the application. The Court has found that the transaction in question was not a mortgage but was a sale. It was, therefore, held that the plaintiff had no right of redemption. This is a conclusive determination of the rights of the parties with regard to the matter in controversy in the application so far as regards the Court expressing it is concerned. It is, therefore, a decree as defined in the Civil Procedure Code. Even if it is an order in form it has the force of a decree. An appeal both against the dismissal of an application under S. 12, Agriculturists' Relief Act as well as against the order allowing the application is appealable under S. 23 of the Act. Under Art. 2B of Sch. I, Court Fees Act, as amended by U. P. Act 19 of 1938 the memorandum of appeal filed under S. 23 U. P. Agriculturists' Relief Act, 1934 has to be stamped with the same fee as would be leviable on the memorandum of appeal as under Art. 1. Art. 1 of Sch. I lays down that "ad valorem court-fee is to be paid on a memorandum of appeal not otherwise provided for in this Act."

The other relevant provision in the Court-fees Act relating to memorandum of appeals is Art. 11 of Sch. II. That Article refers to a memorandum of appeal when the appeal is not from a decree or an order having the force of a decree. As we have already observed this is an appeal either from a decree or from an order having the force of a decree. Therefore Art. 11, Sch. II does not apply. No Article other than Art. 1 of Sch. I of the Act applies to the case.

(3) Learned counsel then wants one month's time to make good the deficiency. The time prayed for is allowed.

B/R.G.D. Order accordingly.

A.I.R. 1954 ALL. 185 (Vol. 41, C. N. 102)
(Lucknow Bench)
RANDHIR SINGH J.

Ram Pratap Singh, Applicant v. Suraj Pal Singh, Complainant Respondent.

Criminal Revn. No. 33 of 1953, D/- 5-10-1953, against order of Addl. Sessions J., Pratapgarh, D/- 18-11-1952.

Criminal P. C. (1898), S. 436 — Revision of order of discharge.

In setting aside an order of discharge under S. 436 the powers of a Sessions Judge are very wide. If once he has, after considering the evidence on record, come to the conclusion that the order of discharge should be set aside and further inquiry should be made, the High Court would be loath to interfere with such an order unless there are compelling reasons for so doing. The mere fact that another Judge could have taken a different view would by itself be no ground for setting aside the order of the Sessions Judge under S. 436. (Para 4)

Anno.: Cr. P. C. S. 436 N 30, 1949 Mitra, S. 436 P. 1310 N. 1186 "Interference.....Court" (Pts. 1 and 2 in N. 30 to S. 436 in AIR Com Extra)

Kalbe Mustafa, for Applicant; Baldeo Sahai Srivastava, for Respondent.

ORDER: This is an application in revision against an order passed by the Addl. Sessions Judge of Pratapgarh under S. 436, Criminal P. C. directing further inquiry in a case in which the applicant was discharged by a Magistrate first class.

(2) It appears that a complaint under Ss. 408/477/477A was instituted against the applicant by the opposite party who was the ziledar of Raja Ajit Prasad Singh of Partabgarh. The complaint was that the applicant had realised sums of money on behalf of the zamindar but had not accounted for them and had committed criminal breach of trust. The case was heard by a Magistrate and as many as 13 witnesses were examined. After these witnesses had been examined the Magistrate passed an order that no other witness would be produced and fixed the case for recording the statement of the accused. The accused was examined on 12-9-1951 and the case was adjourned for hearing and arguments.

A part of the arguments was heard on 24-9-1951 and the case was adjourned once again for hearing the remaining part of the arguments to 28-9-1951. It was then contended on behalf of the applicant that no case had been made out & the case was then fixed for the 25th October, for hearing arguments on that point. The case was then adjourned several times and ultimately was transferred to the file of the Sub-Divisional Magistrate. The Sub-Divisional

Magistrate also passed on the case after it had remained on his own file for about six months to the Judicial Officer II for disposal. The Judicial Officer then passed an order discharging the accused. An application had also been made in the meantime by the accused that he wanted a de novo trial. No order on this application was also passed by the Judicial Officer before he discharged the accused.

(3) The complainant then went in revision to the Sessions Judge who, after considering the evidence on record, set aside the order of discharge and ordered further inquiry. It is against this last order of the Sessions Judge that the applicant has come up in revision.

(4) A Sessions Judge is prefectly competent to pass an order setting aside an order of discharge under S. 436, Criminal P. C. and his powers are very wide in this matter. If once a Sessions Judge has, after considering the evidence on record, come to the conclusion that the order of discharge should be set aside and further inquiry should be made, the High Court would be loath to interfere with such an order unless there are compelling reasons for so doing.

In the present case the learned Counsel for the applicant has not been able to show that the order passed by the Sessions Judge was an impossible order or was perverse or even palpably improper. The mere fact that another Judge could have taken a different view would by itself be no ground for setting aside the order of the Sessions Judge under S. 436, Criminal P. C. I, therefore, see no force in this application for revision. The application is dismissed.

C/V.S.B. Revision dismissed.

A.I.R. 1954 ALL. 186 (Vol. 41, C. N. 103)

MUKERJI J.

Chamman Lal, Convict-Applicant v. The State.

Criminal Revn. No. 344 of 1952, D/-8-10-1953, against order of Addl. S. J., Kanpur, D/-20-12-1951.

(a) Penal Code (1860), S. 304-A — Rash or negligent driving.

Before a conviction can be had under S. 304A, Penal Code a very high degree of negligence must be found, negligence which must amount to recklessness or utter indifference to consequences and not merely negligence of tort. (Para 8)

Rashness and negligence are not the same things. Mere negligence cannot be construed to mean rashness. There are degrees of negligence and rashness and in order to amount to criminal rashness or criminal negligence one must find that the rashness has been of such a degree as to amount to taking hazard knowing that the hazard was of such a degree that injury was most likely to be occasioned thereby. The criminality lies in running the risk or doing such an act with recklessness and indifference to the consequences. Criminal negligence is gross and culpable neglect, that is to say, a failure to exercise that care and failure to take that precaution which, having regard to the circumstances, it was the imperative duty of the individual to take; culpable rashness is acting with consciousness that mischievous consequences are likely to follow although the individual hopes, even though he hopes sincerely, that such consequences may not follow. The criminality lies in not taking the precautions to prevent the happening of the consequences in the hope that they may not happen. The law does not permit a man to be uncautious on a hope however earnest or honest that hope may be. AIR 1953 All 72 and 1937-2 All ER 552, Rel. on. (Para 6)

Anno: Penal Code, S. 304A N. 5.

(b) Penal Code (1860), S. 304A — Evidence and proof — (Evidence Act (1872), S. 114).

In a prosecution under S. 304A, Penal Code for rash and negligent driving the Court should not take into account the speed which the accused developed after the accident to judge the speed at which he was driving the truck prior to the accident. It is well known that it is a common human failing, however reprehensible it may be, for a man to attempt to run away if he has committed an accident. (Para 10)

Anno: Evidence Act, S. 114 N. 18.

C. S. Saran, for Applicant; A. G. A., for the State.

CASES REFERRED:

(A) ('53) AIR 1953 All 72: 1952 All LJ 553: 1953 Cri LJ 324 (Pr 6)
(B) ('81) 3 All 776: 1881 All WN 132 (Pr 6)
(C) ('26) AIR 1926 Cal 300: 53 Cal 333: 27 Cri LJ 153 (Pr 6)
(D) (1937) 1937-2 All ER 552: 1937 AC 576 (Pr 7)

ORDER: This is an application in revision by Chamman Lal, who was the driver of a motor truck, (against his conviction?) under S. 304A, Penal Code. He was convicted by a Magistrate of the 1st class under that section and sentenced to one year's rigorous imprisonment. He preferred an appeal to the Sessions Judge who agreed with the Magistrate and maintained the conviction and the sentence of the applicant.

(2) The facts giving rise to this conviction, briefly stated, were these:

On February 1, 1951, at about 10 O'clock in the forenoon, the applicant was driving a truck bearing registration No. UPR 3185 and to this truck of his was hitched on another disabled truck. The applicant's truck was towing the other truck by means of a small tow-rope. There was another driver on the driving wheel of the truck that was being towed. There was a collision while these trucks were moving along a certain highway and as a result of that collision one Datadin sustained such severe injuries that he died. It may be mentioned that Datadin was one of the men who were taking a Thela which was heavily laden with bags of cement. The case for the prosecution was that the accident was occasioned because of the rash and negligent driving of the applicant. The allegation also was that the applicant was driving fast and after having met with the accident the applicant did not stop his vehicle but attempted to run away. The truck was, however, stopped at some distance because the people of the locality obstructed the passage of the truck.

(3) The defence of the applicant was that he had not been either rash or negligent and further that the accident had been occasioned because of

the negligence of the deceased and his companions who were taking the cement laden Thela. The applicant further alleged that the actual impact as a result of which Datadin sustained his injuries and lost his life was received not from the truck that the applicant was driving but from the truck that was on tow.

(4) The lower appellate Court has assumed for the purpose of this case that the actual impact which occasioned the death of Datadin came from the truck that was on tow, but the Court below was of the opinion that even though this was so, the liability of the applicant was in no way minimized thereby. The lower appellate Court held this view because of the fact that in its opinion the speed and manoeuvrability of the truck on tow depended upon the speed and the line of drive taken by the leading truck which was under the control of the applicant. The Courts below, on the evidence produced in the case, came to the conclusion that the applicant was negligent and that the accident was occassioned because of such negligence. The lower appellate Court has not recorded any categorical finding as to whether or not the applicant was guilty of any rashness.

(5) Section 304A, Penal Code is in these words:

"Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine; or with both."

(6) It must be pointed out that rashness and negligence are not the same things. Mere negligence cannot be construed to mean rashness. There are degrees of negligence and rashness and in order to amount to criminal rashness or criminal negligence one must find that the rashness has been of such a degree as to amount to taking hazard knowing that the hazard was of such a degree that injury was most likely to be occasioned thereby. The criminality lies in running the risk or doing such an act with recklessness and indifference to the consequences. Criminal negligence is gross and culpable neglect, that is to say, a failure to exercise that care and failure to take that precaution which, having regard to the circumstances, it was the imperative duty of the individual to take. Culpable rashness is acting with consciousness that mischievous consequences are likely to follow although the individual hopes, even though he hopes sincerely, that such consequences may not follow. The criminality lies in not taking the precautions to prevent the happening of the consequences in the hope that they may not happen. The law, in my view, does not permit a man to be uncautious on a hope however earnest or honest that hope may be. Some Judges have expressed the view that mere carelessness is not sufficient for sustaining a conviction under S. 304A, I. P. C. They have said that 'mens rea' or a guilty mind must be found in relation to that carelessness before a conviction can be made.

In the case of — 'A. W. Lazarus v. The State', AIR 1953 All 72 (A), a Bench of this Court held following the decisions in — 'Empress of India v. Idu Beg', 3 All 776 (B) and — 'H. W. Smith v. Emperor', AIR 1926 Cal 300 (C), that criminal rashness means hazarding a dangerous or wanton act with the knowledge that it is dangerous or wanton and the further knowledge that it may cause injury but done without any intention to cause injury or knowledge that it would probably be caused. It was pointed out that the criminality in such a case lay in running the risk of doing such an act with recklessness or indifference as to the consequences. The Bench further held that criminal negligence under Section 304-A, I. P. C. was gross and culpable neglect or failure to exercise that reasonable and proper care and to take precautions to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances attending the charge, it was the imperative duty of the accused person to have adopted. Another important element which goes to make the offence is that the act of the accused must be found to be the immediate cause of the death, that is to say, the act and the death must be 'causa causans'.

(7) I may here refer to a very instructive judgment of the House of Lords in — 'Andrews v. Director of Public Prosecutions', 1937-2 All ER 552 (D). In this case Lord Atkin reviewed several of the earlier cases and delivered the leading opinion of the House. Lord Atkin pointed out that the connotations of 'mens rea' are not helpful in distinguishing between degrees of negligence, nor do the ideas of crimes and punishments in themselves carry a jury much further in deciding whether, in a particular case, the degree of negligence shown is a crime and deserves punishment. According to Lord Atkin,

> "the principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established."

Lord Atkin observed that the most appropriate epithet which can be applied to such cases is "reckless". He further pointed out that

> "it is difficult to visualise a case of death caused by "reckless" driving, in the connotation of that term in ordinary speech, which would not justify a conviction for manslaughter, but it is probably not all-embracing, for "reckless" suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction."

In an earlier case Lord Ellenborough had pointed out that to substantiate the charge of manslaughter the prisoner must be found to have been guilty of criminal misconduct arising either from the grossest ignorance or the most criminal inattention. Lord Atkin explained this observation of Lord Ellenborough in these words:

> "The word "criminal" in any attempt to define a crime is perhaps not the most helpful, but it is plain that Lord Ellenborough meant to indicate to the jury a high degree of negligence."

Attention was also drawn by Lord Atkin to a passage in a considered judgment of Lord Hewart, Lord Chief Justice—the passage to which attention was drawn was this:

> "In a criminal Court, on the contrary, the amount and degree of negligence are the determining questions. There must be 'mens rea'."

But, as was pointed out by Lord Atkin, the connotation of mens rea do not always prove helpful in determining the guilt of an accused in a particular case.

(8) It appears to me that before a conviction can be had under S. 304A, Penal Code a very high degree of negligence must be found—negligence which must amount to recklessness or utter indifference to consequences and not merely negligence of tort.

(9) In this case the Courts below do not appear to have scrutinized the circumstances to see whether they could amount to an offence in the light of the observations made above. The lower appellate Court has stated thus:

"If the trucks had not been driven at a fast speed accident could have been avoided."

(10) It appears to me that the Court below came to hold the view that the trucks were being driven at a fast speed because the applicant did not stop his bus after the accident but attempted to run away from the scene of the accident at a fast speed. From this fact also the lower appellate Court inferred that the applicant had a guilty mind. In my judgment the Court should not have taken into account the speed which the applicant developed after the accident to judge the speed at which he was driving the truck prior to the accident. It is well known that it is a common human failing, however reprehensible it may be, for a man to attempt to run away if he has committed an accident.

(11) The Court below has found that the evidence in the case indicated that in all probability the second truck, that is, the truck that was on tow, collided with the wheel of the Thela and that occasioned the injury to Datadin. The evidence points out that the distance between the leading truck and the following truck was about 10 to 12 feet—that was the length of the tow-rope. The learned Judge of the Court below appears to have doubted this part of the evidence on the ground that if the distance between the two trucks was 10 or 12 feet then towing would have been extremely difficult. I am unable to agree with this view of the learned Judge. According to the rules framed under the Motor Vehicles Act a tow-rope can be as long as 10 or 12 feet. This indicates, to my mind, the fact that the framers of the rules did not consider towing with the aid of a tow-rope of 10 or 12 feet in length either hazardous or improbable of performance.

(12) I have given this case my anxious consideration and I have come to the conclusion that in the view of the law that I have taken it is not possible to affirm the conviction of the applicant in the state of the evidence that was adduced against him in the case. The application in revision, therefore, must be allowed.

(13) I accordingly allow this application in revision and set aside the conviction and the sentence passed on the applicant. The applicant is on bail. He need not surrender to his bail. His bail bonds are cancelled.

B/K.S.B. Conviction and sentence set aside.

A.I.R. 1954 ALL. 188 (Vol. 41, C. N. 104)

BRIJ MOHAN LALL J.

Mt. Kulsumunn-isan, Appellant v. Khushnudi Begum and another, Respondents.

F. A. F. O. No. 109 of 1952, D/- 5-8-1953, against order of Civil J., Agra, D/- 7-4-1952.

(a) Civil P. C. (1908), O. 41, R. 22 — Appeal under S. 6A, Court-fees Act — Defendant cannot file cross-objection — (Court-fees Act (1870), S. 6A (U. P.)).

If a cross-objection is allowed to be filed in respect of a matter which could not be agitated by means of an appeal, the very purpose of the law will be defeated. In the matter of court-fee, law has conferred a right of appeal on the plaintiff alone but not on the defendant. Hence in an appeal by the plaintiffs under S. 6A, Court-fees Act, the defendant cannot file cross-objection. (Para 4)

Anno: Civil P. C., O. 41, R. 22 N. 3.

(b) Court-fees Act (1870), S. 7(v)(I)(c) (U. P.) and Sch. II, Art. 17(vi) (U. P.) — Suit for possession of land and demolition of building unauthorisedly erected by defendant — Court-fees.

If a plaintiff brings a suit stating that he owns certain land and also the buildings standing thereon, that he has been dispossessed by the defendant from the land as well as the buildings and he seeks possession over both the land and the buildings, the subject matter of dispute will certainly be the land as well as the buildings. But if the plaintiff comes with the allegation that he owns the land and that the defendant has unlawfully taken possession of the land and made constructions thereon without his consent and if he further prays that the land alone be delivered to him and the buildings be allowed to be removed by the defendant, the buildings standing thereon are not the subject matter of the suit. Since possession is not sought over the buildings court-fee cannot be levied in respect of the price of the buildings. To hold that in such a case also the buildings would be the subject matter of the suit would mean placing this class of case on the same level with a suit in which possession is sought over the land as well as the buildings. The case falls under S. 7(v)(I)(c) (U. P.). (Para 6)

But while in such a case the value of the buildings is to be excluded from consideration when the plaintiff asks for the relief of demolition, a separate court-fee must also be paid for the relief of demolition. That court-fee will not be paid under S. 7 (v) but under Art. 17(vi) (U. P.) of Sch. 2, Court-fees Act, that is a fixed court-fee of Rs. 18/12. The relief in question is, in substance, a combination of two reliefs, i.e. a relief for possession of land, which is governed by S. 7(v)(I)(c), and a relief for demolition in respect of which court-fee is payable under Art. 17(iv) (U. P.) of Sch. 2, Court-fees Act. 4 All 320 (FB), Rel. on. (Para 8)

Anno: Court-fees Act, S. 7(v) N. 13, 15; Sch. II, Art. 17 N. 1, 2.

(c) Court-fees Act (1870), S. 7 (v) (I) (c) (U. P.) — Computation of value of land.

The price which a property may fetch in the market by sale is not necessarily the same as the price calculated for the purposes of court-fee under S. 7(v)(I)(c), Court-fees Act.

Method of finding out market value of land under S. 7(v)(I)(c) (U. P.) stated. (Paras 10, 11)

Anno: Court-fees Act, S. 7(v) N. 17.

S. N. Kacker, for Appellant; P. N. Bakshi, for Respondents.

CASE REFERRED:

(A) ('82) 4 All 320: 1882 All WN 44 (FB) (Pr 7)

JUDGMENT: This is an appeal by a plaintiff under S. 6A, Court-fees Act. The appellant instituted a suit in the Court of the Civil Judge of Agra, claiming several reliefs of which the following is the only relevant one viz.:

"That the plaintiff be delivered possession over the land in dispute marked by letters A, B, C, D, E, F, G, H and shown in red colour in the attached plan by dispossessing defendant 1 therefrom and by the demolition of the constructions made unauthorisedly by her in the portion A, H, G of the said land in dispute."

(2) This relief was valued at Rs. 6,000/-. A plea was taken in defence by the defendants that the subject-matter of the suit should be valued at Rs. 60,000/- and not Rs. 6,000/-. A Commissioner was appointed by the Court to assess the valuation of the subject-matter of the suit and, according to his report, the subject-matter should have been valued at Rs. 21,445/-. Both parties lodged objections against the Commissioner's report. The learned Civil Judge rejected the objections of both parties in a summary judgment and called upon the appellant to pay the deficiency of Rs. 937-8-0 as calculated on the basis of the Commissioner's report. Dissatisfied with this order, the plaintiff has preferred this appeal.

(3) The defendants have filed a cross-objection and their contention is that the market value of the land in question should be fixed at Rs. 60,000/-.

(4) The cross-objection may be disposed of first. It is provided by O. 41, R. 22, Civil P. C. that a respondent

"though he may not have appealed from any part of the decree may.....take any cross-objection to the decree which he could have taken by way of appeal."

It is, therefore, obvious from the very language of the statute that a cross-objection can be taken in respect of that matter only which could be agitated by means of an appeal, if the respondent had so chosen to do. In the matter of court-fee, however, law has conferred a right of appeal on the plaintiff alone but not on the defendant. If the respondents had thought fit to prefer an appeal against the decision of the learned Civil Judge, they could not do so. In the circumstances, they cannot file a cross-objection also because that would amount to circumventing the law. If a cross-objection is allowed to be filed in respect of a matter which could not be agitated by means of an appeal, the very purpose of the law will be defeated. I am, therefore, of the opinion that the cross-objection is not maintainable. It is dismissed with costs.

(5) Taking up the appeal, the first point to decide is as to which section of the Court-fees Act governs a suit like the present. The parties are agreed that S. 7(v), Court-fees Act will apply to a case like the present, although they differ as to which sub-clause will be applicable to this case. Section 7(v) says that in suits for possession of land, buildings or gardens, the court-fee shall be levied "according to the value of the subject-matter". Thereafter rules have been laid down for determining the value of the subject-matter. The point for decision in the present case is as to what is the subject-matter of the relief in question. It is the land itself or also the buildings that stand thereon?

It has been contended on behalf of the appellant that the subject-matter of this relief is the land itself and not the buildings standing thereon. On the contrary, it has been urged on behalf of the respondents that the buildings are also the subject-matter of the dispute and their value should also be taken into consideration. It is, therefore, contended on behalf of the respondents that the present suit falls under S. 7(v)(II), while the learned counsel for the appellant maintains that the suit falls under S. 7(v) (I)(c).

(6) If a plaintiff brings a suit stating that he owns certain land and also the buildings standing thereon, that he has been dispossessed by the defendant from the land as well as the buildings and he seeks possession over both the land and the buildings, the subject-matter of dispute will certainly be the land as well as the buildings. But if the plaintiff comes with the allegation that he owns the land and that the defendant has unlawfully taken possession of the land and made constructions thereon without his consent and if he further prays that the land alone be delivered to him and the buildings be allowed to be removed by the defendant, the buildings standing thereon are not, in my opinion, the subject-matter of the suit. It may be pointed out that he does not seek possession over the buildings.

Section 7(v), which imposes on the plaintiff the obligation to pay court-fee in respect of the subject-matter, contemplates a suit for "possession" of that subject-matter. Since possession is not sought over the buildings in this case court-fee cannot be levied in respect of the price of the buildings. To hold that in such a case also the buildings would be the subject-matter of the suit would mean placing this class of case on the same level with a suit in which possession is sought over the land as well as the buildings.

(7) This point arose for decision in the Full Bench case of — 'Jogal Kishore v. Tale Singh', 4 All 320 (A). Stuart C. J. made certain observations on pages 327-328 which bear quotation. He remarked as follows:

"In S. 7, sub-s. (v), there is a court-fee provided for 'suits for the 'possession' of land, houses, and gardens, according to the value of the subject-matter', ...and if this expression 'subject-matter' could be detached from the opening words of the same sub-section, it might perhaps be considered to cover a claim of the nature made in these suits, but the words 'subject-matter' in this provision must, I think, be read not irrespective of but 'with' the commencing words of the same sub-section, 'for the possession of land, houses and garden'.....And of course if that be the true view of the present state of the law as provided by the Court-fess Act of 1870, the value of the buildings in these two cases sought to be demolished is not to be taken into account in estimating the court-fees to be charged in the suit."

In a separate and concurrent judgment, Tyrrell J., (Straight and Brodhurst JJ., concurring), observed as follows:

"But he (plaintiff) need not pay on the value of the buildings raised by the defendant. This is not a proper factor in the estimate of the plaintiff's reliefs. He must pay on the title he asserts the thing he wants to recover, or the equities he has to vindicate, not on any considerations of what cost or charges or loss his success in his suit may entail on the defendant."

The judgment goes on to add:

"The answer therefore in this as well as in the other referred case should be that the value of the buildings which may have to be demolished is not to be taken into account in estimating the value of the suit for the purposes of the Court-fees Act....."

(8) It is true that the relief in question is to be distinguished from another relief in which the only prayer is for possession of land. The relief in question differs from the relief claiming possession only without demolition in this much that it contains a prayer for demolition also. Therefore, while holding that, in a case like the present, the value of the buildings is to be excluded from consideration, I must record a finding that a separate court-fee must also be paid for the relief of demolition. That court-fee will not be paid under S. 7(v) but under Art. 17(vi) of Sch. 2, Court-fees Act. That Article provides that for "every other suit where it is not possible to estimate at a money value the subject-matter in dispute and which is otherwise provided for by this Act" a fixed court-fee of Rs. 18-12-0 is chargeable. I am, therefore, of opinion that the relief in question is, in substance, a combination of two reliefs, i.e., a relief for possession of land, which is governed by S. 7(v)(I)(c), and a relief for demolition, in respect of which court-fee is payable under Art. 17(vi), Sch. 2, Court-fees Act.

(9) Having determined this basic principle, it remains to find out the market value of the land under sub-cl. (c). This clause runs as follows:

"Where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue, and nett profits have arisen from the land during the three years immediately preceding the date of presenting the plaint—twenty times the annual average of such nett profits; but when no such nett profits have arisen therefrom, the market value, which shall be determined by multiplying by twenty the annual average nett profits of similar land for the three years immediately preceding the date of presenting the plaint."

(10) It will appear that the Commissioner should have found out the average net profits of this land and should have multiplied the said profits by twenty. If no net profits had accrued from this land during the three years immediately preceding the date of the suit, he should have found out the average annual profits of a similar land and should have multiplied the figure so found out by twenty. This was the proper method for determining the net profits. Unfortunately the Commissioner seems to have overlooked this method of calculation. The provisions of S. 7(v)(I)(c) do not appear to have been present to the mind of the Commissioner because he has nowhere attempted to multiply the net profits by twenty.

The method adopted by him may be reproduced in his own words as follows:

"I have therefore no exemplars before me and the only data before me is the rent of the shops standing on the plots in the vicinity and on a portion of the plot in dispute. Hence, I shall have to determine the value of the land on the rental basis of the hypothetical constructions believed to be standing on the land in suit."

This may or may not be a correct method of determining the actual market value for the purposes of sale of the property, but certainly it is not the method recognised by S. 7(v)(I)(c) for the purposes of determining the court-fee.

What the Commissioner did may briefly be stated below. He took a portion of the area in dispute which is marked A, B, C, P. Relying on a certain judgment of the Rent Control Officer he accepted the price of this piece of land as Rs. 30/- per square yard. He calculated the price of the structure standing on that area at Rs. 4/8/- per square foot. Then he added the aforesaid two sums found out by him and fixed the total price of the land as well as the structure at Rs. 4,191/-. He worked out the annual net income after making a deduction of 25 per cent, on account of repairs, depreciation and taxes and fixed the income at Rs. 990/-. Therefrom he drew a conclusion that the rent yielded a return of 24 per cent. per annum on the capital outlay. Having arrived at this conclusion, he took up another piece of land and found out the rent of the shops which stood on that piece of land. Having determined the income from the shops standing on that piece of land at Rs. 2,925/- and acting on the assumption that this was the yield at the rate of 24 per cent. per annum on the capital cost, he calculated the capital cost of the land as well as the buildings. Thereafter he made another assumption, viz., that the cost of building was Rs. 5/- per square foot.

Thus he determined the cost of the buildings standing on that land and, deducting the cost so found out from the capital value determined according to the above calculation, he fixed the price of the land. This procedure was very unsatisfactory. It was based on too many assumptions which may or may not be correct. In any case, this is not the method prescribed by the Court-fees Act. When the statute lays down a special method for calculating the value for a particular purpose, that method and that alone is to be followed.

(11) The learned Judge has pointed out that in proceedings under S. 145, Cr. P. C. which took place before the institution of the suit the appellant had made an admission in the course of a petition presented to that Court to the effect that the property in question was worth about Rs. 30,000/-. Reliance was placed on this admission and it was urged that since the figure contained in this admission is higher than the figure found out by the Commissioner, the appeal should be dismissed. This argument has no force. When the appellant said that the property in question was worth about Rs. 30,000/-, obviously she meant that the property (which included a portion of the construction also) could be sold in the market for that sum.

But the price which a property may fetch in the market by sale is not necessarily the same as the price calculated for the purposes of court-fee under S. 7(v)(I)(c), Court-fees Act. When the appellant made that admission in the petition aforesaid, she did not mean to admit that for the purposes of court-fee also the value of the property was Rs. 30,000/-. I am, therefore, of opinion, that this admission does not stand in the appellant's way. Since the Commissioner has not correctly recorded the value of the subject-matter of the suit and the entire approach of the Commissioner and the Court below has been erroneous, this appeal must succeed.

(12) The order of the Court below is set aside. The case is remanded to the Court below with directions that it shall proceed afresh to determine the value of the subject-matter of the suit in accordance with law. The costs of the appeal shall abide the result. The cross-objection is dismissed with costs.

B/R.G.D. Case remanded.

A.I.R. 1954 ALL. 191 (Vol. 41, C. N. 105)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Pandohi Ahir, Defendant-Appellant v. Faruq Khan and another, Plaintiffs-Respondents.

Second Appeal No. 634 of 1947, D/- 11-9-1953, against decree of Civil J., Fyzabad, D/- 9-5-1947.

(a) Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 180 (before amendment of 1947) and S. 242 — Suit against co-sharer in peaceful possession — Forum — (Civil P. C. (1908), S. 9).

A suit by one co-sharer against another who was in peaceful possession of a particular plot of land instituted in 1945 would be governed by the law as it stood on that date both as regards substantive and procedural rights. A co-sharer in peaceful possession of joint land cannot be said to be in possession of land contrary to the provisions of law under S. 180 before explanation I was added in 1947. Hence the suit in question could not be covered by S. 180 so as to become a suit exclusively within the jurisdiction of the revenue Court under S. 242. Such a suit is rightly instituted in Civil Court. (Para 6)

Anno: Civil P. C., S. 9 N. 51.

(b) Civil P. C. (1908), O. 7, R. 7 — Decree for joint possession.

A co-sharer has no right to claim or get possession to the exclusion of another co-sharer who he claims has entered into exclusive possession of the land in dispute. A co-sharer has a right to transfer his rights in the land and where the co-sharer in exclusive possession had executed a sale-deed in respect of the land the sale-deed cannot be said to be invalid in respect of his transferable share. The transferee becomes a co-sharer in the land and the co-sharer claiming possession would at best be entitled to a decree for joint possession over the plots in dispute.

Even though the prayer clause in the plaint for the suit for possession is not properly worded the Court should give due consideration to the decree which should be passed. (Para 7)

Anno: Civil P. C., O. 7, R. 7 N. 2.

B. K. Dhaon, for Appellant; Mohd. Ayub, for Respondents.

JUDGMENT: This is a second appeal from the judgment of the Civil Judge, Fyzabad, in a suit for possession.

(2) The facts of this case are simple. The plaintiff claiming to be a cosharer in certain property including the plots in dispute in this case brought a suit against defendants 1 and 2 for possession on the allegations that the plots which belonged to the plaintiff and some other cosharers including defendant 2 had been sold to defendant 1 by defendant 2 as his exclusive property and that the plaintiff was therefore entitled to possession of those plots.

(3) The defendants contested the suit. They denied that the plaintiff had any share in the property. A plea of jurisdiction was also raised and it was alleged that the suit was not within the cognizance of the civil court.

(4) The learned Munsif who heard the case came to the conclusion that the suit was cognizable by the civil Court and also found that the plaintiff and defendant 2 were cosharers in the plots which had been sold by defendant 2 to defendant 1. He also held that defendant 2 had no right to sell specific plots to defendant 1 and on these findings he passed a decree for possession in favour of the plaintiff. Defendant 1 then went in appeal to the District Judge and the Civil Judge who heard the appeal concurred with the findings of the trial Court and dismissed the appeal with a slight modification in respect of costs. Defendant 1 has now come up in second appeal.

(5) The first point which has been urged on behalf of the appellant is that the suit was not within the cognizance of the civil Court inasmuch as the suit was covered by the provisions of S. 180, U. P. Tenancy Act and in view of the provisions of S. 242 of the Act a suit such as the one which has given rise to this appeal could not be instituted in the civil Court. Section 180 as it stands at present is the result of an amendment made in 1947. Before the amendment the section stood as follows:

> "A person taking or retaining possession of a plot or plots of land otherwise than in accordance with the provisions of the law for the time being in force and without the written consent of the person entitled to admit him as tenant shall be liable to ejectment under this section on the suit of the person so entitled."

The section was amended by S. 18, U. P. Tenancy (Amendment) Act 10 of 1947 and two explanations were added to the section besides some other amendments.

Explanation I added in 1947 runs as follows:

> "A co-sharer in the proprietary rights in a plot of land taking or retaining possession of such plot without the consent of the whole body of co-sharers or of an agent appointed to act on behalf of all of them shall be deemed to be in possession of such plot otherwise than in accordance with the provisions of the law within the meaning of this section."

(6) After the amendment to the U. P. Tenancy Act in 1947 and the addition of explanation I there is no doubt that a suit by one cosharer against another who has entered into possession of joint land without the consent of all the cosharers can be maintained in the revenue court and such a suit would be exclusively cognizable by the revenue Court in view of the provisions of S. 242, U. P. Tenancy Act. It remains, however, to be seen if even before the amendment such a suit was exclusively within the cognizance of the revenue Court and this would depend entirely on

the meaning of the unamended section. As mentioned above a suit against a person who was in possession otherwise than in accordance with law and secondly without the written consent of the person entitled to admit him was cognizable by the revenue Court. The question for decision, however, would then be if a cosharer in possession of a plot of land belonging jointly to several co-sharers could be said to be a person in possession contrary to law.

A co-sharer in peaceful possession of joint land cannot be said to be in possession of land contrary to the provisions of law and the meaning now assigned to S. 180, by the explanation could not have been imported into the section before the explanation was added in 1947. A suit by one cosharer against another who was in peaceful possession of a particular plot of land could not, therefore, be covered by S. 180 as it stood before the amendment of 1947. The suit which has given rise to this appeal was instituted in 1945 and the rights both substantive and procedural would be governed by the law as it stood on the date the suit was instituted. The suit was, therefore, rightly instituted in the civil Court.

(7) The second point which has been urged on behalf of the appellant is that the Courts below were not justified in passing a decree for exclusive possession of the plots in dispute in favour of the plaintiff. There seems to be considerable force in this contention inasmuch as a cosharer who has a grievance that another cosharer has entered into exclusive possession of a plot of land cannot himself be put into exclusive possession of the plot to the exclusion of others. At best the plaintiff was entitled to a decree for joint possession over the plots in dispute.

The prayer clause in the plaint was not properly worded. The Courts below have also not given due consideration to the decree which should have been passed in this case. The plaintiff had no right to claim or get possession of the plots in dispute to the exclusion of the defendants. Although defendant 2 had no right to transfer specific plots to defendant 1, he had every right to transfer his share in the plots to defendant 1 and the sale deed could not be held to be invalid in respect of the transferable share of defendant 2 in favour of defendant 1. Defendant 1, therefore, also became a cosharer in the plots and if he happened to be in possession of those plots, he could not be ejected from them except by a suit for partition. Defendant 1, however, also could not deny the plaintiff's right to possession and the plaintiff under the circumstances was, therefore, entitled to a decree for joint possession only.

(8) No other point has been pressed in argument.

(9) The appeal is, therefore, allowed to this extent that the claim of the plaintiff is decreed for joint possession of the plots detailed in the plaint. The parties shall bear their own costs throughout.

B/M.K.S. Order accordingly.

A.I.R. 1954 ALL. 192 (Vol. 41, C. N. 106)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Mst. Rukmin and another, Appellants v. Babu Ram and others, Respondents.

Second Rent Appeal No. 70 of 1947. D/- 17-8-1953, against decree of Civil J., Sitapur, D/- 9-8-1947.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 183 — Applicability.

A suit by a tenant against a person who is holding a land either on behalf of the landlord or who has been allowed to continue in possession of the land belonging to a tenant by a landlord would lie under S. 183, Tenancy Act in the Revenue Court. It would not make much difference to the application of the section whether the landlord who did not originally agree to admit that person as a tenant subsequently agreed to admit him to the tenancy or he did not object to the tenancy of that person after a contest and accepted rent from him. (Paras 6, 7)

S. N. Srivastava, for Appellants; H. D. Srivastava, for Respondent No. 1/3.

CASE REFERRED:

(A) ('47) AIR 1947 Oudh 104: 1947 Oudh WN 42 (FB) (Pr 6)

JUDGMENT: This is a second appeal in a suit under S. 183, U. P. Tenancy Act. It appears that one Smt. Radha was the tenant of the khata in dispute in this case. She died in November 1943 and disputes arose over her tenancy rights. The defendants entered into possession of the khata and the plaintiff Mulhay then instituted the suit which has given rise to the present appeal for possession of the khata on the allegation that he was the own brother of Smt. Radha & as such succeeded to the tenancy rights of Smt. Radha. A claim for damages was also made along with the claim for possession. The plaintiff had mentioned in the plaint that defendants 1 to 3 were in possession of the khata on behalf of the zamindars who were defendants 4 to 6.

(2) The suit was contested by defendants 1 and 2 on the ground that the plaintiff was not the brother of Smt. Radha and as such was not entitled to succeed to the tenancy rights of Smt. Radha. It was also pleaded that the suit was not cognizable by the Revenue Court.

(3) The lower Court found that Mulhay was the own brother of Smt. Radha and as Smt. Radha was the original tenant her tenancy would pass to her brother. It also found that the suit was cognizable by the Revenue Court. The trial Court ultimately decreed the claim. Mathura defendant then went in appeal to the District Judge who upheld the decision of the trial Court. Mathura defendant has now come up in second appeal.

(4) It may incidentally be mentioned that there were two suits, Nos. 82 and 83 of 1946, which were in respect of two different khatas, but an appeal has been instituted only against the decree in suit No. 83 of 1946.

(5) The appellant has submitted to the findings of the two Courts below on the question of fact that Smt. Radha was the original tenant of the holding and had not inherited it from her husband and as such Mulhay being the brother of Smt. Radha was entitled to succeed to the rights of tenancy of Smt. Radha. The only point which has been pressed in appeal in this case is that the suit was not cognizable by the Revenue Court and as such should not have been entertained by the Revenue Court.

(6) In support of the contention pressed on behalf of the appellant, learned counsel has cited a ruling of the late Oudh Chief Court, —

'Ori Lal v. Ganeshi', AIR 1947 Oudh 104 (FB) (A). In this ruling distinction which ought to be observed under Ss. 180 and 183, and in suits which are not covered by either of the two sections, have been clearly brought out. It is however not necessary to enter into the ratio on which this reported case is decided inasmuch as the facts of the present case do not attract the application of this ruling at all. It is not disputed by the learned counsel for the appellants that a suit by a tenant against a person who is holding land either on behalf of the landlord or who has been allowed to continue in possession of the land belonging to a tenant by a landlord would lie under S. 183, Tenancy Act in the Revenue Court. In the present case the plaintiff specifically pleaded in the plaint that defendants 1 to 3 had been let into possession or were in possession of the Khata in dispute with the consent, collusion and connivance of defendants 4 to 6 who were the landlords. A joint written statement was also filed on behalf of defendants 4 to 6 who admitted in the written statement that defendants 1 to 3 had paid rent to them and they did not object to their possession. This clearly shows that defendants 1 to 3 had been allowed to remain in possession by the zamindars or landlords.

(7) It has been argued on behalf of the appellants that deft. 1 was in possession of the khata in spite of the landlord as he had succeeded in getting his name entered in the khatauni by the Revenue Court. It would not make much difference even if the landlord who did not originally agree to admit a person as a tenant subsequently agreed to admit him to the tenancy or does not object to the tenancy of a person after a contest and further accepts rent from him. If he has done so, the application of S. 183, U. P. Tenancy Act would be attracted and a suit against such a person would lie only in the Revenue Court. There is, therefore, no force in the contention of the learned counsel for the appellants and the findings of the Court below on this point are correct.

(8) No other point has been pressed in arguments. The result is that the appeal is dismissed with costs to the respondents.

B/M.K.S. Appeal dismissed.

A.I.R. 1954 ALL. 193 (Vol. 41, C.N. 107)

(LUCKNOW BENCH)

BEG AND CHATURVEDI JJ.

Sm. Subhana, Applicant v. State through Hashmat Ali, Opposite Party.

Criminal Revn. No. 43 of 1952, D/- 15-9-1953, from order of Asst. Sess. J., Lucknow, D/- 17-12-51.

Penal Code (1860), S. 441 — "In the possession of another." ILR 1950 All 163, Dissented from.

The question whether the complainant was in possession of the premises in suit or not is a question of fact. Possession of a house delivered to the complainant in execution of a decree is sufficient to show that it was he who was in peaceful possession of it and that possession he has by keeping the house locked is sufficient to attract the provisions of S. 441. AIR 1925 All 540, Explained. (Para 8)

The essence of the offence is the intent in committing the offence and not the presence or absence of the person against whom that intent is held. That intention 'to annoy' may be there in spite of the fact that the person against whom that intention is held may not be actually present at the time of entry. 2 All 465, Rel. on. (Paras 5, 7)

When the dominion which the complainant had acquired over the property with the help of the Civil Court is invaded and usurped by the accused by breaking open the lock and clandestinely entering into the house the act of the accused could not but be a source of great annoyance to the complainant and one done to annoy the complainant who was in actual possession of the premises in suit. (Para 8)

Anno: Penal Code, S. 441 N. 11, 4.

Gopi Krishna, for Applicant; S. L. Suri, for Opposite Party.

CASES REFERRED:

(A) ('78-80) 2 All 465 (Pr 6)
(B) ('50) ILR (1950) All 163 (Pr 9)
(C) ('25) AIR 1925 All 540: 26 Cri LJ 1273 (Pr 9)

CHATURVEDI J.:

Srimati Subhana has come up in revision against her conviction under S. 448, Penal Code by the Special Magistrate of Lucknow. She was sentenced to pay a fine of Rs. 20/- and in default she was directed to undergo rigorous imprisonment for one month. She went in appeal before the Assistant Sessions Judge, who maintained the order of the Magistrate. She has now come up in revision on the ground that her conviction under S. 448, I. P. C. was illegal.

(2) The facts of the case lie within a narrow compass. Hashmat Ali complainant filed a suit for ejectment against Munna Lal, son of the applicant. The suit was decreed and ultimately the possession of the portion of the house was delivered to Hashmat Ali on 3-2-1950 by the Civil Court. Hashmat Ali then put his lock on that portion of the house. A few days later when Hashmat Ali went to realise rent from some other tenant, he found the accused in possession of the house after breaking open the lock which had been put by the complainant. Hashmat Ali at first tried to secure the help of the police to put him in possession of the house again. Ultimately, he filed a complaint about six months after the occurrence.

(3) The facts stated above have not been seriously disputed before us. Both the Courts below have found that the complainant had entered into actual possession of the premises in suit on 3-2-1950. They have further held that the lock which had been put on the house by the complainant had been broken open by the applicant who had taken forcible possession of the house after her son had been ejected earlier. The question is whether the applicant has been rightly convicted under S. 448, Penal Code. Two reasons have been advanced for showing that the act of the applicant in entering into the house does not amount to criminal trespass as defined in S. 441, Penal Code. Firstly, it is pointed out that when the entry was made into the house, it was in the absence of the complainant and consequently there could be no question of any annoyance to him when the illegal act was done. Secondly, it was urged that the complainant was not in actual physical possession to attract the provisions of S. 441. Both these reasons are without any substance.

(4) The argument that the person against whom criminal trespass is committed should be actually present on the property at the time when the illegal act of taking forcible possession is commit-

ted by a person is rather startling. If a person in actual possession of a house or shop goes away temporarily leaving it locked and in his absence a third person, without any right, breaks open the lock and occupies the building, it would be absurd to hold that the trespasser was not guilty of criminal trespass because of the temporary absence of the person in actual possession. The language of S. 441 does not warrant such an inference. It runs thus : (His Lordship quoted the provisions of the section and proceeded :)

(5) It would be going against the very spirit of S. 441, if it were held that no criminal trespass would be committed against a person in peaceful possession merely because a trespasser manipulates his entry in such a way as to go to the property in possession of another at a time when the person in peaceful possession has temporarily gone out. There is nothing in S. 441 to confine its operation only when the person in actual possession and the trespasser making the forcible entry are present physically on the property on which trespass is committed.

(6) In the case of — 'Govind Prasad', reported in '2 All 465 (A)', Straight J., pointed out that in view of the 'unusually vague and elastic language' of S. 441, care should be taken to see that its scope is not so widened as to include within its fold cases which would not be fit even for civil proceedings. The opposite extreme of limiting its scope to an extent as to render the very object of the section nugatory should also be equally avoided. In the words of Straight J. the scope of S. 441 should be confined within those bounds that common sense and sound reason dictate. To say that if the person in possession is absent trespass committed in his absence will not be criminal trespass, is something which does not appeal to common sense.

(7) Next, it was contended on behalf of the applicant that, in order to attract S. 441, the entry must be with a view to 'annoy' the person in possession, and that, unless the person in possession is physically present on the premises the question of annoyance will not arise. This argument is again based on a misconception of the whole S. 441 which lays down that the entry of the trespasser must be with intent 'to annoy'. It is the 'intent' of the trespasser which constitutes the entry criminal. In every case we have to find out what was the intention of the person committing the trespass. The presence or absence of the person in actual possession on the spot is immaterial. Even though the person against whom the offence is committed is absent, the intention of the offender to annoy may be there. And in the circumstances of each case we have to find out whether that intention to annoy existed or not in the mind of the person committing trespass.

That intention 'to annoy' may be there in spite of the fact that the person against whom that intention is held may not be actually present at the time of entry. If the criminal intention was present in the mind of the person, his entry will be sufficient to make the trespass criminal trespass within the meaning of S. 441. The essence of the offence is the intent in committing the offence and not the presence or absence of the person against whom that intent is held.

(8) The other point taken up is that the possession contemplated in S. 441 should be actual physical possession, and not a formal or nominal possession. It is urged before us that the complainant was not in actual possession of the house in which the entry was made by the applicant. This contention also is without substance. The question whether the complainant was in possession of the premises in suit or not is a question of fact. Both the Courts below have held that the possession of the property was with the complainant at the time when the criminal trespass was committed. There is no legal flaw in this finding of fact. The applicant is the wife of Mehilal, and mother of Munnalal. Mehilal had set up proprietary rights in the disputed house in the partition suit No. 65 of 1940 but it was negatived by the Civil Judge, and on an appeal to the Chief Court the finding of the Civil Judge was confirmed. After Mehilal had receded in the background, his son Munna Lal came forward. The complainant then brought a suit for ejectment against Munna Lal which was decreed. The decree was executed, and ultimately on 3-2-1950, the complainant was put in possession. Having secured possesion of the house, the complainant put his lock on the door.

Now came the turn of Munna Lal's mother, that is the accused applicant. The lock was put by the complainant on 3-2-1950 and when he again came to the premises on 7-2-1950 he found to his utter surprise and annoyance, that Srimati had taken possession of the house after breaking open the lock. Possession delivered to the complainant in execution of the decree is sufficient to show that it was complainant who was in peaceful possession of the portion of the house which had been locked by him. Possession such as this was sufficient to attract the provisions of S. 441, Penal Code. The dominion which the plaintiff had acquired over the property with the help of the civil Court was invaded and usurped by the accused when she broke open the lock and clandestinely entered into the house which she knew had been closed and barred against her by the complainant. The act of the accused could not but be a source of great annoyance to the complainant who had, with great difficulty and at great expense, succeeded, in ejecting the son of the accused. The criminality of the act is so obvious that there cannot be two opinions that the act was done to annoy the complainant who was in actual possession of the premises in suit.

(9) On behalf of the applicant, reliance has been placed upon a decision of this Court in — 'Abdul Salam v. Rex', reported in 'ILR (1950) All 163 (B)'. Facts of that case may be briefly stated. One Srimati Mehr Bano was the owner of a house which she had let to Abdul Hamid who with the consent of the landlady had sublet it to one Mahfooz. Both the tenant and his subtenant vacated the house. Possession of the house was taken on behalf of the lady by her manager by locking the house. In that case the accused had broken open the lock and entered into the house without any right. Mootham J. took the view that as Shrimati Mehr Bano was in constructive possession of the house, S. 441, I. P. C. did not apply. With great respect, we find it difficult to subscribe to that view. So long as the tenants were in occupation of the house, Mehr Bano was no doubt in constructive possession of the house through her tenants. But the moment the tenants left the house, and Mehr Bano's manager put a lock on the house, the actual possession was with Mehr Bano. The fact that Mehr Bano did not actually come to live in the house will not matter. It was not necessary. The putting of a lock on the house was sufficient to show that she had full control of the house so as to attract the provisions of S. 441, Penal Code.

In deciding the above case Mootham J. relied upon the case of Motilal reported in — 'Motilal

v. Emperor', AIR 1925 All 540 (C). If we may say so with great respect the facts in Motilal's case differed materially with the facts of the case of Abdul Salam. In the Division Bench case of Motilal, one widow was the owner of a shop which had been let out to a tenant named Yusuf. When the widow died, there were two claimants namely Kanhaiyalal, who claimed the shop as the next reversioner, and Motilal who claimed to be the adopted son of the widow. The shop was in occupation of a tenant and Kanhaiyalal was successful in persuading the tenant to pay rent to him. The tenant decided to vacate the shop and did so on 24-10-1924. Motilal won the race by locking the shop before Kanhaiya Lal could take its possession. The other claimant Kanhaiyalal then filed the complaint alleging that he was realizing the rent from the outgoing tenant and as such he was in possession of the shop and that Motilal committed criminal trespass by locking the shop. It was held that Kanhaiya Lal was not in possession of the shop at the time when trespass was committed 'either by himself or through any other person'. It was further held that when Motilal took possession of the shop he did so with the object of asserting his title to the shop, and not with the intent to annoy Kanhaiya Lal. We have no doubt that the Division Bench case was rightly decided on the facts as they existed in that case.

(10) A few other cases were cited at the Bar but we do not think it necessary to refer to them. We have already indicated that in this case the possession of the property was with the complainant and the act of trespass committed by the applicant was done to annoy the complainant. The applicant was, therefore rightly convicted. The sentence errs on the side of leniency.

(11) We dismiss the revision.

A/M.K.S. Revision dismissed.

A.I.R. 1954 ALL. 195 (Vol. 41, C. N. 103)

BEG, J.

The Central Finance and Housing Co. Ltd; Plaintiff-Appellant v. British Transport Co. and others, Defendants-Respondents.

Second Appeals Nos. 774, 583 and 584 of 1948, D/- 15-7-1953, against order of Civil Judge, Agra, D/- 15-12-1947.

(a) Transfer of Property Act (1882), S. 54 — Sale or hire purchase agreement — Principles to determine — (Deed — Construction).

In determining the question as to the nature of a transaction the Court should not be led away merely by the ostensible appearance given to it by the words used by the parties, but should make an attempt to go behind the phraseology for the purpose of ascertaining the real intention of the parties. In other words, it is not the garb with which the parties choose to clothe the transaction that should guide the Courts, but it is the spirit permeating the transaction that should be the determining factor of its real nature.

In its endeavour to do it, the Court should dissect the transaction, scrutinise its legal implications and bear in mind the legal consequences that would ensue from it. In other words, the real nature and the essence of the transaction has got to be discovered.

In order to arrive at a conclusion, the transaction has got to be looked at as a whole. The conclusion arrived at by the Court should be the cumulative result of the totality of circumstances emerging from the agreement.

Thus, for example, where it is apparent that as a result of a hire purchase agreement, the transferee has eventually to pay the entire purchase price, it may be a circumstance indicating that the transaction was meant to be a sale. On the other hand, if the transferee is given a right to terminate the agreement, that may be an important circumstance indicating that the transaction was intended to be a hire purchase agreement. That again, however, may not be a conclusive test, as the right to terminate the transaction might itself have been put into the agreement for the purpose of giving it the appearance of a hire purchase agreement.

Held that viewed in the light of the above principles, the transaction in question was in reality a transaction of sale. AIR 1930 Bom. 306; AIR 1938 Nag. 18 and AIR 1932 All. 607, Ref.

(Para 10)

Anno: T. P. Act, S. 54 N. 5.

(b) Sale of Goods Act (1930), S. 49 (b) — Termination of seller's lien.

The right of lien for unpaid purchase money subsists only so long as the seller has the possession of the goods. Once the seller delivers possession of the goods to the buyer the lien disappears under S. 49, Sale of Goods Act.

(Para 15)

Anno: S. G. Act, S. 49 N. 1.

J. Swarup, for Appellant; Shanti Bhushan and Vishwa Mitra, for Respondents.

CASES REFERRED:

(A) ('30) AIR 1930 Bom. 306: 54 Bom. 381 (Pr. 9)

(B) ('38) AIR 1938 Nag. 18: ILR (1940) Nag. 208 (Pr. 9)

(C) ('32) AIR 1932 All. 607: 54 All. 781 (Pr. 9)

JUDGMENT: This judgment disposes of two second appeals, namely, second appeal No. 774 of 1948, & second appeal No. 584 of 1948. Both the second appeals arise out of a common judgment. The circumstances in which these second appeals arise are briefly given below:

(2) It would appear that on 2-6-1941, the plaintiff in this case viz. the Central Finance and Housing Company Limited entered into an agreement with defendants 1 and 2 regarding a bus. Defendant 1 is Babu Singh and defendant 2 is Sardar Singh. Babu Singh and Sardar Singh are styled as 'hirers' in this agreement. Defendant 3 is Bhupal Singh and he signed the agreement as a guarantor. Babu Singh and Sardar Singh are the persons to whom the bus is stated to have been hired under the said agreement and the agreement itself is described as a hire purchase agreement. Under the said agreement Babu Singh and Sardar Singh, the alleged hirers of the bus, were liable to pay the hire of the bus by twelve instalments starting on 1-7-1941 and ending on 1-6-1942. The total amount of the instalments to be paid by the hirers was Rs. 1320/-. One of the conditions of the said agreement was that if the hirers made any default in the payment of any of the instalments, it

would be open to the Central Finance and Housing Company Limited to terminate the agreement and to take possession of the bus.

(3) The present suit was brought by the Central Finance and Housing Company Limited as plaintiff on the allegation that there was a default on the part of the hirers in the payment of instalments and, accordingly, the plaintiff terminated the said agreement by means of a letter dated 18-3-1942. The plaintiff, therefore, filed the suit out of which this second appeal arises praying for a decree of Rs. 560/- with 'pendente lite' and future interest against defendants 1 to 3. This amount represented the amount of unpaid instalments which had already fallen due, the interest on the said instalments and some other expenses which the plaintiff had incurred in this connection upto 18-3-1942, the date of the termination of the agreement. It was further alleged by the plaintiff that defendant 1 parted with the bus in favour of defendant 4 viz. the British Transport Company Limited, which was running the bus on hire and was liable along with other defendants for damages for withholding the said bus upto the date of the suit. These damages were assessed by the plaintiff at Rs. 740/- and he claimed a decree against all the four defendants in respect of this amount. Further the plaintiff claimed a decree for possession of the bus valued at Rs. 1000/- against all the defendants in his favour. The plaintiff also claimed future profits at the rate of Rs. 100/- per month against the aforesaid defendants and stated that the Court-fee on the same shall be paid in the execution department.

(4) Defendant 1 pleaded in defence that he had given the bus to defendant 4 at the instance of the plaintiff, and the plaintiff was, therefore, not entitled to any relief against him.

(5) The real contest in the case was, however, raised by defendant 4. The main plea taken by him was that the agreement in question was in fact a sale in favour of defendants 1 and 2 and was not a hire purchase agreement at all.

(6) The trial Court decreed the plaintiff's suit in toto except that the sum of Rs. 560/- was reduced to Rs. 450/-. Defendant 4 filed an appeal against the said judgment and decree of the trial Court. The plaintiff also filed a cross-objection on the ground that the trial Court should not have fixed the price of the bus and that it should have been done in the execution proceedings. The lower appellate Court dismissed the cross-objection of the plaintiff and allowed the appeal of defendant 4 holding that the agreement in question was a sale and not a hire purchase agreement. The appellate Court, accordingly, set aside the decree of the Munsif and ordered that the plaintiff's suit should be decreed for an amount of Rs. 1268/6/- due upto 1-12-1947, and for proportionate costs on Rs. 985/-, and the amount due upto the date of the suit. The above amount was decreed against all the four defendants mentioned above.

(7) Dissatisfied with the said judgment, the plaintiff has filed an appeal in this Court. This appeal is second appeal No. 774 of 1948. Defendant 4 has also filed an appeal against the said judgment and this appeal is second appeal No. 584 of 1948.

(8) I shall first take up second appeal No. 774 of 1948 which has been filed on behalf of the plaintiff. The sole question that has been argued before me by the learned counsel for the appellant in this appeal relates to the interpretation of the agreement of 2-6-1941. The learned counsel has argued that the conclusion of the trial Court that the agreement in question operates and as a sale is erroneous. He has strenuously contended that on a proper interpretation of the said deed, it is a hire purchase agreement. On the other hand, the learned counsel for the respondents has argued that the finding of the trial Court on this point is correct; and, in spite of all the appearance of a hire purchase agreement, the agreement in question is really a sale deed.

(9) The principles governing the interpretation of such deeds are well-known and have been enunciated in a number of cases vide — 'Bhimji N. Dalal v. Bombay Trust Corporation', AIR 1930 Bom 306 (A); — 'Manikchand Pranjiwan v. Berar Motor Supply Co.', AIR 1938 Nag 18 (B) and — 'Mahabali Prasad v. H. N. Palmer', AIR 1932 All 607 (C).

(10) In determining the question as to the nature of such an agreement, the Court should not be led away merely by the ostensible appearance given to the transaction by the words used by the parties, but should make an attempt to go behind the phraseology for the purpose of ascertaining the real intention of the parties. In other words, it is not the garb with which the parties choose to clothe the transaction that should guide the Courts, but it is the spirit permeating the transaction that should be the determining factor of its real nature. It is not the form in which the transaction is presented by the parties but the real substance of it that has got to be ascertained by the Court. In its endeavour to do it, the Court should dissect the transaction, scrutinise its legal implications and bear in mind the legal consequences that would ensue from it. In other words, the real nature and the essence of the transaction has got to be discovered. In order to arrive at a conclusion, the agreement has got to be looked at as a whole. The conclusion arrived at by the Court should be the cumulative result of the totality of circumstances emerging from the agreement. As the Court tries to ascertain the real nature of the transaction, the Court should take into consideration all the circumstances of the case. It cannot be said that any one particular circumstance provides an acid test in the case.

Thus, for example, where it is apparent that as a result of the agreement, the transferee has eventually to pay the entire purchase price, it may be a circumstance indicating that the transaction was meant to be a sale. On the other hand, if the transferee is given a right to terminate the agreement, that may be an important circumstance indicating that the transaction was intended to be a hire purchase agreement. That again, however, may not be a conclusive test, as the right to terminate the transaction might itself have been put into the agreement for the purpose of giving it the appearance of a hire purchase agreement. The question would be whether the right given to the hirers was a 'bona fide' conferment of such a right or merely a 'mala fide' insertion of a condition as a part of the attempt to delude the Court into thinking that the transaction in

question was a hire purchase agreement and not a sale. Viewing the transaction in question in the light of the above principles, I have come to the conclusion that the transaction in question is in reality a transaction of sale, in spite of the fact that the parties have been at pains to hide that fact.

(11) The learned counsel appearing for the appellant invited my attention to the use of the word 'owner' to describe the plaintiff company that had transferred the bus, to the use of the word 'hirer' to describe the persons who were allowed the use of the bus, and the use of the similar other words in the agreement which would indicate that the agreement in question was a hire purchase agreement. As mentioned by me above, the mere use of such words cannot convert a transaction that was really a sale into a hire purchase agreement. The true essence and the real nature of the transaction has got to be seen and ascertained. The sheet-anchor of the appellant's learned counsel's argument, however, has been cl. 11 in which a right appears to have been given to the hirer to terminate the agreement. According to his argument, the insertion of cl. 11 and the conferment therein of a right to terminate the agreement is the deciding factor in the case and must necessarily lead to the conclusion that the agreement in question was a hire purchase agreement and not a sale.

I would have been inclined to agree with him, if I had found that the right to terminate given therein to the hirer was a genuine and a 'bona fide' conferment of the said right. On the other hand, a close scrutiny of the conditions and the restrictions with which this right to terminate has been hedged round shows that the right conferred therein is merely a fiction and not a fact.

(12) Learned counsel has argued that the right to terminate conferred under cl. 11 of the agreement is an absolute right. A perusal of cl. 11, however, does not bear out this contention. According to cl. 11, the right can be exercised only if the vehicle is surrendered in the same order and condition in which it was hired "fair wear and tear excepted". This would mean that if the vehicle met an accident and was damaged, the hirer's right to terminate the agreement would be lost. The right to terminate cannot, therefore, be considered to be an absolute right available to the hirer in every case.

(13) The most important circumstance in connection with the so-called right to terminate contained in cl. 11 is that, according to the said clause, if the hirer chooses to terminate the agreement, he

> "shall pay to the owner the stipulated amount of hire upto the date of the said agreement including the apportioned hire without any broken period of the month plus Rs. 1500/- as compensation for depreciation in the value of the vehicle."

In this connection it should be borne in mind that the total amount payable by the hirer adding up all the twelve instalments comes to Rs. 1320/- only. After payment of the said amount of Rs. 1320/-, according to cl. 12 of the said agreement, the hirer would become the absolute owner of the vehicle. Thus the value of the vehicle as assessed by the parties themselves at the time was at the most Rs. 1320/-. In the plaint itself, the plaintiff valued it at Rs. 1000/- only. If, however, the hirer chose to terminate the agreement, he would not only have to deliver the bus for what it is worth, but further pay Rs. 1500/- an amount which would exceed the price or the value of the bus itself. In addition to that, he would further forfeit the amount of any instalment or instalments that had already been paid by him to the so-called owner.

The absurdity of this situation will be appreciated if it is remembered that in cl. 12 of the agreement it is laid down that where the hirer has already paid a number of instalments, it would be open to the hirer to pay the remaining amount of unpaid instalments with a rebate that might be allowed to him by the owner for advance payment of the entire amount; and, on such payment, he would become the absolute owner of the property. Thus under the said agreement if the hirer wanted to terminate the agreement, he would be saddled with much higher liability than the one imposed on him to entitle him to become an absolute owner of the vehicle. No person possessing a grain of common sense could think of availing himself of it. The so-called compensation for depreciation exceeds the price of the bus itself. When confronted with this position, the appellant's learned counsel had to concede that the position created was an absurd one and the only reply that he could give was that the mention of Rs. 1500/- in para 11 was a mistake. It is nobody's case that para 11 or any part of it was a result of mistake. It appears to me quite clear that the clause giving a right of termination to the hirer was so framed as to make the right illusory. It was deliberately shoved into the agreement for the purpose of giving it a deceptive appearance and concealing the fact that the transaction in question was an out and out sale.

(14) It may further be mentioned that the position taken up by the learned counsel for the appellants was not that the condition regarding payment of Rs. 1500/- was invalid being in the nature of a penalty. On the other hand, he cited — 'Halsbury's Laws of England', Para 775 (Vol. XVI Second Edition 1935) in support of his contention that conditions of this character can be validly imposed in such contracts. Taking into consideration all the circumstances of the case, I find myself in agreement with the interpretation placed on the agreement by the lower appellate Court and have no hesitation in holding that the transaction in question is a transaction of sale and not of hire purchase. In this view of the matter, second appeal No. 774 of 1948 must be dismissed.

(15) The other appeal which is before me is second appeal No. 584 of 1948. This appeal has been filed by defendant 4. As mentioned above, the lower appellate Court has decreed the amount of Rs. 1268/6/- against all the four defendants. In this second appeal, the learned counsel for defendant 4 has argued that this amount cannot in law be decreed against defendant 4. Having heard the learned counsel for the appellant, I am of opinion that his contention must be accepted. It is obvious that defendant 4 was not a party to the agreement of 2-6-1941, and there was no privity of contract between him and the plaintiff. The bus is alleged to have been hired to him by defendants 1 and 2 and he was a third party so far as the aforesaid agreement was concerned. He could not, therefore, be made liable under

the said contract. The plaintiff could only have claimed this amount by way of lien, but that right of lien would subsist only so long as the plaintiff had possession of the bus. Once the plaintiff had delivered possession of the said bus, the lien would disappear under S. 49, Sale of Goods Act. The learned counsel for the respondents in this appeal could not support this part of the judgment and had to concede that if the transaction was held to be a sale, the judgment of the lower appellate Court could not be sustained. This appeal must, therefore, be allowed.

(16) The net result of the conclusions arrived at by me above is that second appeal No. 774 of 1948 is dismissed with costs and second appeal No. 584 of 1948 is allowed with costs.

(17) Learned counsel for the appellant prays for leave to appeal to a Division Bench. The permission asked for is allowed.

B/D.R.R. Order accordingly.

A.I.R. 1954 ALL. 198 (Vol. 41, C.N. 109)
(LUCKNOW BENCH)

BEG AND RANDHIR SINGH JJ.

Lachhmi Narain Tewari, Applicant v. District Judge, Lucknow and others, Opposite Party.

Civil Misc. Appln. No. 55 of 1952, D/- 17-9-1953.

(a) Payment of Wages Act (1936), S. 15 — Scope — Admission of application under, after expiry of six months.

It is within the discretion of the Magistrate under S. 15 to admit an application even after the expiry of the period of six months if he is satisfied that there was sufficient cause for not making the application within time. But this admission should however be a conscious admission and a mere order to issue notice to the opposite party cannot be an implied admission in all cases.

Held, in the circumstances of the case that the Magistrate had not considered the cause of delay at all when notice was issued and the mere act of ordering issue of notice did not imply the admission of the application. (Para 5)

(b) Constitution of India, Art. 226 — Scope — (Payment of Wages Act (1936), S. 15).

If a Magistrate refused to admit the application under S. 15, Payment of Wages Act after hearing the opposite party he cannot be said to have exercised a jurisdiction not vested in him or to have exercised his jurisdiction wrongly and the High Court has no jurisdiction to issue writ under Art. 226, in such cases. (Para 6)

M. L. Tewari, for Applicant; B. K. Dhaon, (for No. 1); B. N. Roy (for No. 2) and R. K. Bose (for No. 3), for Opposite Party.

RANDHIR SINGH J.

This is a petition under Arts. 226 and 227 of the Constitution of India and the petitioner prays that the order passed by the Magistrate and upheld by the District Judge under S. 15, Payment of Wages Act (4 of 1936) be quashed as they acted with material irregularity in rejecting the application made by the applicant under S. 15, Payment of Wages Act.

(2) The applicant was a ward keeper in the office of the District Controller of Stores, Alambagh, Lucknow. He was in charge of certain stores and some items of the stores were found missing whereupon he was asked to make good the deficiency and the price of the articles lost which amounted to Rs. 883/2/- was ordered to be deducted in monthly instalments of Rs. 49/1/- extending over a period from 1-6-1947 to 30-11-1948. The deductions were made. On 13-7-1950, an application was made under S. 15, Payment of Wages Act to the City Magistrate Lucknow claiming that the deductions from his wages were improper and that the amount deducted should be paid back to him. This application was transferred by the City Magistrate to the Additional City Magistrate (II). It was again transferred to the City Magistrate and was ultimately disposed of by him. He rejected the application as time barred and the applicant then went in appeal to the District Judge. The District Judge held that no appeal lay against the order passed by the Magistrate and dismissed the appeal. The applicant has now come up to invoke the jurisdiction of this Court by a petition of writ.

(3) It has been contended on behalf of the applicant that the Magistrate was not within his jurisdiction to admit the plea of limitation once the application had been admitted and that the subsequent order of dismissal of the application on a point of limitation was incompetent. The proviso to S. 15(2), Payment of Wages Act is as follows :

"Provided that every such application shall be presented within six months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made, as the case may be:

Provided further that any application may be admitted after the said period of six months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period."

(4) It would thus appear that an application under S. 15 should be made within six months from the date on which the deduction from the wages is made. In the present case the deductions began on 1-6-1947, and the last deduction was made from the salary for the month of November, 1948. The application was made on 13-7-1950, about one and a half years after the last deduction had been made. The application was therefore prima facie barred by limitation but the Magistrate had jurisdiction to entertain it even after the expiry of six months if he was satisfied that there was sufficient cause for not making the application within such period. When the application was presented on the 13th July, it appears that it was transferred by the City Magistrate to the Additional City Magistrate for disposal and on the 15th July, the Additional City Magistrate passed the following order :

"Send copy of this plaint to each of the defendants and ask them to submit a written reply within 30 days of the date of this order."

When the replies were filed an issue was framed on 17-3-1951, as follows :

"Is there any sufficient cause for the applicant not filing the application within six months of the alleged deductions."

The preliminary issue, it appears, was reframed on 1-5-1951 in the following words:

"Did the applicant have sufficient cause for not making his application in this Court within the prescribed period of six months from the date

on which the alleged deduction from the applicant's wages was made."

The Magistrate then heard the parties and came to a finding that the applicant had not sufficient cause for not making the application within six months. On this finding the application was rejected.

(5) The main contention on behalf of the applicant now is that the order for the issue of notices to the opposite party should be deemed to imply that the Magistrate had admitted the application and had accepted the cause shown by the applicant for the delay in making the application. No doubt it is within the discretion of the Magistrate under S. 15, Payment of Wages Act to admit an application even after the expiry of the period of six months if he is satisfied that there was sufficient cause for not making the application within time. This admission should however be a conscious admission and a mere order to issue notice to the opposite party can hardly be deemed to be an implied admission in all cases. If the Magistrate thought that before deciding the point of limitation which was based on facts connected with the opposite party, it was proper for him to hear the opposite party and issued notice to the opposite party, he cannot be said to have acted against the principles of natural justice or in an improper manner. There is no order of admission of the application or any order to show that the Magistrate had taken into consideration the grounds given by the applicant in ordering the issue of notice and it cannot be inferred under these circumstances that the Magistrate had satisfied himself about the sufficiency of the cause of the delay and had in fact admitted the application before the order of issue of notice was made.

A supplementary affidavit has now been filed to show that the Magistrate had in fact questioned him about para 4 of his application before issue of notice, but it appears from the judgment of the Magistrate that no objection was taken before him that the question of limitation had already been decided or that the applicant had already been questioned about the sufficiency of the cause for the delay before the issue of notice. No objection was even taken at the time when the issue was framed in the month of March or when it was reframed on 1-5-1951. We are unable therefore to give credence to the allegations of the applicant that the Magistrate had questioned him about the sufficiency of the cause for the delay. Admission of an application referred to under S. 15 would not mean only the physical act of taking the application and issuing an order but should be a conscious admission of the application. In the present case we are satisfied that the Magistrate had not considered the cause of delay at all when notice was issued and we are unable, therefore to infer that the mere act of ordering issue of notice implied the admission of the application.

(6) The jurisdiction of the High Court in matters in writ is limited to cases in which there has been manifest injustice due to non-observance or to the wrong observance of laws regarding procedure or jurisdiction. In the present case no injustice has resulted from the procedure adopted by the learned Magistrate. It was entirely within the jurisdiction of the Magistrate to admit or not to admit the application and if he refused to admit the application after hearing the opposite party he cannot be said to have exercised a jurisdiction not vested in him or to have exercised his jurisdiction wrongly. The petition has also been made with considerable delay. The order of the District Judge dismissing the appeal was made in April 1952 and the present application was made on 11-9-1952. There is no force in this petition and it is accordingly dismissed. We make no order as to costs.

A/H.G.P. Petition dismissed.

A.I.R. 1954 ALL. 199 (Vol. 41, C.N. 110)

BRIJ MOHAN LALL J.

Ram Lakhan, Defendant-Appellant v. Mst. Tulsha widow of Mata Prasad and others, Plaintiffs-Respondents.

Civil Revn. No. 801 of 1953, D/- 9-10-1953, from order of Munsif, Gyanpur, D/- 20-7-1953.

(a) Specific Relief Act (1877), S. 9 — Applicability — Property in dispute agricultural land.

If a plaintiff claims to have been in possession and makes a grievance of the fact that he was dispossessed by the defendant without his consent and otherwise than in due course of law, he can maintain a suit in the Civil Court under S. 9, Specific Relief Act, notwithstanding the fact that the property in dispute may be agricultural land. (Para 5)

Anno: Specific Relief Act, S. 9 N. 17.

(b) Limitation Act (1908), S. 14(1) — "In good faith."

Suit under S. 9, Specific Relief Act — Property in dispute agricultural land — Munsiff directing plaint to be filed in revenue Court as suit was believed to be entertainable by revenue Court only — High Court subsequently taking different view — Revenue Court returning plaint for presentation to civil Court — Plaintiff held was entitled to claim exclusion of period spent in revenue Court. (Para 5)

Anno: Limitation Act, S. 14 N. 20.

(c) Limitation Act (1908), S. 14, Explanation 1 — "The day on which the proceedings therein ended."

While in majority of cases the period right up to the date of the actual return of the plaint should be excluded, it cannot be held as a hard and fast rule, applicable to all cases, that exclusion should extend up to the date of the actual return of the plaint. The period shall vary according to the circumstances of each case. (Para 7)

Anno: Limitation Act, S. 14 N. 27, Pts. 1 and 2.

(d) Limitation Act (1908), S. 14(1) — "Other cause of a like nature."

Where both parties and the Court believed that there was lack of jurisdiction in the Court there is "other cause of a like nature." (Para 9)

Anno: Limitation Act, S. 14 N. 24.

Harnandan Prasad and Yashoda Nandan, for Appellant; B. N. Sapru, G. P. Bhargava and N. D. Ojha, for Respondents.

CASES REFERRED:

(A) ('49) AIR 1949 All 510: 1949 All LJ 24 (Pr 4)

(B) ('50) 1950 All LJ 645: 1950 All WR (HC) 236 (Pr 4)

(C) ('50) AIR 1950 All 407: 1951 All LJ 290 (Pr 4)
(D) ('39) AIR 1939 All 590: ILR (1939) All 709 (Pr 7)
(E) ('34) AIR 1934 All 688: 57 All 145 (FB) (Pr 10)

ORDER: This is an application in revision by a defendant against whom a suit for possession instituted under S. 9, Specific Relief Act has been decreed by the learned Munsif of Gyanpur, district Banaras.

(2) The plaint allegations, which have been found to be correct by the learned Munsif, are that the plaintiffs (opposite parties 1 and 2) were in peaceful possession of the land in dispute but they were, without their consent and otherwise than in due course of law, dispossessed therefrom by the applicant and other persons who were impleaded in the Court below as co-defendants and who are arrayed in this revision as opposite parties 3 to 6. These findings of fact have to be accepted as correct in these proceedings.

(3) The only question of law that arises for decision is whether the suit was time-barred. In order to appreciate this question, it is necessary to mention certain facts. The plaintiff's dispossession took place on 12-7-1949. The suit was instituted in the Munsif's Court on 21-12-1949. On 3-4-1950 the plaint was ordered to be returned for presentation to "proper Court" by which term was meant the revenue Court. The plaint was actually returned on the next day, i.e. on 4-4-1950. It was presented in the revenue Court the same day. On 6-6-1951 the revenue Court held that the suit was cognizable by the civil Court. It ordered the plaint to be returned for re-presentation to the said Court.

The plaint was actually returned on 4-7-1951 on which date it was again presented before the learned Munsif who entertained it. This presentation was certainly made beyond the period of six months from the date of actual dispossession. Article 3 of the Schedule to the Limitation Act prescribes a period of six months calculated from the date of dispossession for instituting a suit under S. 9, Specific Relief Act.

(4) The plaintiffs sought to invoke to their aid the provisions of S. 14, Limitation Act. Under this section a plaintiff can exclude from computation the period during which he

> "has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a Court of appeal, against the defendant"

where the proceeding

> "is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it".

The learned Munsif has held that the plaintiffs were entitled to the benefit of this section. He has also pointed out the reason why the plaintiffs were driven from pillar to post. It appears that in 1949 the view prevalent in Courts was that a suit like the present, where the property in dispute was agricultural holdings, would be entertained by the revenue Court. This belief was brought about by a decision of a single Judge of this Court reported in — 'Beni Madho Singh v. Prag', AIR 1949 All 510 (A). This view appears to have been in force when the order dated 3-4-1950 directing the return of the plaint for presentation to revenue Court was passed. Subsequent decision took a different view. These decisions are reported in — 'Jagdish Singh v. Mehi Lal Mullah', 1950 All LJ 645 (B) and — 'Ganga Din v. Gokul Prasad', AIR 1950 All 407 (C). These decisions apparently influenced the decision of the revenue Court which, obviously acting on these authorities, returned the plaint for re-presentation to the civil Court.

(5) The law is now well settled that, if a plaintiff claims to be in possession and makes a grievance of the fact that he was dispossessed by the defendant without his consent and otherwise than in due course of law, he can maintain the suit in the civil Court under S. 9, Specific Relief Act, notwithstanding the fact that the property in dispute may be agricultural land. Therefore, there can be no doubt that the revenue Court was a Court which could not entertain the suit on account of want of jurisdiction. At the same time, there can be no doubt that the plaintiffs had acted 'bona fide' in presenting the plaint to the revenue Court. They had been directed by the Munsif to present the plaint there and, according to the state of law as then understood, the suit was believed to be entertainable by the revenue Court only. Therefore, the plaintiffs are entitled to claim exclusion of the period spent in the revenue Court.

(6) The next question that arises for decision is as to whether the period of the pendency of the suit in the revenue Court is to be calculated up to 6-6-1951, on which date the order for the return of plaint was passed, or up to 4-7-1951, on which date the plaint was actually returned. Explanation I to S. 14, Limitation Act throws light on this question. It runs as follows:

> "In excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted."

(7) According to this Explanation, the period up to "the day on which the proceedings therein ended" is to be excluded. This phrase was interpreted in the case of — 'Jafar Uddin v. Debi Prasad', AIR 1939 All 590 (D) to mean that the period up to the day of the actual return of the plaint was to be excluded. While agreeing that in majority of cases the period right up to the date of the actual return of the plaint should be excluded, I am not prepared to hold as a hard and fast rule, applicable to all cases, that exclusion should extend up to the date of the actual return of the plaint. The period shall vary according to the circumstances of each case. After an order for the return of plaint is passed, office has to go through certain formalities before the plaint is actually returned. An endorsement has to be made on the back of the plaint under O. 7, R. 10(2), C. P. C. Entries have to be made in certain registers and it is only then that the plaint can be returned. Office may take several days for going through all these formalities. The actual period required for observing all these formalities will depend upon the state of work in each office.

But it is conceivable to think of cases where the delay may take place not on account of the office but on account of the plaintiff himself. The plaintiff may feel dissatisfied with the order directing the return of the plaint, may be contemplating an appeal and may even refuse to take back the plaint when offered to him by the office. His refusal may continue for months together. In such cases it will not be proper to

hold that the period right up to the date of the actual return of the plaint is to be excluded. In such cases, the date on which the plaint was tendered to the plaintiff by the office will be "the day on which the proceedings therein ended".

(8) In the present case, however, the actual return was made within a month of the date of order of return. There is nothing to indicate that the plaintiffs had refused to take back the plaint when tendered to them by the office or that they were, in any way, responsible for the delay in the actual return of the plaint. The return was not made with unreasonable delay after the date of the order of return. In the circumstances, I am prepared to hold that the period right up to the date of actual return should be excluded from computation.

(9) Another question that arises for decision is whether the period during which the suit remained pending in the Munsif's Court on the first occasion is to be excluded from consideration. The Munsif's Court was not a Court which lacked jurisdiction to try the suit, although everyone seemed to believe at that time that the Munsif had no jurisdiction. The learned counsel for the applicant read out to me a petition which the plaintiffs had presented in that suit. According to this document, the plaintiffs had themselves admitted that the Munsif's Court had no jurisdiction and had expressed a desire that the plaint might be returned. This petition is not on the record and the learned counsel for the opposite parties had serious objection to this document being taken into consideration.

But I am of the opinion that, even if this document is read in evidence, it would not alter the situation. It does not disclose lack of 'bona fides' on the part of the plaintiffs. On the contrary, it proves their good faith inasmuch as they, having regard to the state of law as it was then understood, conceded a certain legal position. But still it was the Court which passed the order and they were bound by it because that, although the element of good faith might be there, the other ingredient, viz. the lack of jurisdiction in the Court, did not exist because the Court did really possess the jurisdiction.

In this connection, it may be pointed out that the defect of jurisdiction is not the only ground to attract the provisions of S. 14, Limitation Act. If there is "any cause of a like nature" the plaintiffs can still take advantage of S. 14. In the present case, both parties and the court believed that there was lack of jurisdiction in the Court. There was, therefore, other "cause of a like nature" within the meaning of the phrase as used in S. 14 so as to attract the applicability of that section.

(10) The learned counsel for the applicant relied on the case of — 'Sadayatan Pande v. Ram Chandra', AIR 1934 All 688 (FB) (E). That case is clearly distinguishable. In that case the plaintiff had sought permission to withdraw the suit under O. 23, R. 1, with permission to institute it again on the same cause of action. It was held that, when representing the plaint, he could not avail of S. 14, Limitation Act. In the present case, however, there was no withdrawal of suit by the plaintiffs. Moreover, O. 23, R. 2, C. P. C. clearly indicates that when a suit is withdrawn under O. 23, R. 1, the fresh suit shall be governed by the law of limitation "in the same manner as if the first suit had not been instituted".

This special provision which governs suits instituted after withdrawing the first suit with permission of the Court under O. 23, R. 1, can, by no stretch of reasoning, be made applicable to the present circumstances. I am, therefore, of the opinion that the authority cited by the learned counsel for the applicant does not help him. In my opinion, the learned Munsif has acted rightly in extending the benefit of S. 14, Limitation Act to the plaintiffs and in treating the suit as having been filed within time.

(11) The revision, therefore, fails. It is hereby dismissed with costs.

B/V.R.B. Revision dismissed.

A.I.R. 1954 ALL. 201 (Vol. 41, C.N. 111)

(LUCKNOW BENCH)

RANDHIR SINGH J.

Jai Dayal and another, Appellants v. State.

Criminal Appeal No. 118 of 1953, D/- 4-9-1953, from order of Addl. Sessions J., Unnao, D/- 11-2-1953.

Criminal P. C. (1898), Ss. 233, 234 and 235 — Three offences of same kind committed by same accused at short intervals on three different sets of people — They are not part of same transaction — They can, however, be tried in single trial under S. 234 — Charges, however, should be separate and not composite.

All offences which constitute the cause or effect, or which are the principal or subsidiary of the main act, may be taken to be parts of the same transaction, but similar offences even though committed by the same set of persons and at short intervals or within close proximity of time will not, however, constitute a single transaction. (Para 4)

Accused who had collected on a road waylaid and looted a batch of students passing that way. After some interval another batch of students which was passing, was also waylaid and looted. Again after some interval still another batch which was passing, was similarly waylaid and looted. The accused were charged under S. 395, Penal Code. All the three incidents were tried as single offence. The charge was a composite one. The accused pleaded that the single trial was illegal and that they were prejudiced :

Held that the three offences committed on three different sets of persons could not be said to be part of the same transaction and that they were evidently different transactions. AIR 1953 All 448, Ref. (Para 4)

Held further, that under S. 234 there could be a single trial for all these three offences. (Para 5)

Held however, that there should have been three separate charges, and a composite charge for three offences prejudiced the accused in their trial. (Retrial ordered.) (Para 5)

Anno: Criminal P. C., S. 233, N. 3, 4; S. 234 N. 6, 8; S. 235 N. 2, 13.

A. N. Mulla, for Appellants; M. L. Trivedi, for Addl. Govt. Advocate, for the State.

CASE REFERRED:

(A) ('53) AIR 1953 All 448: 1953 Cri LJ 1003 (Pr 4)

JUDGMENT: This appeal and the four connected appeals Nos. 120, 121, 122 and 123 have been heard together as they arise out of the same judgment. The appellants in Appeal No. 118 are represented by counsel while the remaining four appeals are jail appeals.

(2) It appears that 15 or 16 persons collected together on the Bangarmau Mallawan Road on 28-8-1951, at about 7 p. m. There was a volley-ball match at Mallawan and students who had gone to attend the match were returning after the match in the evening. Radha Ballabh passed the place where these persons sat at about 7 p. m. and he was attacked and his property was looted. He was then made to sit at a distance. Some ten minutes after, another batch of two students happened to pass and they were also likewise waylaid and looted. Some fifteen minutes after this second occurrence a third batch of students consisting of four persons, Mahendra Pratap, Shushil Kumar, Brijendra Kumar and Birendra Singh passed on the way. These persons were also attacked and looted.

An alarm was then raised and the miscreants decamped. Reports were lodged by some of these students and the police took up the investigation and finally sent up the six appellants for trial under S. 395, Penal Code. Some stolen property was also recovered from the possession of some of the appellants and they were also tried under S. 412 of the Indian Penal Code. The case was ultimately committed to the Court of Session and the Additional Sessions Judge found all of them guilty and sentenced them to various terms of imprisonment. They have now come up in appeal.

(3) The first point which has been canvassed on behalf of the appellants is that the trial of all the appellants for the three offences alleged to have been committed was illegal and in support of this contention reliance has been placed on the provisions of S. 233, Criminal P. C. which enjoins that there shall be a separate charge and a separate trial for each separate offence.

(4) The learned counsel for the appellants has tried to show that the case as tried could not be covered by the various exceptions contained in Ss. 234 to 239, Criminal P. C. inasmuch as the three offences alleged to have been committed by the appellants were not part of the same transaction, and even if they were separate offences, a composite charge was not proper and the appellants were prejudiced in their trial on account of this impropriety in the framing of the charge.

The learned counsel has cited a recent ruling of this Court in which dacoities committed at eight different houses in the course of a single night by the same set of persons were not held to be part of the same transaction, vide —' Raj Narain v. The State', AIR 1953 All 448 (A).

In the present case the three sets of persons who were looted were looted at short intervals, and, according to the prosecution, by the same set of persons. There was nothing in common in the three occurrences except in so far that the culprits were actuated by a motive for loot or robbery. That by itself, however, cannot be any criterion for deciding whether certain acts do or do not make a single transaction.

All offences which constitute the cause or effect, or which are the principal or subsidiary of the main act, may be taken to be parts of the same transaction, but similar offences even though committed by the same set of persons and at short intervals or within close proximity of time will not, however, constitute a single transaction. In the present case the three offences committed on three different sets of persons could not, therefore, be said to be part of the same transaction. They are evidently different transactions.

(5) Section 234, Criminal P. C., however, permits one trial of three different offences provided they were committed within a space of 12 months and by the same persons. In the present case no doubt there were no more than three offences and were all committed within a space of 12 months and there could, therefore, be a single trial for all these offences.

The learned Magistrate, however, framed one single charge in respect of all the different occurrences or offences and the appellants were tried on this charge in the Court of the Additional Sessions Judge. It has been argued on behalf of the appellants that the framing of a composite charge in respect of all the three offences greatly prejudiced the case of the appellants inasmuch as there were a number of persons who were prosecuted for these offences and evidence of identification was also produced. If the charges had been separate, the trying Judge could have been made to focus his attention on the evidence in respect of each of the three separate charges while deciding whether that particular charge had or had not been established against the appellants. This could not, however, be done if there was a composite charge in respect of all the three separate offences.

It appears to me that there is some force in the contention raised by the learned counsel for the appellants and it seems that the appellants' case may have been prejudiced on account of the composite charge framed by the learned Sessions Judge.

(6) In view of what I have said above, it is not necessary to go into the merits of the case. The only course open to me is to set aside the conviction and sentences and order a retrial.

(7) These appeals are, therefore, allowed and the conviction and sentences of the appellants are set aside. The case shall go back to the Court below with the direction that separate charges should be framed in respect of all the three separate offences and the case be tried according to law.

B/R.G.D. Retrial ordered.

A.I.R. 1954 ALL. 202 (Vol. 41, C.N. 112)

RAGHUBAR DAYAL AND V. BHARGAVA JJ.

Radha Krishan Applicant v. Compensation Officer, Meja, Allahabad and others, Opposite Party.

Civil Misc. Writ No. 904 of 1953 D/- 21-10-1953.

(a) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 69 — U. P. Zamindari Abolition and Land Reforms Rules, 1952, R. 84 — Discretion of Compensation Officer.

Section 69 gives a discretion to the Compensation Officer to deposit or not to deposit the amount of compensation payable to a limited owner. Such discretion, how-

ever, is subject to any general directions, the State Government may give. In the absence of any directions issued by the State Government, it cannot be said that the Compensation Officer did not act in accordance with the directions given by the State Government. Rule 84 of the Rules made under the Act does not give any directions with respect to this matter. The provisions of the rule come into effect only after the Compensation Officer has exercised his discretion and has come to the conclusion that the amount should be deposited in a bank.

(Para 4)

(b) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 69, 72 — U. P. Zamindari Abolition and Land Reforms Rules, 1952, Rule 84 — Rules cannot take away what is given by Act — (Interpretation of Statutes).

Rules made under the rule making provision of an Act cannot take away what is given by the Act. Rules are for the purpose of carrying out the provisions of the Act. Hence, the contention that the State Government can make a rule, namely R. 84, taking away the discretion of the Compensation Officer under S. 69 cannot be accepted.

(Para 5)

Anno: C. P. C. Pre N 7, Pt. 29.

S. C. Khare for Applicant.

RAGHUBAR DAYAL J.:

This is a writ application under Art. 226 of the Constitution in the following circumstances:

(2) Sheo Garul Ram Pande died in 1925, leaving a widow and two daughters-in-law, one of whom is still alive. The zamindari property, which he left and over which the names of his widow, opposite-party 2, and daughter-in-law, opposite party 3, stand mutated, vested in the Government in view of the provisions of the U. P. Zamindari Abolition and Land Reforms Act, 1951. Compensation for the zamindari property is to be paid. Under the orders of the Compensation Commissioner the amount is to be paid to opposite-parties 2 and 3. The applicant claims to be one of the sons of one of the two daughters left by Sheo Ram Pande. He at first filed an objection before the Compensation Officer to the payment of compensation to the opposite-parties 2 and 3. The objection was rejected by the Compensation Officer relying on the instructions issued from the Compensation Commissioner. He now files this application.

(3) It is contended for the applicant that under S. 69, Zamindari Abolition Act the Compensation Officer is to deposit the compensation payable to a limited owner with such authority or bank as he prescribed, notwithstanding anything contained in any law but subject to any general directions that the State Government may give. The State Government made rules under this Act and R. 84 lays down that the compensation due to a limited owner shall be deposited for or on behalf of such person with the Imperial Bank of India and in the districts where there are no branches of the said bank with any scheduled bank as may be selected by the Compensation Commissioner. It is submitted that in view of this rule the Compensation Officer is bound to deposit the amount with one of the banks mentioned in R. 84 and that it is not open to him to pay the amount direct to the person entitled to it.

(4) We do not agree with this contention. We are of opinion that S. 69, Zamindari Abolition and Land Reforms Act gives a discretion to the Compensation Officer to deposit or not to deposit the amount and that such discretion is to be subject to any general directions that the State Government might give. We have not been referred to any general directions of the State Government to the effect that this discretion under S. 69 has been taken away and that the Compensation Officer must deposit the amount with the prescribed bank or authority in every case. If the objection of the applicant has been rejected by the Compensation Officer relying on the directions of the Compensation Commissioner which directions are not said to be against any directions given by any other superior authority on behalf of the State, it cannot be said that the Compensation Officer did not act in accordance with the directions given by the State Government. Rule 84 does not give any directions with respect to this matter. It simply prescribes the bank or authority with which the compensation money was to be deposited. The provisions of the rule will come into effect only after the Compensation Officer has exercised his discretion and has come to the conclusion that the amount should be deposited in a bank. He has no discretion in selecting the authority or the bank with which to deposit the amount, as he had no such discretion. Rule 84 had to provide the bank or authority with which the amount was to be deposited.

(5) It is further contended that under S. 72, Zamindari Abolition and Land Reforms Act the State Government was quite free to make any rule for the purpose of carrying into effect the provisions of this Chapter and that the State Government could, therefore, make a rule taking away the discretion of the Compensation Officer under S. 69, Zamindari Abolition and Land Reforms Act. Rules cannot take away what is given by the Act. Rules are for the purpose of carrying out the provisions of the Act. The discretion of the Compensation Officer, as already mentioned, was subject to any general directions which the State Government might issue and, as mentioned above, no such general directions had been issued, and R. 84 does not contemplate to give any such general directions with respect to the deposit of compensation money.

(6) In view of the above we reject this application.

B/V.S.B. Application rejected.

A.I.R. 1954 ALL. 203 (Vol. 41, C.N. 113)

(LUCKNOW BENCH)

RANDHIR SINGH J.

S. P. Trivedi, Applicant v. State.

Criminal Revn. No. 122 of 1953, D/- 8-9-1953, against order of Sess. J., Sitapur, D/- 16-4-1953.

Criminal P. C. (1898), S. 139A — "Shall enquire into the matter".

Notice issued to 'A' to show cause why encroachment by him on public road should not be removed — 'A' when he appeared before Magistrate not asked as to whether he denied the right of way — 'A' filing written statement in which he put his defence stating that the piece of land on which he had made the construction did not form part of the public road and that

he had purchased that piece of land by means of a sale deed — Magistrate after repelling 'A's' contention, and holding that he did not deny the existence of the public way and as such it was not necessary to ask the parties to get the matter decided by the Civil Court, examining the evidence produced on behalf of complainant and ordering the removal of the obstruction — Held that the written statement showed that 'A' disputed the existence of the right of way on the portion of land on which he had made the construction and that therefore the Magistrate should have complied with the provisions of S. 139A and have come to a finding that there was no reliable evidence before proceeding with the inquiry and making the order for removal of the construction; & that he not having so done the order passed by him could not be upheld.

(Paras 4, 5)

Anno. Cr. P. C., S. 139A N. 4.

S. D. Misra, for Applicant. M. L. Trivedi for Addl. Govt. Advocate for the State.

ORDER : This is an application in revision against the order of a Magistrate, first class, in proceedings under S. 133, Criminal P. C.

(2) A complaint was made by the District Engineer, P. W. D. Sitapur, on 11-7-1952, against the applicant to the effect that the applicant had encroached upon a piece of land 62.5 feet in length and 15 feet in breadth which formed part of the public road. It was prayed that the encroachment be ordered to be removed by the Court.

(3) Notice was issued to the applicant to show cause why the obstruction should not be removed. The applicant appeared before the Magistrate and pleaded that the piece of land on which he had made the construction did not form part of the public road and that he had purchased that piece of land by means of a sale deed. Some documents were also produced by him in support of his contention that the land belonged to him and was not a part of the public way. The learned Magistrate repelled the contention of the applicant on the ground that he did not deny the existence of the public way and as such it was not necessary to ask the parties to get the matter decided by the Civil Court. He examined the evidence produced on behalf of the complainant and ordered the removal of the obstruction. The applicant then went in revision to the Sessions Judge who in a brief order dismissed the application for revision.

(4) The main point canvassed on behalf of the applicant in this case is that it was imperative for the Magistrate to have come to a finding whether or not there was reliable evidence in support of the contention put forward by the applicant and to have proceeded according to the provisions of S. 139A. It appears to me that the learned Magistrate overlooked the provisions of S. 139A, Criminal P. C., which enjoins that if an order has been made under S. 133, Criminal P. C. it is the duty of the Magistrate to inquire of the person against whom the notice has been issued if he denied the existence of any right in respect of the way etc.

In the present case no inquiry was made from the applicant but he filed a written statement in which he had put up his defence. A perusal of the written statement filed shows that the applicant disputed the existence of the right of way on the portion of land on which he had made the construction. In the face of this written statement the learned Magistrate should have come to a finding after an inquiry if in his opinion there was reliable evidence in support of the denial of the existence of a right of way on the land in dispute, and if he came to the conclusion that there was reliable evidence, he could not proceed with the hearing of the case further, and the only order which he could pass in those circumstances was to stay the proceedings until the matter of the existence of such a right had been decided by a competent civil Court. If only he came to the conclusion that there was no reliable evidence he was entitled to proceed with the inquiry and subsequent order.

(5) In the present case the learned Magistrate did not comply with the provisions of S. 139A, Criminal P. C. and the order passed by him cannot be upheld. The order passed by the Sub-Divisional Magistrate, Sitapur, dated 1-4-1953 is therefore set aside. The case will go back to the Magistrate who will rehear the case keeping in view the provisions of S. 139 A, Criminal P. C. and proceed according to law.

C/M.K.S. Order accordingly.

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* A.I.R. 1954 ALL. 204 (Vol. 41, C.N. 114) (FULL BENCH)

MALIK C. J., DESAI AND MUKERJI JJ.

Raja Ram, Applicant v. State.

Criminal Revn. No. 1379 of 1951, D/- 22-9-1953; against judgment of S. J., Etawah, D/- 11-8-1951.

(a) Prevention of Corruption Act (1947), S. 3, Proviso — Scope.

(Brij Mohan Lall J. in the Order of Reference) : Ordinarily an officer below the rank of a Deputy Superintendent of Police is not to conduct the investigation. But an exception is possible if sanctioned by a Magistrate of the first class. (Para 3)

(b) Prevention of Corruption Act (1947), S. 6 — Taking cognizance before sanction.

(Brij Mohan Lall J. in the Order of Reference) : Sanction prescribed by S. 6 was given on 25-8-1950. On 6-6-50 the case was brought to the notice of the District Magistrate that the accused was demanding illegal gratification and the District Magistrate ordered another Magistrate to lay a trap.

Held that this did not amount to taking cognizance of any case. As a matter of fact, no case was pending at that time. Nor had any offence been committed till then. The District Magistrate really directed his subordinate to find out whether the offence was going to be committed or not.

(Para 4)

†*(c) Prevention of Corruption Act (1947), S. 7 — Duty of Court to inform accused of his right under. ILR (1950) All 382: AIR 1951 All 546: 52 Cri LJ 197, Overruled.

The failure of a Court to inform an accused of the right conferred by S. 7 of the Act is not an irregularity and it is not obligatory on the part of the Court trying a case under S. 161 or 165, I. P. C. to inform the accused that he can appear as a witness for himself. The right may be of great value to the accused and the Court may have to be jealous to safeguard it, but it does not follow that the Court must

inform the accused that he possesses it. It is for him to know what his rights are and to seek to exercise them; the Court's duty is to see that he has every reasonable opportunity of exercising them and nothing more. AIR 1953 All 110, Approved.
(Para 15)

(d) Civil P. C. (1908), Pre. — English decisions.

It would be quite wrong for Indian Courts to follow the English practice without knowing the circumstances which gave rise to, and justified, the practice.
(Para 14)

Anno: C. P. C., Pre. N. 16.

B. S. Darbari, B. C. Saxena and D. S. Chaudhry, for Applicant; D. G. A., for the State.

CASES REFERRED:

(A) ('51) AIR 1951 All 546: 1949 All LJ 441: 52 Cri LJ 197 (Prs 5, 10, 15)
(B) (1927) 20 Cr App 150 (Prs 7, 14)
(C) (1908) 1 Cr App 132 (Pr 14)
(D) (1909) 2 Cr App 194 (Pr 14)
(E) (1922) 17 Cr App 18: 128 LT 28 (Pr 14)
(F) (1922) 17 Cr App 40 (Pr 14)
(G) ('53) AIR 1953 All 110: 1953 Cri LJ 340 (Pr 15)

ORDER OF REFERENCE

BRIJ MOHAN LALL J.:

This is an application in revision by one Raja Ram who has been convicted by a learned Magistrate, 1st Class, of Etawah of an offence punishable under S. 161, I. P. C. and sentenced to pay a fine of Rs. 200 and in default to undergo three months' simple imprisonment. The conviction and sentence were upheld on appeal by the learned Sessions Judge of Mainpuri.

(2) The applicant was a civil Court Amin to whom a certain decree was sent for execution. The findings of fact recorded by the Courts below which have to be accepted as correct in these proceedings are that the applicant demanded illegal gratification from the 'pairokar' of the decree-holder in order to execute the decree speedily. The 'pairokar' approached the District Magistrate who ordered another Magistrate to lay a trap for the applicant. A trap was laid and currency notes worth Rs. 15/- of which the numbers had previously been noted by the Magistrate, were delivered to the applicant. He was caught red-handed in possession of those currency notes.

(3) Three points have been argued by Mr. Darbari before me. It is pointed out, in the first place, that the investigation was conducted by a police officer of Sub-Inspector's grade and that this is forbidden by the proviso to S. 3, Prevention of Corruption Act (2 of 1947). This proviso runs as follows:

"Provided that a police officer below the rank of Deputy Superintendent of Police shall not investigate any such offence without the order of a Magistrate of the first class or make any arrest therefor without a warrant."

It will appear from the language of this proviso that ordinarily an officer below the rank of a Deputy Superintendent of Police is not to conduct the investigation in a case like the present. But an exception is possible if sanctioned by a Magistrate of the first class. In the present case Mr. Kansal, a Magistrate of the first class, had given such a permission. It is Ex. P-15. Thus, the first argument has no force.

(4) The second argument advanced by Mr. Darbari is that the sanction prescribed by S. 6 of the said Act was given on 25-8-50, but the District Magistrate had taken cognizance of the case as early as on 6-6-50. What had happened on 6-6-50 was that it was brought to the notice of the District Magistrate that the applicant was demanding illegal gratification. The District Magistrate had ordered another Magistrate to lay a trap. This did not amount of taking cognizance of any case. As a matter of fact, no case was pending at that time. Nor had any offence been committed till then. The District Magistrate really directed his subordinate to find out whether the offence was going to be committed or not. His action did not amount to taking cognizance of any case against the applicant. In the circumstances I find no force in the second argument as well.

(5) Mr. Darbari's next argument which forms the main contention in the case is that it was obligatory on the part of the Magistrate trying the case to inform the applicant that by reason of S. 7 of the Act the applicant could appear as a witness for himself and that failure on the part of the Magistrate to perform this duty amounted to an illegality which vitiates the conviction. I have given due consideration to this argument. I find nothing in the Prevention of Corruption Act which can be construed as laying down a duty on the Magistrate to inform an accused of this right of his. Everyone is presumed to know the law. A litigant coming before a Court of law must know what his rights are and it is open to him to exercise such rights or not. A Magistrate is ordinarily under no obligation to point out to a litigant what his rights are.

Wherever it was intended by law that a Magistrate or a Court should draw the attention of a litigant towards any particular matter it has expressly said so. For instance, S. 371(2)(c) lays down that

"When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred."

Had the matter been 'res integra', I would have had no hesitation in holding that there has been no illegality in the present case. But Mr. Darbari has drawn my attention to a Division Bench ruling reported in — 'Rex v. Promod Chandra,' AIR 1951 All 546 (A).

In that case Mootham and Wanchoo JJ. held:

"The failure of a Court to inform an accused person charged with an offence punishable under S. 161 or 165, Penal Code of his right to give evidence on oath in disproof of the charge is a grave irregularity the effect of which must depend upon whether in the opinion of the appellate Court, it has in fact occasioned a failure of justice. If it has the trial is bad, and the Court will consider whether the circumstances are such that a retrial should be ordered;"

(6) If there really exists a duty on the Court to inform the accused of his right, the failure on the part of the Court to perform this duty will certainly prejudice the accused. In a case of illegal gratification the transaction is settled

at a time when none besides the giver and the taker is present. The giver always enters the witness-box. If the failure of the taker to enter the witness-box results from an omission on the part of the Court to perform its duty there will certainly be a prejudice to the accused. He can always say that evidence available to him which could be brought on the record is not available to the Court because of the Court's default.

But, if the Court is under no such obligation, the accused cannot make a grievance of the fact that he was not told about his right. I am, therefore, of the opinion that if it is held that there was such a duty on the Court the applicant has undoubtedly been prejudiced. The net result therefore is that if the law is as laid down in this authority, the least that should be done in the present case is to order a retrial. But with utmost respect to the learned Judges who were responsible for this ruling, I am of the opinion that the view taken by them needs reconsideration.

(7) Reliance has been placed by the learned Judges on the case of — 'R. v. Villars', (1927) 20 Cr. App. 150 (B). The report of this case is not available in the Library and I have not had the advantage of reading what is laid down in this case. This ruling seems to have interpreted the provisions of the Criminal Evidence Act of 1890 (61 and 62 Victoria C 36), I have gone through that statute. In the first place, it has no application in India and secondly there is nothing in it which casts such a duty on the Court.

(8) In the circumstances I direct that this case be laid before the Hon'ble the Chief Justice so that he may consider the desirability of forming a Full Bench for the decision of the following question, viz.

"Whether it is obligatory on the part of a Court trying a case under S. 161 or 165, I. P. C. to inform the accused that he can appear as a witness for himself."

(Opinion of the Full Bench)

DESAI J.:

(9) Our brother Brij Mohan Lall has referred the following question to us for answer:

"Whether it is obligatory on the part of the Court trying a case under S. 161 or 165, I. P. C. to inform the accused that he can appear as a witness for himself."

(10) The applicant, who was a civil Court Amin, was prosecuted for the offence of S. 161, I. P. C. before a first class Magistrate; it was alleged that he had accepted an illegal gratification from a party for the purpose of executing his decree speedily. He was convicted by the Magistrate and his appeal was dismissed. He went up in revision which was heard by our learned brother. One of the pleas taken up before him was that it was obligatory upon the Magistrate to inform him that he could appear as a witness for himself and that his failure to do so amounted to an illegality which vitiated his conviction.

Our learned brother was of the view that if the Magistrate's failure to inform the applicant of his right to give evidence for himself in defence was an illegality, it caused a prejudice to him, but he was doubtful if it was at all an illegality. He doubted the correctness of the decision by a Bench of this Court in — 'AIR 1951 All 546 (A)'. He was, therefore, obliged to refer the question to a Full Bench for its decision.

(11) Under the Code of Criminal Procedure an accused cannot be administered oath and has no right to offer himself as a witness and cannot be compelled to give evidence. But by the Prevention of Corruption Act, 1947, a person charged with an offence punishable under S. 161 or S. 165, Penal Code has been given the right to offer himself as a witness. The relevant provision is S. 7 which lays down that such a person

"shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him" (or any person charged together with him at the same trial).

It further lays down that he shall not be called as a witness except on his own request and that

"his failure to give evidence shall not be made the subject of any comment by the prosecution or give rise to any presumption against himself."

There is no provision in the Act expressly making it obligatory upon the Court trying such an accused to inform him of his right to give evidence on oath in disproof of the charges made against him. This fact was conceded by Shri B. S. Darbari. He contended that the obligation is implied and has relied upon certain English decision. He contended that because the Prevention of Corruption Act is a recent enactment making a departure from the old law which did not permit an accused person's giving evidence on oath in defence and because in many cases he would be the best witness to rebut the presumption, which the Court is bound to draw under S. 4 of the Act, he must be informed of his right.

Though the provision that a person accused of an offence punishable under S. 161 or S. 165, I. P. C. shall be a competent witness for defence is new, it is not without precedents. Section 340(2) of the Code is to the effect that

"any person against whom proceedings are instituted—under S. 107 or under Chap. X..... may offer himself as a witness in such proceedings."

So far as I am aware, such a person is never informed by any Magistrate that he may offer himself as a witness in the proceedings and it has never been decided by any Court that his failure to do so is even an irregularity. The Code of Criminal Procedure is exhaustive, and where the Legislature has intended that a Court must inform an accused that he possesses a certain right, it has said so expressly.

Besides S. 371 (3) cited by our learned brother, there was S. 447 which made it incumbent upon a Magistrate, if he found that the case was or might be held to be a case which ought to be tried under the provisions of Chap. XXXIII, to inform the accused of his rights under the Chapter. Section 534 expressly laid down that no conviction could be set aside on the ground of a Magistrate's failure to comply with that provision. There was thus not only an express provision requiring a Magistrate to inform an accused that he possessed a certain right but also the Legislature did not intend that his failure to inform him vitiated the conviction.

Chapter XXXIII and S. 534 have been omitted by Act 17 of 1949 but that has no effect on the reasoning.

When the Legislature did not make it obligatory upon a Magistrate to inform a person who is being proceeded against under S. 107 of the Code or under Chap. X etc. that he may offer himself as a witness in the case, there is no reason to think that it intended that the Court should inform a person who is being proceeded against under S. 161 or S. 165, I. P. C. that he may offer himself as a witness in the case. A Court's duty, in the absence of a statutory provision, is to interpret and administer the law and not to make people acquainted with it. Therefore, the fact that the Act is a recent one and makes a departure from the old law is no justification for our laying down that a Court is bound to inform the person who is being tried under S. 161, or S. 165, I. P. C. that he can give evidence for the defence. A Court may inform him of his right, but is certainly not bound to do so.

Reference to the presumption that can be drawn in such a case under S. 4, Prevention of Corruption Act does not seem to be of any relevance; that presumption simply provides proof of an ingredient of the offence of S. 161 or S. 165. If the offence is proved against an accused, the onus of rebuttal is always upon him and merely because the onus of rebuttal of the presumption drawn under S. 4 is upon the accused, it cannot be contended that he must be informed of his right to offer evidence for himself. The presumption supplies the proof of the motive or intention for doing the act of accepting or attempting to obtain any gratification.

But the offence of S. 161 or S. 165, I. P. C. is not the only offence in which a relevant fact is within the exclusive knowledge of the accused; whenever there is a question of an intention or motive for doing a criminal act, the matter is within the exclusive knowledge of the person accused of doing it and he is the best person to give evidence about it. I do not understand why, merely because only in a case under S. 161 or S. 165 the accused is given the right to offer himself as a witness, it should be laid down that the Court is under a duty to inform him of the right.

(12) Not only do I see nothing in the Prevention of Corruption Act which would imply an obligation upon the Court to inform an accused of the right conferred by S. 7, but also I find reasons to the contrary. The Act has not affected the provisions of the Code regarding the trial of cases. An offence under S. 161 or S. 165 is triable as a warrant case and the procedure laid down in Chap. XXI of the Code is to be followed. The duties of the Magistrate to the accused are mentioned in S. 256; he has to ask him whether he wishes to cross-examine any prosecution witness, to recall such of them as he wishes to cross-examine and to call upon him to enter upon his defence. The case may be committed to a Court of Session for trial and the Sessions Judge's duties to the accused are mentioned in S. 289; he has to ask him whether he means to adduce evidence and to call upon him to enter upon his defence.

Under S. 342 the Court is required to question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. Whatever a person accused of an offence under S. 161 or S. 165 can say on oath under S. 7 of the Act, can be said by him during his examination under S. 342. The answers given by him may be taken into consideration as laid down in S. 342 (2). When it is for an accused himself to ascertain his rights and the law simply requires the Court to examine him so that he may have an opportunity of saying whatever he wants to say, it means that the Court is not obliged to inform him that he has a right to offer himself as a witness in defence.

(13) The provisions of S. 7 of the Act have been borrowed from the Criminal Evidence Act, 1898, (61 and 62 Vic. Ch. 36) S. 1, which reads as follows:

> "Every person charged with an offence, ... shall be a competent witness for the defence at every stage of the proceedings. Provided as follows:
>
> (a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:
>
> (b) The failure of any person charged with an offence to give evidence shall not be made the subject of any comment by the prosecution:
>
> .....
>
> (h) Nothing in this Act shall affect the provisions of S. 18, Indictable Offences Act, 1848, or any right of the persons charged to make a statement without being sworn."

It is said that there grew a practice in England of the Court's informing the accused of the right thus conferred. The Criminal Justice Act, 1925 (15 George the 5th Ch. 86) S. 12, which replaced S. 18, Indictable Offences Act, 1848 (11 and 12 Vic. c. 42), provided that the examining Justices after the last prosecution witness was examined should read the charge to the accused and "inform him that he has the right to call witnesses and, if he so desires, to give evidence on his own behalf." In spite of the practice and in spite of the statutory provision making it obligatory upon the examining Justices to inform the accused of his right to give evidence on his own behalf, the Indian Legislature, when it enacted the Prevention of Corruption Act, did not enact any provision making it obligatory upon the Court to inform the accused of the right conferred by S. 7 and did not amend the abovementioned provisions of the Code of Criminal Procedure. One can legitimately infer that the Legislature did not intend to cast an obligation upon the Court to inform the accused of the right conferred by S. 7.

(14) The English rule, as stated in Archbold's Criminal Pleading, Evidence and Practice, 29 Edn., p. 466, is that the accused ought to be distinctly told by the Court of trial that he has a right to give evidence on his own behalf and that its failure to so inform him does not of itself necessarily invalidate the trial though where it is unsatisfactory in other respects, the failure may lead to the conviction being quashed. Roscoe writes in his Criminal Evidence, 16th edn. p. 278, that the usual practice is that the Judge informs an undefended person of his rights of defence. According to Phipson on Evidence, 9th edn., p. 473, the Court ought in all cases to inform the accused of his right to give evidence and if it fails to do so,

the conviction will be quashed, unless so substantial miscarriage of justice has occurred.

In — 'R. v. Mack', (1908) 1 Cr. App. 132 (C), Mack, who was undefended and had pleaded alibi, was not invited by the Court to go into the box and the Court of Criminal Appeal refused to quash his conviction. The Lord Chief Justice observed that a person who sets up an alibi and does not go into the box cannot ordinarily expect a retrial. In — 'R. v. Warren', (1909) 2 Cr. App. 194 (D), there were two flaws in the trial; one was that the Court did not sufficiently direct the jury about the evidence of an accomplice and the other, that it did not tell the accused that he had a right to give evidence. So his conviction was quashed. Channell J., however, added that he was not sure that he would have quashed the conviction on the second ground alone.

In — 'R. v. Yeldham', (1922) 17 Cr. App. 18 (E), Mrs. Yeldham who was tried along with her husband on a charge of murder, was not given an opportunity of giving evidence or of making a statement and was never told of her rights, though she was unrepresented, still her conviction was not quashed. In argument her counsel said that where an accused is not informed of his right the omission does not necessarily invalidate the trial (sic). The Lord Chief Justice took into account the facts that she had seen her husband go into the witness-box and give evidence, that she had made a long and detailed statement which was read by the Court to the jury and that there was no suggestion in her notice of appeal that she had suffered in any way though not having given evidence. He observed that the satisfactory course is that an accused's attention should be pointed to his right to give evidence or make a statement.

In — 'R. v. Graham', (1922) 17 Cr. App. 40 (F) the conviction was quashed because the summing up was not so full and so explicit as it should have been and the accused was not given an opportunity of calling witnesses. The conviction was not quashed merely because he was not told that he could give evidence himself. In — '(1927) 20 Cr. App. 150 (B)' not only was the accused not told that he could give evidence if he wished, but also immediately the evidence for the prosecution was finished the Court proceeded to sum up the case to the jury and did not inform the accused even of his right to make an unsworn statement. The evidence against the accused, so far from being overwhelming, was such that he had a real defence which the jury should have considered. In the circumstances, the conviction was quashed. Thus even in England, though there was the practice of the Court's informing the accused of his right to give evidence for himself, his conviction was not quashed merely on account of its failure and the failure was not taken to amount to miscarriage of justice in every case.

The practice of English Courts does not bind Indian Courts. It is not known how the practice grew in England; Shri B. S. Darbari threw no light on the subject and my researches did not yield much fruit. It would be quite wrong for Indian Courts to follow the English practice without knowing the circumstances which gave rise to, and justified, the practice. For all one knows, some of those circumstances may not exist in India. It is stated by Roscoe in his Criminal Evidence at p. 277 that the fundamental principle of the Common Law being that all evidence must be sworn, the Court discouraged any statement by an accused and that any statement which he made was for centuries theoretically a nullity. Though the Indictable Offences Act, 1848, S. 18 and the Summary Jurisdiction Act 1848 (11 and 12 Vic. c. 43) S. 14 required the Courts to hear the accused and examine the witnesses produced by him the Common Law rule which treated unsworn statement as a nullity might have had something to do with the practice.

The Criminal Evidence Act of 1898 prohibited the prosecution from commenting upon the accused's failure to go into the witness-box and give evidence for himself but permitted the Court to comment upon it; see Roscoe p. 278, Phipson p. 473 and Archbold p. 467. Section 7 (b), Prevention of Corruption Act lays down that no presumption can be drawn adverse to an accused from his failure to go into the witness box, but there was no such law in England. It may be that because an adverse presumption could be drawn in England, the practice grew of the Court's informing the accused of his right. There an accused would suffer on account of his failure but not in India.

(15) Coming to Indian authorities, two have been brought to our notice; — 'Rex v. Promod Chandra (A)' and — 'Mahfuz Ali v. State', AIR 1953 All 110 (G). In the former case our brother Mootham (with whom Wanchoo J. agreed) said on page 548 that a Court's failure to inform an accused person charged with an offence punishable under S. 161 or S. 165, Penal Code of his right to give evidence on oath "is a grave irregularity", the effect of which must depend on whether, in the opinion of the appellate Court, it has in fact occasioned a failure of justice. Our learned brother regarded the right "of the highest value to an innocent person" and "one which the Court must be jealous to safeguard."

The right may be of great value to the accused and the Court may have to be jealous to safeguard it, but with great respect, I do not see how it follows that the Court must inform the accused that he possesses it. It is for him to know what his rights are and to seek to exercise them; the Court's duty is to see that he has every reasonable opportunity of exercising them and nothing more. In my opinion, the failure of a Court to inform an accused of the right conferred by S. 7 of the Act is not an irregularity and on this point we must overrule the above decision. In the other case, decided by one of us, it was stated that S. 7 does not cast any obligation on the Court to invite the accused to offer himself as a witness. I respectfully agree with that view. My answer to the question is "No".

(16) MALIK C. J.: I agree.

(17) MUKERJI J.: I agree and have nothing to add.

A/D.H.Z. Answer in the negative.

A.I.R. 1954 ALLAHABAD 209 (Vol. 41, C.N. 115)

(LUCKNOW BENCH)

RANDHIR SINGH J.

Mohammad Mehdi, Applicant v. Husain Ali and another, Opposite Party.

Appln. No. 132 of 1952, D/- 18-8-1953, to revise order of Dist. J., Lucknow, D/- 5-5-1952.

Civil P. C. (1908), O. 47, R. 7 and S. 115 — Appeal against order granting review.

Review not sought on the ground that there was an error apparent on the face of the record, or in any event not granted on that ground but allowed on ground that there was sufficient cause. Opposite party's appeal based on ground of incorrectness of the order and also on the ground of limitation urged by him in the first Court is competent — Consequently order by appellate Court being one passed with jurisdiction will not be interfered with in revision only for the reasons that it is erroneous on facts or law and that there is no second appeal. (Paras 3, 5)

Anno: C. P. C., O. 47, R. 7 N. 4; S. 115 N. 13.

M. M. Gaur, for Applicant; B. K. Mathur, for Opposite Party No. 1.

CASE REFERRED:

(A) ('49) AIR 1949 PC 156: ILR (1950) Mad 1 (PC) (Pr 4)

ORDER: This is an application in revision against an order of the District Judge, Lucknow, in appeal against an order of the Munsif, Haveli, Lucknow, allowing an application for amendment of a written statement in a suit which was pending before him.

(2) It appears that a suit for rendition of accounts was instituted by the plaintiff-opposite party against the detendant-applicant in the Court of the Munsif North. It was alleged on behalf of the plaintiff that a sum of Rs. 10,000/- had been paid to the defendants towards establishing a mill which was to be run by them jointly. The defendants filed a written statement denying the receipt of Rs. 10,000/- from the plaintiff. Subsequently after a witness had been examined the defendants made an application for amendment of their written statement. This application for amendment was considered by the learned Munsif and was rejected. In rejecting the application for amendment, the learned Munsif also made certain observations about the conduct of the defendants. The defendants then moved the District Judge for transfer of the case from the file of the Munsif North to some other Court as the Munsif had expressed a certain opinion adverse to the defendants.

This application for transfer was granted. The learned District Judge while granting the application for transfer of the case from the file of the Munsif North to Munsif Haveli also remarked that the observations made by the learned Munsif North to the effect that the defendants could in spite of the rejection of their application for amendment lead evidence to prove certain payments were incorrect. The defendants then made an application to the Munsif Haveli after the case had been transferred to him for a review of the order of his predecessor rejecting the application for amendment. This application for review was allowed by the Munsif Haveli and the amendments sought were incorporated in the written statement. The plaintiff aggrieved by this order of the Munsif went in appeal and the District Judge allowed the appeal. The defendants have now come up in revision against the order of the District Judge.

(3) The first point which has been urged on behalf of the applicants is that the order passed by the Munsif Haveli allowing the amendment was an order passed under his inherent powers and not under O. 47, R. 1, C. P. C. A perusal of the application made by the defendants for review of the order passed by the Munsif dated 29-9-1951, clearly shows that the application was made under O. 47, R. 1, C. P. C. and the order allowing the review was also passed under O. 47, R. 1, C. P. C. No doubt the defendants had in their application for review mentioned S. 151, C. P. C. as an alternative section under which the application could be granted but the Munsif has nowhere in his order made any mention that the order which he passed was under S. 151 or under any other provision. It would evidently mean that the order was passed under O. 47, R. 1, C. P. C.

If the application for review was allowed, an appeal is provided for under O. 47, Rr. 4 and 7. It has been argued on behalf of the applicant that the Munsif Haveli allowed the application for review as there was an error apparent on the face of the record. I am unable to agree with this contention. An error apparent on the face of the record would only be an error which can be detected without looking into the evidence or other matters. In the present case, the original order of the Munsif North rejecting the application for amendment was clear. He held that the defendants had no right to make an application for amendment at the stage at which it was made and he rejected the application. It was only towards the end of his order that he made an observation that although the amendment was being disallowed, the defendants could still lead evidence to prove certain payments. This observation would not nullify the effect of his previous order rejecting the application and it would be difficult to argue that this subsequent observation meant that the Munsif wanted to allow the application. It would, therefore, mean that the review of the order passed by the Munsif North was not sought on the ground that there was an error apparent on the face of the record, or in any event it was not granted on this ground. The Munsif allowed the application for review as he thought there was sufficient cause. The plaintiff was, therefore, entitled to go in appeal against this order. Besides the ground of the incorrectness of the order it was also pleaded on behalf of the plaintiff that the application for review had not been made within limitation. This point was raised by him in the Court of the Munsif Haveli as also before the District Judge. It is, therefore, clear that the appeal against this order of the Munsif was rightly filed before the District Judge.

(4) The grounds on which an application for revision under S. 115, C. P. C. can be maintained have been set out and discussed in a recent ruling of the Privy Council in — 'N. S. Venkatagiri Ayyangar v. The Hindu Religious Endowments Board, Madras', AIR 1949 PC 156 (A). It has been held that an applicant in revision cannot challenge the correctness of the findings of a Court. It is only if it is found that the Court has exercised a jurisdiction not vested in it or has failed to exercise a jurisdiction vested in it or where there has been an error of procedure that the order can be revised under S. 115, C. P. C. Even if the judgment of a Court is erroneous on questions of fact or law and no appeal is provided, this circumstance will not justify or permit an application for revision under S. 115, C. P. C.

(5) Learned counsel for the applicant has not been able to make out any ground on which an application under S. 115, C. P. C. can be maintained. The District Judge was competent to hear the appeal and it is not open to this Court to examine the merits of the judgment on facts or law. The application for revision has, therefore, no force and is dismissed with costs to the opposite party.

C/M.K.S. Application dismissed.

A.I.R. 1954 ALLAHABAD 210 (Vol. 41, C.N. 116)

RAGHUBAR DAYAL AND V. BHARGAVA JJ.

Chhedi Lal and others, Applicants v. Director of Election for Local Bodies, Govt. of Uttar Pradesh and others, Opposite Parties.

Civil Misc. Writ No. 903 of 1953, D/- 20-10-1953.

(a) Municipalities — U. P. Town Areas (Preparation and Revision of Electoral Rolls) Order (1953), Paragraph 8, Proviso — Validity — If takes away right to vote.

The condition laying down that a fee of Rs. 10 should be charged from the applicants who want their names to be included in the Electoral Roll and whose names were not included in the Assembly Rolls or in the rolls for the area relatable to the Ward is not beyond the powers of the State Government. There is no question of taking away the right which the applicants may possess by virtue of their possessing the various qualifications which make a certain person eligible, for getting his name entered as a voter in the Electoral Roll. The right exists and is not taken away by the aforesaid proviso, which lays down just a procedure to be adopted for getting the omission of the name rectified. (Para 2)

(b) Municipalities — U. P. Town Areas (Preparation and Revision of Electoral Rolls) Order (1953), Para. 13 (3).

Under para. 13 (3), it is for the Director to determine whether there is a case of large scale omission and whether he should issue the necessary direction for the amendment, and where the Director used that direction in refusing to amend the list, it is not open for the High Court to speculate whether the Director exercised the discretion fairly or not and interfere with it. (Para 3)

S. C. Khare, for Applicants.

RAGHUBAR DAYAL J.:

This is an application under Art. 226 of the Constitution praying for the issue of directions to the opposite-parties to amend the Electoral Rolls by including the names of the applicants and other persons who are eligible to be on the list of voters in the Electoral Rolls of the Town Area of Zafrabad for the year 1953 and also to issue a direction to consider the claims and objections of the applicants without demanding a fee of Rs. 10.

In brief, the grievance of the applicants, who are 8 in number, is that they are qualified to be voters for the Town Area elections of the Town Area, Zafrabad, that their names were omitted from the Electoral Rolls published in September 1953, that when they wanted to file claims for the inclusion of their names they were asked to deposit Rs. 10 along with each claim and that the rule requiring the deposit of such an amount, in fact, took away the right of voting which they possessed. The relevant provision is proviso to para. 8, U. P. Town Areas (Preparation and Revision of Electoral Rolls) Order, 1953. Paragraph 8, Cl. (c) provides that any person whose name is not included in the Assembly rolls at all or in the rolls for the area relatable to the ward but who is otherwise qualified to be registered in the electoral roll of that ward may apply to the Electoral Registration Officer for the inclusion of his name in the electoral roll of the ward; and the aforesaid proviso is:

> "Provided that an application under Cl. (c) above shall, except as otherwise directed by the Director, not be entertained unless it is accompanied by a fee of Rs. 10 in respect of each entry which shall in no case be refunded."

(2) It is not alleged that the Director of Elections, Local Bodies, issued directions that this fee be not realised. What is contended is that this proviso was beyond the rule making power of the Local Government. These rules were made by the Local Government in exercise of the powers conferred by S. 12 (H), U. P. Municipalities Act, 1916, as applied to elections under the U. P. Town Areas Act, 1914, by a certain notification. Section 12 (H), U. P. Municipalities Act as applied to Town Areas provides in its clause (d), sub-cl. (ii), that the State Government may, by order, make provisions in respect of the inclusion in the Electoral Rolls of the name of any person whose name is not so included in the Assembly Rolls and who is otherwise qualified to be registered in the Electoral Roll of the Ward. There is no restriction on the nature of provisions which the State Government may by order make in connection with the inclusion of names in the Electoral Rolls. We, therefore, do not consider that the condition laying down that a fee of Rs. 10 should be charged from the applicants who want their names to be included in the Electoral Roll and whose names were not included in the Assembly Rolls or in the rolls for the area relatable to the Ward is beyond the powers of the State Government. There is no question of taking away the right which the applicants may possess by virtue of their possessing the various qualifications which make a certain person eligible for getting his name entered as a voter in the Electoral Roll. The right exists and is not taken away by the aforesaid proviso. which lays down just a procedure to be adopted for getting the omission of the name rectified.

(3) The second objection of the applicants is that according to them the names of about 500 to 600 persons have been omitted from the electoral roll and that therefore the Director had a duty cast on him under para. 13 (3), U. P. Town Areas (Preparation and Revision of Electoral Rolls) Order, 1953, to amend the Electoral Roll. The aforesaid para. 13 (3) provides that where there has been any large scale omission of persons of any area entitled to be registered in the Assembly rolls from being included in such rolls, the Director may direct the Electoral Registration Officer of every ward in which any portion of such area is included to amend in such manner as he may direct the Electoral Roll of the ward by including therein the name of every such person about whom he be satisfied that he would have been registered on the Assembly roll or rolls for the area in case there had not been that large scale omission. Firstly it appears to us that it is for the Director to determine whether there is a case of any large scale omission of persons of any area and then whether he should issue the necessary direction for the amendment or just leave it for the persons omitted from the Electoral Roll to move the Electoral Registration Officer for the inclusion of their names. In the present case

we find that a representation had been made to the Director and he rejected it. The application or the affidavit accompanying it does not disclose the reasons given by the Director for the rejection of their representation. The Director did exercise his right in disposing of the representation made to him and, therefore, no case exists for our directing him to exercise that right again. In the absence of the reasons it is not open for us to speculate whether he exercised that discretion fairly or not and whether a discretion which can be said not to have been exercised fairly could be interfered with by us on this petition or not.

(4) In view of the above we reject this application.

B/H.G.P. Application rejected.

A.I.R. 1954 ALLAHABAD 211 (Vol. 41, C.N. 117)

MOOTHAM AND SAPRU JJ.

Kishan, Defendant-Appellant v. Hafiz Sir Mohd. Ahmad Said Khan, Plaintiff-Respondent.

Letters Patent Appeal No. 42 of 1945, D/- 21-10-1953, from judgment of Bennet J., in S. A. No. 97 of 1944, D/- 22-4-1945.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 91 — Object of S. 91 and its interpretation — Charge levied on weaver for weaving in house — Charge amounts to cess and cannot be levied.

The object of the Legislature in enacting S. 91 appears to have been to curtail the right of the zamindar to levy customary dues or services of a vague and uncertain nature. In interpreting this section it should be remembered that no suit can lie for the recovery of any cess which is levied in accordance with village custom unless it is sanctioned by the provisions of sub-section (2) of the section. (Para 7)

The question whether a particular demand is a cess or ground rent has to be determined on the circumstances and evidence of each case, though the name by which the demand is generally known and is recorded in the wajib-ul-arz furnishes 'prima facie' evidence of the purpose for which the demand is levied and is helpful in determining the true nature of the demand. Thus, where a charge is levied only for weaving work done inside the house in the abadi it cannot be looked upon as analogous to parjaut or ground rent. Having regard to all the surrounding circumstances and evidence, the levy is in the nature of a cess, and, therefore, cannot be levied by any zamindar in view of the provisions of section 91, the State Government not having sanctioned its collection under that section. AIR 1944 All 29 (FB); 14 Bom 526 (PC), Rel. on. (Paras 8, 9)

Bhagwan Das Gupta, for Appellant; M. H. Beg, for Respondent.

CASES REFERRED:

(A) ('44) AIR 1944 All 29: 1943 All LJ 586 (FB) (Prs 6, 9)

(B) ('90) 14 Bom 526: 17 Ind App 103 (PC) (Pr 8)

SAPRU J.:

This appeal is directed against the judgment and decree dated the 22nd March, 1945 of a learned single Judge of this Court.

(2) The facts which have given rise to this appeal may be stated shortly. The plaintiff-respondent is the proprietor of a village of which the defendant is a resident. The defendant-appellant is a weaver, being a Koli by caste. The plaintiff-respondent's case was that he was entitled to recover from the defendant-appellant a sum of Rs. 3/- as parjaut for a period of three years. The case as put forward by the plaintiff-respondent was that the defendant-appellant, being a Koli by caste, was carrying on weaving work in the village, that in connection with that work there exists a garha or a loom inside his house and that in accordance with the custom as recorded in the wajib-ul-arz the plaintiff-respondent was entitled to claim a sum of Re. 1/- a year as parjaut for the use of the land on which the garha exists.

(3) The suit was resisted by the defendant-appellant on the ground that he was a riaya from the time of his ancestors, that he had been carrying on weaving business in his residential house, that the riayas in the village pay no rent for their houses and that he was not liable to pay any ground rent, the charge claimed being in the nature of a cess.

(4) The learned Munsif decreed the plaintiff-respondent's claim holding that the defendant-appellant was liable to pay it as ground rent, the charge being not a cess or a tax on profession. Aggrieved by the judgment and decree of the learned Munsif, the defendant-appellant went in appeal to the lower appellate court. The view taken by the learned Additional Civil Judge was different from that which had appealed to the learned Munsif. He came to the conclusion that the plaintiff-respondent was not entitled to the relief claimed by him as the sum claimed was in the nature of a cess which could not be levied by any zamindar in view of the provisions of section 91 of the U. P. Tenancy Act, the Provincial Government not having sanctioned its collection under that section. The learned single Judge who heard the appeal did not find himself in agreement with the learned Additional Civil Judge. He allowed the appeal, reversed the decree of the lower appellate court and decreed the plaintiff-respondent's suit. As the question was an important one, he gave the defendant-appellant leave to appeal under the Letters Patent as it was then called.

(5) The question for consideration is whether the amount in dispute was in the nature of a cess and was therefore in view of the provisions of section 91 of the U. P. Tenancy Act not recoverable from the defendant-appellant. From the wajib-ul-arz it would appear that no rent is payable by ryots for their houses in the abadi. It, however, states that a Koli, i.e., a weaver is liable to pay Re. 1/- annually as parjaut for each garha, i.e., loom, used by him. This garha has been found by the learned Additional Civil Judge to be inside the defendant-appellant's house. From the evidence of Kamta Prasad, general attorney of the plaintiff, it is clear that this amount was annually chargeable only from those Kolis who did weaving work. It was dependent upon their doing weaving work. If no weaving work was done, it was not charged at all. On these facts, the learned Additional Civil Judge came to the finding that the amount levied was not in the nature of a rent for land but a tax on profession. Being a tax on profession, he looked

upon it as a cess and held that the suit was barred by section 91 of the U. P. Tenancy Act.

(6) There can be no doubt that the wajib-ul-arz furnishes prima facie evidence, as held in the Full Bench case of this Court, — 'Allah Dia v. Akhtar Ali', AIR 1944 All 29 (A), that the charge is in the nature of what is described in it, i.e., a parjaut or something in the nature of a ground rent. The learned single Judge has, however, taken the view that where a site in the village abadi is occupied by a ryot for the purpose of a profession other than that of agriculture, he is liable to pay some due to the zamindar which is not a cess, provided such payment is warranted by the wajib-ul-arz and that this due is not house rent. It is in the nature of a ground rent for utilising the site for the purpose of his profession. The matter, however, is capable of being looked at from a different angle. It is conceded by learned counsel for the plaintiff-respondent that if it cannot be looked upon as a ground rent, it is not a legal charge.

Whatever be the description of the charge in the wajib-ul-arz we fail to understand how in the face of the clear findings in this case that the charge is levied only for weaving work done inside the house it can be looked upon as analogous to parjaut or ground rent. It is clear that it is only chargeable from those Kolis who actually weave. If they do not weave, they would not be charged at all. Section 91 of the U. P. Tenancy Act is in the following terms:

> "Notwithstanding that a cess had been recorded under the provisions of section 56 or section 86 of the United Provinces Land Revenue Act, 1901, no cess which is levied in accordance with village custom, other than a payment in kind which forms part of the rent payable for a holding shall, after such date as may be notified by the Provincial Government in the official Gazette, be recoverable in any civil or revenue Court unless such cess is sanctioned under the provisions of sub-section (2)."

(7) In interpreting this section it must be remembered that no suit can lie for the recovery of any cess which is levied in accordance with village custom unless it is sanctioned by the provisions of sub-section (2) of section 91. Sub-section (2) authorises the Provincial Government to sanction the collection of any cess levied on account of any bazar or fair and impose on the collection of such cess any such condition regarding conservancy, police or other establishments as it thinks fit. Obviously the levy in this case is not of the character contemplated by sub-section (2). The object of the Legislature in enacting this section appears to have been to curtail the right of the zamindar to levy customary dues or services of a vague and uncertain nature.

(8) The levy is in the nature of a cess or tax prohibited by law. Reference on this part of the case may be made to — 'Sri Kalyanraiji v. Mofussil Co. Ltd.', 14 Bom 526 (PC) (B). In that case the question was whether the Managing Proprietor of the temple in Broach was entitled to a lago, or perquisite, or tax, of two annas per bale on all cotton brought in and exported from Broach; inasmuch as Act XIX of 1844 had abolished all taxes and cesses of every kind on trades and professions, under whatsoever name, levied within the Presidency of Bombay, and not forming part of the land revenue, it was held by their Lordships of the Privy Council of the Judicial Committee that the tax was in the nature of a cess not leviable by the Managing Proprietor of the temple. On the analogy of that case we think it correct to hold that the payment was not on the facts established in this case in the nature of a compensation for land but for carrying on the work of the profession of a weaver inside the defendant-appellant's house and, as such, not leviable.

(9) It may be mentioned that according to the view taken by the Full Bench in AIR 1944 All 29 (A), the question whether a particular demand is a cess or ground rent has to be determined on the circumstances and evidence of each case, though the name by which the the demand is generally known and is recorded in the wajib-ul-arz furnishes 'prima facie' evidence of the purpose for which the demand is levied and is helpful in determining the true nature of the demand. We have shown that in this case, having regard to all the surrounding circumstances and evidence, the levy was in the nature of a cess.

(10) The result is that we allow this appeal, set aside the judgment and decree of the learned single Judge and restore that of the lower appellate Court. In the circumstances of the case, we make no order as to costs.

B/V.S.B. Appeal allowed.

A.I.R. 1954 ALLAHABAD 212 (Vol. 41, C.N. 118)

(LUCKNOW BENCH)

CHATURVEDI J.

Ram Raj Rai and others, Applicants v. Chedi Rai and others, Opposite-party.

Application No. 119 of 1947, D/- 8-9-1953, to revise order of Dist. Judge, Barabanki D/- 25-1-1947.

Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 12 — Application — Nature of.

Under S. 12 only an application for redemption of a subsisting mortgage can lie. It is impossible to treat the application for redemption as a suit for recovery of possession of the property. AIR 1946 All. 400, Distinguished.

(Para 3)

B. K. Dhaon, for Applicants; P. N. Bhat, for Opposite Party No. 4.

CASES REFERRED:—

(A) ('46) AIR 1946 All 400: 227 Ind Cas 541 (Pr 3)

(B) ('50) AIR 1950 All 60: 1949 All LJ 423 (Pr 4)

(C) ('52) AIR 1952 All 300 (Pr 4)

ORDER: This revision arises out of proceedings under the U. P. Agriculturists' Relief Act. The applicants applied for redemption of an old mortgage under S. 12, Agriculturists' Relief Act. It was not disputed that the applicants were the legal representatives of the original mortgagor and that the opposite parties were the legal representatives of the original mortgagee. The mortgage sought to be redeemed was executed some time before the year 1882.

(2) The claim for redemption was resisted on the ground that there was no subsisting mortgage and that whatever the rights which the mortgagor had in the mortgaged property were lost to him by lapse of time. In other words, it was pleaded

that the right of redemption was lost by reason of Art. 148, Limitation Act, which provides 60 years for redemption of mortgages. Both the Courts have held that the mortgage sought to be redeemed came into existence more than 60 years back & consequently the mortgagor had lost his right to redeem the property. In this revision this finding of the two Courts below has been challenged.

(3) It is not disputed before me that more than 60 years have elapsed from the date on which the mortgage sought to be redeemed was executed. It was argued that under Art. 148 the mortgagor has a right to recover possession of the mortgaged property and 60 years' limitation should be reckoned from the date when the right to recover possession accrued, that is to say from the date when the mortgage debt was discharged. In other words, it is urged before me that the application under S. 12, Agriculturists' Relief Act is in substance, an application to recover possession of the property which was the subject-matter of a mortgage which had been paid off. Reliance has been placed upon a Bench decision of this Court in — 'Ram Prasad v. Bishambhar Singh', AIR 1946 All 400 (A). The facts of that case were different. In that case the mortgagor had brought a suit to recover possession of the mortgaged property; and it was not, in reality, a suit for redemption of the mortgage but it was treated to be a suit for possession against a trespasser.

Section 12, Agriculturists' Relief Act contemplates that the application filed thereunder must be an application for redemption of a particular subsisting mortgage. Not only that, the section makes it further clear that the benefit of S. 12 will be given only before the suit for redemption is barred. It is, therefore, manifest that under S. 12, Agriculturists' Relief Act only an application for redemption of a subsisting mortgage can lie. It is impossible to treat the application for redemption as a suit for recovery of possession of the property. The case referred to above does not apply to proceedings under S. 12, Agriculturists' Relief Act.

(4) This view is in consonance with the view expressed by Seth J. in — 'Shafiq Uddin v. Lakhan Singh', AIR 1950 All 60 (B). The following observation may be quoted with advantage:

> "The plaintiff-applicant having chosen to put forward a claim for redemption cannot say, in order to save limitation, that the claim was not a claim for redemption but a claim for possession. The same view was held in — 'Ram Palhawan v. Ummedi Ahir', AIR 1952 All 300 (C). There is a clear and marked distinction between a suit for redemption and a suit for possession of property against a trespasser who had continued to remain in possession after the mortgage was discharged."

(5) The two Courts below were justified in throwing out the application under S. 12, U. P. Agriculturists' Relief Act as time-barred. The revision is without substance. It is accordingly dismissed with costs.

B/V.R.B. Revision dismissed.

A.I.R. 1954 ALLAHABAD 213 (Vol. 41, C.N. 119)

MUKERJI J.

Mohd. Sarifullah, Applicant v. State through Yakub Khan and others, Accused-Opposite Party.

Criminal Revn. No. 997 of 1952, D/- 22-9-1953, against Order of Dist. Magistrate, Agra, D/- 3-7-1952.

Criminal P. C. (1898) Ss. 503 and 506 — Scope.

An order of a District Magistrate directing the examination of a witness on commission in a case pending before a magistrate subordinate to him, on the application of a party to the case and without any reference by that Magistrate under S. 506 is without jurisdiction. (Para 7)

Section 503 does not empower either the Presidency Magistrate, or the District Magistrate or the Court of Session or even a High Court to make an order in respect of an enquiry, trial or other proceedings not pending before them or to make an order on the application of any party to a case which is not pending before those courts. District Magistrate can only make an order for the examination of a witness on commission if he was approached by the Magistrate who is seized of the case, under S. 506. (Para 5)

Anno: Cr. P. C. S. 503 N. 1; S. 506 N. 1

Jagdish Sahai, for Applicant; Shambhu Prasad, for Opposite Party.

CASE REFERRED:

(A) ('36) AIR 1936 Sind 221: 38 Cri LJ 127 (Pr 6)

ORDER: This is an application in revision against the order of the District Magistrate of Agra whereby the District Magistrate purported to act under the provisions of section 503 of the Code of Criminal Procedure and directed a Magistrate subordinate to him to examine one Srimati Rohilla Khatoon on commission.

(2) It appears that a case was pending in the court of Sri Goswami, a Magistrate of the 1st class, Agra, in which five persons stood charged with offences under sections 366 and 342 I. P. C. The accused were charged with having abducted Srimati Rohilla Khatoon. The complainant in this case was Sharifullah Khan, the husband of Srimati Rohilla Khatoon.

(3) Sharifullah Khan applied to the court for summoning Rohilla Khatoon and examining her as a witness in the case on behalf of the prosecution. This application was opposed and Yaqoob Khan, one of the accused in the case who made an application to the Magistrate under section 506 of the Code of Criminal Procedure for examining Srimati Rohilla Khatoon on commission. This application under section 506 Cr. P. C. was moved on the 12th of June, 1952. The learned Magistrate fixed the 21st of June, 1952 for orders. On the 21st of June, 1952 when the application came up before the learned Magistrate it was not pressed and consequently the learned Magistrate refrained from making any orders on the application.

It appears that on the same date viz. the 21st of June, 1952, Yaqoob Khan moved the District Magistrate to order Sri Goswami, who was trying the case in which Rohilla Khatoon was to appear as a witness, not to summon her as a witness but to examine her on commission. The learned District Magistrate allowed this application on the 3rd of July, 1952. He has given no reasons why he chose to direct the examination of Rohilla Khatoon on commission. All that the District Magistrate has said in his order is that it appeared to him desirable in the cir-

cumstances of the case that she may be examined on commission.

(4) This revision, as I have said earlier, is directed against the order of the District Magistrate directing the examination of Rohilla Khatoon on commission. It has been contended by Sri Jagdish Sahai that the District Magistrate could only make an order for the examination of a witness on commission if he was approached by the Magistrate, who was seized of the case, under section 506 Cr. P. C. There is no doubt that under section 506 Cr. P. C. a Magistrate other than a Presidency Magistrate or a District Magistrate before whom a witness is to be examined during the course of an enquiry or trial or any other proceedings may, if he thinks proper, apply to the District Magistrate that in his view the witness should be examined on commission and the District Magistrate may then either issue a commission in the manner provided for or may reject the application of the Magistrate.

(5) Under section 503 a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court can during the course of an enquiry, trial or other proceedings direct that a witness may be examined on commission and when such examination is considered necessary then a commission may be issued to any District Magistrate of the 1st Class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness. This section does not empower either the Presidency Magistrate, or the District Magistrate or the Court of Session or even a High Court to make an order in respect of an enquiry, trial or other proceedings not pending before them or to make an order on the application of any party to a case which is not pending before those courts. If the scope of section 503 Cr. P. C. were otherwise, viz. if under the provisions of this section the courts mentioned therein had the power to act either 'suo motu' or on being approached by any party then the language used would have been different. Instead of the words "it appears" the words would in my opinion, have been "it is made to appear."

There is yet another reason why I am of the opinion that the courts mentioned in section 503 Cr. P. C. have no power to act in respect of cases which are not pending before them because the legislature could not have given a choice of so many courts to a litigant to approach in respect of obtaining the same relief. A Magistrate before whom the question of issuing a commission may arise has not been given any choice of making a reference to either a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court. In such a case the reference has to be made to the District Magistrate alone. In my judgment a reading of the two sections, viz. sections 503 and 506 Cr. P. C., makes it clear that it was never the intention of the legislature to confer any such powers on a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court as is contended for by the opposite parties in this application.

(6) A similar view appears to have been taken by the Judicial Commissioner's Court of Sind. The latest decision of that Court is in — 'Saleh v. Emperor', reported in AIR 1936 Sind 221 (A).

(7) From what I have stated above, I am of the opinion that the order made by the District Magistrate of Agra on the 3rd of July, 1952 directing the examination of Rohilla Khatoon on commission was an order made without jurisdiction and must be set aside. This order of mine does not however preclude the learned trying Magistrate from considering the question whether or not Rohilla Khatoon should be examined on commission in the event of his being properly moved.

(8) I accordingly allow this application and set aside the order of the District Magistrate of Agra dated the 3rd of July, 1952.

B/K.S.B. Application allowed.

A.I.R. 1954 ALLAHABAD 214 (Vol. 41, C.N. 120)

BRIJ MOHAN LALL J.

Raja Ram, Applicant v. State.

Criminal Ref. No. 75 of 1953, D/- 8-10-1953.

(a) U. P. Excise Act (4 of 1910), S. 60 (a) — Possession of illicit liquor — Proof — (Evidence Act (1872), Ss. 5, 32 and 45).

Prosecution under S. 60 (a) for possession of illicit liquor on report of Excise Sub-Inspector — Fact in issue was whether liquor possessed was of illicit origin — Excise Sub-Inspector not examined to prove fact in issue but Excise Clerk proving report of Excise Sub-Inspector who had been transferred — In absence of circumstances which would make report admissible under S. 32 or some other section of Evidence Act it could not take place of sworn statement of maker thereof to prove that liquor was of illicit origin — Accused deprived of the advantage of tasting accuracy of Sub-Inspector's opinion by question in cross-examination — Conviction of accused under S. 60 (a) held was not proper.

(Para 3)

Anno: Evidence Act, S. 5 N. 2; S. 32 N. 15; S. 45 N. 1.

(b) Criminal P. C. (1898), S. 439 — Retrial, when to be ordered.

In a revision against a conviction, a retrial will not be ordered where the prosecution has failed to produce the right type of evidence to sustain a conviction so as to allow them an opportunity to fill up the lacuna in evidence.

(Para 4)

Anno: Criminal P. C., S. 439 N. 25a.

ORDER: This is a reference by the learned Additional Sessions Judge of Shahjahanpur under section 438 of the Code of Criminal Procedure recommending that the accused Raja Ram's conviction recorded by a learned magistrate of that district be set aside and that the case against him be directed to be retried.

(2) The accused was tried under section 60(a) of the Excise Act. The charge brought against him was that a bottle containing illicit liquor was recovered from his house. At the time of arguments before the learned magistrate it was pointed out by the accused's counsel that there was no evidence to prove that the liquor found in the bottle was illicit. The learned Magistrate thereupon ordered that the Excise Inspector who had made the recovery should be examined. It was found on enquiry that the Excise Inspector had been transferred to Tehri. There was, however, on the record a report by the said Excise Inspector. The learned magistrate examined the Excise Clerk who said that he identified the signature & the writing of the Excise Inspector and that he was present when the Excise Inspector

examined the strength of the liquor with the help of a hydrometer. Beyond this he was unable to say. He could not say that the strength discovered by the Excise Inspector was that of illicit liquor.

(3) The learned judge has pointed out that this evidence was not sufficient to prove that the liquor was of illicit origin. I am in entire agreement with the learned judge. If the fact in issue before the learned magistrate had been as to whether or not the report was in the handwriting of the Excise Inspector, it was not necessary to examine him personally. Any one familiar with his handwriting could prove this fact. The Excise Clerk, who had presumably seen him writing on previous occasions, could certainly prove the handwriting. But the fact in issue in the present case was not whether the report was in the Excise Inspector's handwriting but whether the liquor was of illicit origin. It was the Excise Inspector himself, and not the Excise Clerk, who could swear that the liquor possessed forbidden strength. That was a fact about which the Excise Inspector alone could depose.

Moreover, his evidence could not be of much use unless it was tested in cross-examination. By keeping the Excise Inspector out of the witness box and by using his report against the accused the learned magistrate deprived the accused of the advantage of testing the accuracy of the Excise Inspector's opinion by questions in cross-examination. The report itself, in the absence of circumstances which would make it admissible under section 32 or some other section of the Evidence Act, could not take the place of the sworn statement of the maker thereof. In the present case I am of opinion that Tehri was not such a far distant place that the Excise Inspector could not conveniently come from there to Shahjahanpur to give evidence. In the circumstances the prosecution failed to prove that the liquor was illicit.

(4) While I have agreed with the learned Sessions Judge so far, I cannot accept his suggestion that the case should be sent back for retrial. There is no reason why the prosecution should be given a fresh opportunity to fill up the lacuna in evidence. If it failed to produce the right type of evidence, it should suffer the consequences thereof.

(5) The reference is accepted in part. The conviction and sentence are set aside. The fine, if recovered, shall be refunded.

C/K.S.B. Conviction & sentence set aside.

A.I.R. 1954 ALLAHABAD 215 (Vol. 41, C.N. 121)

AGARWALA J.

Jai Prakash and others, Appellants v. Bishambhar Das and others, Respondents.

Second Appeal No. 10 of 1949, D/- 23-9-1953, from order of 2nd Civil Judge, Muzaffarnagar, D/- 30-8-1948.

(a) Civil P. C. (1908), S. 11 — Matter not in issue.

Suit for demolition of construction on portion of land — No issue regarding ownership of entire land raised — Subsequent suit for demolition of construction on another portion of land — Matter in issue being whether entire land was joint land of plaintiff and defendant — Decision in previous suit held did not operate as 'res judicata'. 5 Ind Cas 278 (All.), Explained. (Para 4)

Anno: C. P. C., S. 11 N. 12 Pt. 1.

(b) Civil P. C. (1908), S. 11 — What operates as 'res judicata.'

It is the decision of the matter in the previous suit which operates as 'res judicata' and not the reasoning or the basis of the decision. (Para 4)

Anno: C. P. C., S. 11 N. 2 Pt. 14.

(c) Evidence Act (1872), S. 114 — Open piece of land used for common purposes — Presumption.

When a certain piece of open land is surrounded on all sides by houses and the open piece of land is used for common purposes, e.g. on the occasion of marriages, deaths and other festivities and also used for passage, a presumption may reasonably be drawn that the open piece of land is either the joint property of the owners of the houses surrounding it in the same way as they own the sites of their houses, or if they be not the owners of the sites, that that land has been left for their own use by the owners thereof and that the owners of the houses have rights over the land in the nature of easements. The presumption is no doubt rebuttable. (Para 5)

Anno: Evidence Act, S. 114 N. 40.

Vishwa Mitra, for Appellants; B. Dayal, for Respondents.

CASES REFERRED:

(A) ('10) 5 Ind Cas 278 (All) (Pr 4)
(B) ('01) 24 All 112: 1901 All WN 177 (Pr 4)

JUDGMENT: This is a plaintiffs' appeal arising out of a suit for demolition of constructions and for an injunction. The dispute in the case relates to an open piece of land surrounded on all sides by houses. The defendants have constructed a room on a portion of the said open piece of land and it is more or less in front of, but not attached to, their houses. It is marked ABCD in the map which has been made part of the decree in the case. There are two outlets from the common court-yard, one to the north-west and the other to the south-east. On the south-east and south-west sides of this court-yard are the houses of the defendants. On the north-west and south are the houses of different people. The houses of the plaintiffs are to the north-east.

The case for the plaintiffs was that the court-yard was generally a court-yard of the owners of the houses on all sides of it, and that the defendants had no right to make constructions in this open 'sehan' which was intended for various purposes, e.g., for use on the occasion of marriages, on festive occasions and for use as a passage. The plaintiffs, therefore, sued for the demolition of the constructions and for an injunction restraining the defendants from making any further constructions in the joint 'sehan'. The plaintiffs based their claim on joint ownership and in the alternative on easements. They also stated that in 1892 on another portion of this joint 'sehan' the defendants had similarly constructed a house and on the suit of the predecessor-in-interest of the plaintiffs the house was demolished on the ground that the entire land was joint 'sehan.'

They pleaded that the finding in the previous suit operated as 'res judicata' for the purposes of the present suit. The defence was that the 'sehan' was not the joint property of all the owners, that there was no right of easement, that the previous suit did not relate to this land and did not operate as 'res judicata', that the land of the entire 'sehan' has been taken on lease by the defendants from the Zamindar, Sri Liaqat Ali Khan, by means of a document dated 12-10-1945 and that the land on which the constructions in dispute had been made later in front of the defendants' house, belongs to them and since it did not lie in front of the plaintiffs' house, the plaintiffs had no cause of action for the suit. Certain other pleas were also raised with which we are not concerned in this appeal.

The learned Munsif held that the plaintiffs failed to prove that they were joint owners of the land in suit, or that the land in suit was the joint 'sehan' of the parties or that the matter in dispute now was decided in the previous suit and was 'res judicata'. He further held that the plaintiffs had merely a right of passage, but the right of passage had not been obstructed by the construction in dispute. He, therefore, decreed the suit of the plaintiffs in so far as he issued an injunction restraining the defendants from making any constructions to the north of the constructions already made by them, or to make any constructions so as to interfere with the plaintiffs' right of way to the north or south. But he dismissed the suit for demolition of the constructions already made. Against this decree the plaintiffs appealed to the lower appellate Court and the defendants filed a cross-objection.

(2) The lower appellate Court dismissed both the appeal and the cross-objection and affirmed the decree of the trial Court. The plaintiffs have now come up in appeal to this Court and the defendants have filed a cross-objection.

(3) Two main points have been urged before me by the learned counsel for the appellants. He has urged that the question whether the parties were joint owners of the entire 'sehan' was decided in the previous suit in 1892 and was 'res judicata'. He further urged that even if that were not so, there was a presumption, in the circumstances of the case, that the land was the joint 'sehan' of the parties unless the contrary was established and that since neither of the Courts below raised this presumption, the view taken by them could not be sustained. In the cross-objection learned counsel for the respondents has urged that since the plaintiffs failed to prove that they were either the sole owners or the joint owners of the land to the north of the disputed constructions the Courts below were not right in issuing an injunction restraining them from making any constructions in future. No objection has been raised before me on behalf of the defendants-respondents so far as the order restraining the defendants from making any constructions on the passage of the plaintiffs is concerned.

(4) So far as the question of 'res judicata' is concerned, I am satisfied that the plaintiff's plea is not sound. The dispute in the previous case of 1892 was no doubt between the ancestors of the present parties but it was in respect of constructions made by the ancestors of the defendants-respondents on another portion of the 'sehan' in dispute. In that case the plaintiffs pleaded that the land over which the constructions had been made was the joint land of the two parties. The owners of the other houses surrounding the 'sehan' were not impleaded in the suit. It was urged by the then plaintiffs that at one time the houses belonging to the parties formed one house owned by a joint Hindu family and that there was a partition between them in which the house now occupied by the plaintiffs was allotted to the plaintiffs' ancestors and that occupied by the defendants was allotted to the defendants' ancestors, but that there was no partition of the land in front and which continued, therefore, to be a joint land of the parties.

In defence it was pleaded in that suit that the plaintiffs were not the joint owners of the land in dispute and that the defendants alone were its owners. The issue framed in the case was — "Are the parties joint owners of the land in dispute or only the defendants?" The land in dispute undoubtedly referred to the land over which the defendants had made constructions. It did not refer to the entire 'sehan' land. Although no plaint of that suit is available, it does appear that at some subsequent state the plaintiffs had put forward the case that the entire 'sehan' was jointly owned by the owners of the adjoining houses. But this point was not even referred to by the trial Court in that case, and the trial Court based its opinion on an inspection of the locality and upon the situation of the 'sehan' and held that the land on which the defendants had built must have been appurtenant to the joint house of the parties and so was left joint after the partition between them.

This finding was affirmed by the appellate Court. The suit was, therefore, decreed on that basis. The dispute, therefore, in that case was with regard to the particular piece of land on which constructions had been built by the ancestors of the defendants. The issue was raised only with regard to that land and not with regard to the ownership of the entire 'sehan'. The matter now in dispute is whether the entire 'sehan' is a joint 'sehan' of the owners of the houses adjoining it and whether the defendants have a right to build over the portion of the land on which they have made constructions.

As already stated, neither the entire 'sehan' nor the portion of the land over which the disputed constructions have been built now by the defendants was in dispute in the previous case. The decision arrived at in the previous case cannot, therefore, be said to be 'res judicata' in the present case and the stray observations about the joint ownership of the entire 'sehan' would be of no avail to the plaintiffs in the present case, because those observations do not amount to 'res judicata'. Learned counsel for the appellants relied upon — 'Ram Krishna v. Shiam Chand', 5 Ind Cas 278 (All) (A).

The facts of that case were as follows: The lands in dispute in the previous suit and in the suit which was decided by Karamat Husain, J. were parts of the same area. In the previous suit, the plaintiff had claimed the ownership of the part then in dispute on the basis of a sale certificate in his favour. The Court gave him a decree for possession of that part, holding that he was the owner in possession of the whole area comprised in the sale

certificate. In the subsequent suit relating to the remaining portion of the same area, it was held by Karamat Husain J. that the finding in the previous suit was binding in the subsequent case.

The issue raised in the previous suit was not merely with regard to the portion of the entire area then in dispute but the issue was a wider one, namely, whether the plaintiff of that suit was the owner of the entire area on the basis of the sale certificate. Since the wider issue was decided in the previous suit, the decision of Karamat Husain J. that it operated as 'res judicata' was, with all respect, perfectly correct. In the course of the judgment, however, the learned Judge referred to a previous decision of this Court in — 'Chandi Prasad v. M. M. Mahendra Singh', 24 All 112 (B) and on the basis of that decision observed that:

> 'It is the identity of the title and not the identity of the subject-matter of the suit on which the doctrine of res judicata is based."

Learned counsel for the appellants has strongly relied upon this observation and has urged that the title of the plaintiffs is the joint ownership of the entire 'sehan' and since the decision in the previous case was given on the basis that the plaintiff was the joint owner of the entire 'sehan' the finding in the previous suit must be taken to conclude the matter in the present case. What had happened in — '24 All. 112 (B)' was that the right of the plaintiff to recover the arrears of revenue in respect of the entire village was decided in a previous litigation, though the previous litigation was to recover the revenue due on a particular khata.

In a subsequent suit which was for recovery of arrears of revenue in respect of another Khata of the same village it was held that the decision in the previous case, that the plaintiff was the assignee of the Government revenue of the entire village, operated as 'res judicata'. It was on these facts that it was observed by that Court that the title under which the plaintiff claimed the arrears of revenue, which had fallen due on one khata or another, was one and the same 'title', and that the identity of the subject-matter was not material whenever a plea of 'res judicata' had to be considered. By this the Court did not mean that in every case the title of the plaintiff has to be considered and not the subject-matter of the suit, irrespective of whether in the previous litigation the title was directly put in issue between the parties or not.

The question whether the title of the plaintiff covered the properties of both the suits was not put in issue in the previous litigation and the issue was confined to the particular subject-matter of the suit. The decision that the plaintiff was entitled to that particular subject-matter, though based upon the reasoning that the plaintiff had the title to the entire property including the property in dispute of the subsequent suit, could not be said to be the matter directly in issue between the parties in the previous suit. It is well settled that it is the decision of the matter in the previous suit which operates as 'res judicata' and not the reasoning or the basis of the decision that operates as 'res judicata', where the title of the plaintiff to the entire property covering the subject-matter of the previous suit and the subject-matter of the subsequent suit is not directly put in issue in the previous suit.

The decision in the previous suit in which observations are made with regard to the title of the plaintiff over the entire subject-matter of the two suits are merely reasonings for holding that the plaintiff was entitled to the subject-matter which was specifically in dispute in the previous suit. It is, therefore, not quite correct to say that it is the title to the property and not the subject-matter that is the basis of res judicata. What one has to decide is, whether in the words of S. 11, the matter in dispute in the subsequent suit was directly and substantially in issue in the previous suit and it was decided.

(5) The next point for consideration is whether the plaintiffs can be said to be entitled to claim that they are the joint owners of the 'sehan'. So far as the case for the defendants that they have taken a lease from Sri Liaqat Ali Khan is concerned, both the Courts below have concurrently held that it has not been established by the defendants that the land they have taken on lease is the same as is in dispute in the present case. Further, it has been pointed out to me that the land in dispute is in the town of Khatauli which is not an agricultural village and that it was not established that Liaqat Ali Khan was the owner of the site. If Liaqat Ali Khan was not the owner of the site, then the lease taken by the defendants from him would be of no avail to them. Learned counsel has not been able to show to me that there is any proof of ownership of the land by Liaqat Ali Khan.

It must, therefore, be assumed for the purposes of the present case that the defendants have established no title to the land over which the disputed constructions have been made by them. On the other hand, it must also be held that the plaintiffs have, apart from any presumption in their favour, which may arise on account of the situation of the land, failed to establish that they are joint owners of the land. But learned counsel for the appellants argues that, in the circumstances of the case, a presumption ought to be drawn in their favour that they are the owners of the land along with the other owners of the adjoining houses.

To my mind, when a certain piece of open land is surrounded on all sides by houses and the open piece of land is used for common purposes, e.g., on the occasion of marriages, deaths and other festivities and also used for passage, a presumption may reasonably be drawn that the open piece of land is either the joint property of the owners of the houses surrounding it in the same way as they own the sites of their houses, or if they be not the owners of the sites, that that land has been left for their own use by the owners thereof and that the owners of the houses have rights over the land in the nature of easements.

In either event it is not open to the owner of one house to make constructions over the open piece of land unless he establishes his title to make such constructions either by adverse possession or in some other way. The presumption in all such cases should be drawn in favour of the plaintiffs. The presumption is no doubt rebuttable, but unless rebutted it must be presumed that the defendants had no right to make constructions over the open 'sehan' land. In the present case, however, the learned Munsif found that the owners of

all the houses had been making constructions over the land in front of their houses for a large number of years without any objection by any party. He himself inspected the locality and found that the 'chabutra' had been built in front of their houses by the owners.

In that event it is quite possible that the owners of the houses were by general consent supposed to be the owners of the land in front of their houses. Therefore, in the present case, it cannot be said with any certainty whether the particular piece of land in dispute over which the disputed constructions have been made, and which is mostly in front of the defendants' house, is the property of all the owners or not. It is, therefore, difficult in the present case to interfere with the decision of the Courts below on this point.

(6) As regards the cross-objection it is enough to point out that the injunction has been issued in respect of the land to the north of the disputed constructions. The land to the north of the disputed constructions is not in front of the defendants' houses. They have, therefore, no right to build on it and the plaintiffs in front of whose house that land is situated have clearly a right to restrain the defendants from making constructions over the same. There is, therefore, no force either in the appeal or in the cross-objection, which are, accordingly, dismissed with costs.

(7) Leave for special appeal is refused.

B/V.R.B. Appeal and cross-objection dismissed.

A.I.R. 1954 ALLAHABAD 218 (Vol. 41, C.N. 122)

AGARWALA AND DESAI JJ.

M/s National Carbon Co. (India) Ltd., Plaintiff-Appellant v. Raj Kumar and another, Defendants-Respondents.

F. A. F. O. No. 261 of 1951, D/- 21-9-1953, from order of Dist. J., Saharanpur, D/- 24-5-1951.

(a) Civil P. C. (1908), O. 39, Rr. 1 and 2 — Conditions necessary for grant of interim injunction.

When an interim injunction is sought during the pendency of the suit what has to be seen is, first whether a 'prima facie' case has been made out by the plaintiff in respect of his claim, and secondly, whether the balance of convenience demands that the injunction should be issued. (Para 6)

Anno: Civil P. C., O. 39, R. 1 N. 3, Pts. 6 and 10; R. 2 N. 2, Pts. 3 and 5.

1953 Mulla: O. 39, R. 1, P. 1151 N. "Principles .....injunctions" (11 Points extra in N. 3 to O. 39, R. 1 in A.I.R. Com.).

1953 Mulla: O. 39, R. 1 P. 1158 N. "Principles .....contract" (9 Points extra in N. 2 to O. 39, R. 2 in A.I.R. Com.).

(b) Civil P. C. (1908), O. 39, R. 2 — Passing off action — Temporary injunction applied for — Mere fact that defendant undertakes to keep account would be no safeguard against possible injury to plaintiff's trade — (1881) 45 LT 54 and 3 Cal 417, Rel. on. (Para 8)

Anno: Civil P. C., O. 39, R. 2 N. 2 Pt. 4.

1953 Mulla: O. 39, R. 1 P. 1158 N. "Principles.. .....contract" (9 Points extra in N. 2 to O. 39, R. 2 in A.I.R. Com.).

V. D. Bhargava, for Appellant; B. L. Dikshit, for Respondents.

CASES REFERRED:

(A) (1881) 45 LT 54 (Pr 8)
(B) ('77-78) 3 Cal 417: 2 Cal LR 93 (Pr 9)

AGARWALA J.:

This is a plaintiff's appeal arising out of an order made on an application for the grant of an interim injunction. The plaintiff-appellant, a limited Company, is a manufacturer and seller of flash lights, dry cell batteries for use in flash lights and other articles. It carries on its business throughout India. It is the owner of the trade mark "Eveready" which is registered in the register of trade marks under Nos. 6727 and 6728. The "Eveready" flash lights which are in dispute in the present case have impressed on their bottom end caps the word "Eveready". The trade mark "Eveready" is in block capital letters arranged in a distinctive pyramidal form. There are five groups of distinctive parallel indentations each group comprising of three parallel lines running vertically on both sides of the trade mark. The said groups are spaced and arranged in a distinctive manner with the words "made in U. S. A." appearing underneath the lower group of indentations. The shell of flash lights has also its own scheme of colour and chromium plating.

(2) The defendants are the manufacturers of flash lights with the trade mark 'Lit Ready' embossed upon them and have placed them on the market for sale. The plaintiff's case is that the get-up of the defendants' flash light cases bears a close resemblance to the get-up of the plaintiff's flash light cases and that the ignorant and illiterate section of the public in India is very likely to be confused and the goods of the defendants may pass off as the goods of the plaintiff causing great injury to the plaintiff. The plaintiff, therefore, sued for the grant of a permanent injunction restraining the defendants from selling the disputed flash lights in the market and for other reliefs and also applied for a temporary injunction to the same effect.

(3) The defendants' case is that the defendants' flash lights do not infringe the plaintiff's trade mark and cannot be taken to pass off as the plaintiff's good.

(4) The plaintiff's application for the grant of a temporary injunction has been partly allowed by the lower Court. That Court has directed the defendants either not to place the disputed flash lights on the market or if they did so, to disclose the sales thereof in detail. The defendants were further directed that they should not manufacture any more 'Litready' torch lights unless they were willing to show on an affidavit to that Court before manufacturing as to how many flash lights they propose to manufacture and when. The learned Judge in the course of his judgment observed that the petitioner could not claim any property in the shell of the flash lights as shells similar to those manufactured by the plaintiff were manufactured by other manufacturers and were for sale in the market. Moreover, the fact that there was phonetic similarity between 'EveReady' and 'LitReady' would not invest the plaintiff with a right to claim an interim injunction. Against this order the plaintiff has come up to this Court in appeal.

(5) It has been urged by the learned counsel for the plaintiff-appellant that the learned Judge of the Court below was not correct when he made observations with regard to the phonetic similarity being of no avail to the plaintiff and with regard to the plaintiff not possessing any property right in the shell of the flash lights. Learned counsel has urged that the suit was not merely

for the breach of the trade mark but also for the damage caused to the plaintiff by the defendants passing off his goods as those of the plaintiff.

(6) In our opinion, what we have to see in a case of this kind, when an interim injunction is sought during the pendency of the suit before the rights of the parties are finally decided, is first whether a 'prima facie' case has been made out by the plaintiff in respect of his claim, and secondly, whether the balance of convenience demands that the injunction should be issued.

(7) So far as the 'prima facie' case is concerned, without committing ourselves finally in the matter, we have been impressed by the fact that the 2 flash lights in question, viz., that of the plff. & that of the defts., are very much similar in appearance. Their colour design, chromium plating & the make up of the bottom end are similar. The only differences that one can see on a close examination of the two flash lights are, firstly, that while in the plaintiff's torch there is the word 'Eve-Ready'; in the defendants' torch there is the word 'LitReady'. The portion 'Ready' is impressed exactly in the same form and style in both the torches, that is to say, the difference is only in 'Eve' and 'Lit'. The indentations on the upper and the lower ends of the words 'Eveready' and 'Litready' are almost the same.

The words 'Eveready' and 'Litready' are in the same pyramidal design and of the same shape and form and measurements. The only other difference on the bottom cap of the torch is in respect of the words 'made in U. S. A.' which appear in the plaintiff's torch while we find the words 'made in India' in the defendants' torch. While a literate person may not be misled because he would perhaps read whether the word was 'Eveready' or 'Litready', an illiterate person is likely to be confused and misled by the whole shape and design of the defendants' torch. Without going further into this matter, we think that this is enough so far as the making out of a 'prima facie' case is concerned and we are satisfied that the plaintiff has made out a 'prima facie' case.

(8) The balance of convenience, in our opinion, weighed heavily on the side of the plaintiff. The defendants are admittedly newcomers in the field. The defendants, according to what the lower Court has found, have manufactured only about 2,000 torches of the style in dispute, of which they have sold 1,000 and 1,000 remain with them unsold. The defendants do not claim that they have already established a name for their 'Litready' torches in the market. On the other hand, it has not been contested before us that the 'Eveready' torches of the plaintiff are selling throughout India and are sold in large numbers. The mere fact that the defendants have undertaken to keep an account would not be a safeguard against a possible injury to the plaintiff's trade.

In — 'Read v. Richardson', (1881) 45 LT 54 (A), on the defendants undertaking to keep an account, Jessel, M. R., refused an interlocutory injunction, but the Court of appeal granted it because, while the defendants had only recently commenced to use their mark, and their trade mark was admittedly not dependent on it, the plaintiffs had a large trade in connection with which they used a label alleged to be infringed, and their rights would have been irremediably and incalculably injured unless the injunction were granted, if their case should be established at the trial. (See Karly on Trade Marks, 6th Edition, p. 507).

(9) To the same effect are the observations of Garth C. J. in — 'Ralli v. Fleming', 3 Cal 417 at p. 424 (B):

> "In this particular case I do not think that their keeping an account of sales would be a sufficient protection to the plaintiffs, because if the defendants were allowed to use these marks in the market for several months in order to sell their cloth, they would become as well known in the market as importers and sellers of the cloth as the plaintiffs; and so the very mischief which the injunction is intended to guard against would have been effected."

We, therefore, consider that this was a fit case in which a temporary injunction should have been issued. We, therefore, allow this appeal, set aside the order of the Court below and restrain the defendants, their servants and agents from selling the torch lights in dispute or manufacturing them during the pendency of the suit. We may make it clear that the observations that we have made in this case are not intended to influence the Court below in deciding the case on the merits at the final hearing of the case.

(10) The plaintiff-appellant will have the costs of this appeal from the defendants-respondents.

C/V.R.B. Appeal allowed.

A.I.R. 1954 ALLAHABAD 219 (Vol. 41, C.N. 123)

MOOTHAM AND SAPRU JJ.

Kailash Chand and others, Applicants v. H. N. Agarwala and others, Opposite Party.

Misc. Writ No. 885 of 1953, D/- 26-10-1953.

(a) Municipalities — U. P. Municipalities Act (2 of 1916), S. 19 (2) (b).

The election of any person as a member of a Municipal Board can be questioned by an election petition on one or more of the grounds specified in sub-s. (2) (b) of S. 19 provided the result of the election has been thereby materially affected. (Para 7)

(b) Municipalities — U. P. Municipalities Act (2 of 1916), S. 19 — Charged with carrying out the Act.

Although the Returning Officer's functions with regard to the scrutiny of nomination papers may have ended on a certain date he nevertheless remains charged with other duties under the Act and therefore continues to be an officer charged with carrying out the Act.

The action of the Returning officer in setting aside, on review, his previous order rejecting the nomination papers is not without jurisdiction. If such an order is without legal justification, it can be made a subject of election petition. (Para 8)

(c) Municipalities — U. P. Municipalities Act (2 of 1916), S. 19 (2) (b) — Scope of.

Clause (b) in sub-s. (2) of S. 19 in substance, embodies two provisions; a negative provision that non-compliance with the Act or any rule or any mistake in the forms etc. shall not be a ground upon which the election of any person can be challenged, and a positive provision, that any such non-compliance, mistake, error, irregularity or informality shall constitute a ground upon which it may be challenged if it has materially affected the result of the election. The only way, therefore, in which effect can be given to the positive provision embodied in this clause is to deem it to be a ground additional to those mentioned in

sub-s. (1) of this section. AIR 1937 All 365, Ref. (Para 7)

(d) Municipalities — U. P. Municipalities Act (2 of 1916), Ss. 13K (2) and S. 19 (b) — Jurisdiction of Election Tribunal.

Section 13K (2) of the Act is a bar to the exercise of jurisdiction by a civil Court in matters relating to the validity of an election, and unless the provisions of clause (2) of S. 19 are to be rendered nugatory it must follow that the Election Tribunal has jurisdiction in such cases. (Para 7)

Ambika Prasad, for Applicants; J. Swarup, S. N. Diwedi and R. K. Shukla, for Opposite Party.

CASE REFERRED:

(A) ('37) AIR 1937 All 365: 1937 All LJ 336 (Pr 7)

MOOTHAM J.:

This is a petition under Art. 226 of the Constitution which arises in the following circumstances:

(2) The petitioners and respondents Nos. 2 to 18 are candidates at an election for membership of the Municipal Board, Roorkee. The petitioners and these respondents filed their nomination papers on 5-10-1953. On the 7th October, which was the date fixed for the scrutiny of the nomination papers, the Returning Officer rejected the nomination papers of the respondents on the ground that they were not presented within the prescribed time. On the following day the respondents presented an application to the Returning Officer (who is the first respondent) asking him to review his order rejecting their nomination papers. The Returning Officer allowed this application and by an order dated the 10th October he set aside his earlier order of the 7th October and accepted the nomination papers of the respondents. The relief which the petitioners seek is the issue of a writ in the nature of 'certiorari' to quash the order of the Returning Officer made on 10-10-1953.

(3) It is argued on behalf of the petitioners in this Court that the action of the Returning Officer in reviewing his earlier order and accepting the nomination papers of the respondents is not a ground which can be made the subject of an election petition, and that unless this Court interferes on their behalf in the exercise of its jurisdiction under Art. 226 they have no remedy.

(4) The question whether the petitioners have a remedy by way of an election petition turns upon the interpretation of S. 19, U. P. Municipalities Act, 1916. The section reads as follows:

"19. 'Power to question municipal election by petition.' — (1) The election of any person as a member of a board may be questioned by an election petition on the ground:

(a) that such person committed during or in respect of the election proceedings a corrupt practice as defined in section 28;

(b) that such person was declared to be elected by reason of the improper rejection or admission of one or more votes, or for any other reason was not duly elected by a majority of lawful votes;

(c) that such person was not qualified to be nominated as a candidate for election or that the nomination paper of the petitioner was improperly rejected.

(2) The election of any person as a member of a board shall not be questioned—

(a) on the ground that the name of any person qualified to vote has been omitted from or the name of any person not qualified to vote has been inserted in, the electoral roll or rolls;

(b) on the ground of any non-compliance with this Act or any rule, or of any mistake in the forms required thereby, or of any error, irregularity or informality on the part of the officer or officers charged with carrying out this Act or any rules, unless such non-compliance, mistake, error, irregularity or informality has materially affected the result of the election."

(5) It is argued on behalf of the petitioners that, in the first place, the election of any person as a member of a Municipal Board can be questioned only on one or more of the grounds specified in sub-s. (1) of this section, and that the provisions of sub-s. (2) are by way of a qualification or restriction on the rights conferred by sub-s. (1). Secondly, it is contended that the conduct of the Returning Officer in reviewing his former order does not amount to an error or irregularity within the meaning of cl. (b) of sub-s. (2).

(6) Section 19 is not an easy section to construe. The structure of the section is such as would be adopted if it were the intention of the legislature that the provisions of sub-s. (2) were to be by way of restriction on the rights conferred by sub-s. (1); but we are satisfied that the terms of cl. (b) of sub-s. (2) show that this is not the case.

(7) Clause (b), in substance, embodies two provisions; a negative provision that non-compliance with the Act or any rule or any mistake in the forms required thereby or any error, irregularity or informality on the part of the Officer or Officers charged with carrying out the Act shall not be a ground upon which the election of any person as member of a Board can be challenged, and a positive provision that any such non-compliance, mistake, error, irregularity or informality shall constitute a ground upon which the election of a person as a member of a Board may be challenged if it has materially affected the result of the election. The only way, therefore, in which effect can be given to the positive provision embodied in this clause is to deem it to be a ground additional to those mentioned in sub-s. (1) of this section; and this appears to be the view which was taken by a Bench of this Court in —'Nawal Kishore v. Municipal Board, Gorakhpur', AIR 1937 All 365 (A).

It was argued that the omission in sub-s. (2) of any reference to an election petition means that even if an election may be questioned on one or more of the grounds mentioned in clause (b) if the result of the election has been materially affected, the matter cannot be agitated before the Election Tribunal. We are unable to accede to this argument. Section 13K(2) of the Act is a bar to the exercise of jurisdiction by a civil Court in matters relating to the validity of an election, and unless the provisions of cl. (b) are to be rendered nugatory it must follow that the Election Tribunal has jurisdiction in such cases. We are, therefore, of opinion that the election of any person as a member of a Municipal Board can be questioned by an election petition on one or more of the grounds specified in sub-s. (2)(b) of S. 19 provided that the result of the election has been thereby materially affected.

(8) The second question is whether the action of the Returning Officer in setting aside on review his order of the 7th October rejecting the nomination papers of the respondents can constitute an error or irregularity within the mean-

ing of sub-s. (2)(b) of S. 19. It is not for this Court to express an opinion as to whether the action of the Returning Officer was correct in law or not, but we are clearly of opinion that it would be open to an Election Tribunal, if satisfied that the order of the Returning Officer made on 10-10-1953, was without legal justification, to hold that it constituted an error on the part of the Officer charged with the carrying out the Act and the rules made thereunder within the meaning of sub-s. (2)(b), and if the Tribunal is further satisfied that such error materially affected the result of the election, to hold that the error constituted a ground upon which the election of a person as a member of the Board may be questioned. It was suggested in argument that the Returning Officer became 'functus officio' as soon as he had completed his scrutiny of the nomination papers on the 7th October, and that consequently he could not on the 10th October be an Officer "charged with carrying out" the Act as required by sub-s. (2)(b).

We are of opinion that this argument has no substance, for although the Returning Officer's functions with regard to the scrutiny of nomination papers may have ended on the 7th October, he nevertheless remains charged with other duties under the Act and therefore continues to be an officer charged with carrying out the Act.

(9) We are satisfied that the petitioners are not without a remedy by way of an election petition, and that their proper course is to pursue that remedy as soon as it is open to them to do so. The petition is accordingly dismissed with costs which we fix at two hundred rupees of which one hundred rupees will be paid to respondent No. 1.

B/H.G.P. Petition dismissed.

A.I.R. 1954 ALLAHABAD 221 (Vol. 41, C.N. 124)

MALIK C. J.

Aijaz Hussain, Defendant-Applicant v. Hans Raj, Plaintiff-Opposite-Party.

Civil Revn. Nos. 149 to 152 of 1953, D/- 21-10-53, against decree and Judgment of City Munsif, Meerut, D/- 28-10-1952.

(a) Civil P. C. (1908), S. 115 — Exercise of jurisdiction illegally or with material irregularity — (Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5(4)).

Suit for assessment of reasonable rent — Fact that the plaintiff tenant had agreed to pay a higher rent than the reasonable rent is a circumstance which can be taken into consideration in determining whether transaction is unfair — Court holding transaction to be unfair after taking into consideration this circumstance along with other evidence — There is no defect of jurisdiction and the finding cannot be challenged in revision. (Para 2)

Anno: Civil P. C., S. 115 N. 12, 13.

(b) Civil P. C. (1908), S. 115 — Error of law or fact.

Mere error of law or fact in the exercise of jurisdiction would not entitle the High Court to interfere with the finding of the lower Court under S. 115, Civil P. C. (Para 3)

Anno: Civil P. C., S. 115 N. 13.

(c) Civil P. C. (1908), O. 8, R. 1 — Scope.

A plea in a written statement is no evidence in the case. (Para 3)

Anno: Civil P. C., O. 8, R. 1 N. 1.

(d) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 2 (f) and 3A — Act applies to accommodations constructed after 1-7-1946.

The argument that as there is no provision in S. 2(f) as to how reasonable annual rent is to be worked out in the case of an accommodation constructed after 1-7-1946, the Act should be interpreted to mean that it would apply only to accommodation constructed before 1-7-1946, and not to accommodation constructed after 1-7-1946, cannot be accepted. The jurisdiction of the Court is not conferred by the definition section but it is to be found in the other provisions of the Act. Section 3A of the Act which deals with accommodations constructed after 30-6-1946 clearly implies that the Act applies to accommodation constructed on or after 1-7-1946. (Para 4)

Shambhu Prashad and Lalji Sinha, for Applicant.

CASE REFERRED:

(A) ('53) AIR 1953 All 175: 1952 All LJ 705 (Pr 2)

ORDER : These Civil Revisions arise out of four suits brought by different plaintiffs against a common defendant and have been filed on behalf of the defendant for assessment of a reasonable rent under S. 5(4), U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947).

(2) The plaintiffs were refugees from Pakistan who came to Meerut in the winter of 1947-48. They were without shelter and were staying at the railway station. The defendant offered to let out some accommodation to the plaintiffs, which the plaintiffs accepted on the terms proposed. After the Control of Rent and Eviction Act was passed the plaintiffs filed the suits, out of which these revisions have arisen, for assessment of reasonable rent. The lower court has found that the agreements were unfair and has fixed a reasonable rent for the accommodation in possession of the plaintiffs.

Learned counsel has challenged the finding as regards the unfairness of the transaction on the ground that the mere fact that the rent agreed upon was much higher than the fair or reasonable rent would lead to no conclusion about the unfairness of the transaction. Learned counsel has relied on a decision of a learned single Judge in — 'Agarwal & Co. v. City Board, Dehra Dun', AIR 1953 All 175 (A). It may be that in every case it may not be possible to hold that the transaction was unfair merely because the plaintiff had agreed to pay rent at a higher rate than the reasonable rent, but the learned single Judge could not have intended to hold that the rent agreed to be paid is not a circumstance to be taken into consideration in dealing with that question. The lower court was, to my mind, justified in taking this circumstance into consideration and in holding that this circumstance along with other circumstances and the evidence showed to its satisfaction that the transaction was unfair. I do not think that there is any defect of jurisdiction and this point cannot, therefore, be raised by learned counsel.

(3) The other point urged by learned counsel is that the lower court erred in fixing the reasonable rent as the accommodation in suit was assessed to Municipal tax at a higher rate. Firstly, this is not a question of jurisdiction which would entitle this Court to interfere with the finding of

the lower court under S. 115, Civil P. C., and secondly, learned counsel was not able to point out from any document on the record that the accommodation was assessed to Municipal tax on a valuation of Rs. 35/- per mensem. Learned counsel has relied on a plea to this effect taken by his client in the written statement, but a plea in the written statement is no evidence in the case.

(4) Lastly, it is urged that the house having been constructed in 1947 the Control of Rent and Eviction Act does not apply. The basis of the argument is that in the definition section 2(f), how reasonable annual rent in the case of accommodation constructed before 1-7-1946, is to be worked out is mentioned. It is to be Municipal assessment plus 25 per cent thereon if the accommodation is separately assessed to Municipal tax. If only a part of the accommodation has been assessed then the reasonable annual rent would be the proportionate amount of Municipal assessment of such accommodation plus 25 per cent thereon. The argument of learned counsel is that as there is no provision in this section as to how reasonable annual rent is to be worked out in the case of an accommodation constructed after 1-7-1946, the Act should be interpreted to mean that it would apply only to accommodation constructed before 1-7-1946, and not to accommodation constructed after 1-7-1946. I am not prepared to accept this argument. This jurisdiction of the court is not conferred by the definition section but it is to be found in the other provisions of the Act. Learned counsel has not been able to refer to any section in the Act in support of his contention that the Act does not apply to an accommodation constructed after 1-7-1946. As a matter of fact, the provisions of S. 3A of the Act go directly against the contention of learned counsel. Section 3A(1) deals with accommodation constructed after 30-6-1946, which must necessarily mean on or after 1-7-1946.

(5) These revisions have no force and are dismissed.

B/K.S.B. Revisions dismissed.

A.I.R. 1954 ALLAHABAD 222 (Vol. 41, C.N. 125)

MOOTHAM AND GURTU JJ.

Faiyaz Khan, Judgment-debtor-Appellant v. Mithan, Decree-holder, Respondent.

F. A. F. O. No. 150 of 1953, D/- 13-10-1953, from order of Civil Judge, Agra, D/- 31-5-1952.

Civil P. C. (1908), O. 17 R. 3 and O. 9 R. 13 — Remedy of a person aggrieved by an order under O. 17 R. 3.

If the order granting the plaintiff a decree is actually made by the Court under O. 17 R. 3 an application by the defendant under O. 9 R. 13 will not lie and the defendant's remedy is by way of appeal or review. What has to be considered is the power vested in the Judge who decided the suit; and if in so deciding it he purported to act under O. 17 R. 3 he could have no jurisdiction under O. 9 R. 13 to set aside the decree which he had passed. His order may be wrong but so long as it stands he has no power to alter it. AIR 1924 All 144; AIR 1944 All 211 and AIR 1952 All 652 Foll.; AIR 1940 All 217 and AIR 1949 All 423, Not foll. (Para 6)

Anno: C. P. C., O. 9 R. 13 N. 6; O. 17 R. 3 N. 7.

1953 Mulla O. 17 R. 3 P. 714 N 1 "Remedy" (14 Pts extra in N 7 to O. 17 R. 3 in AIR Com.)

1953 Mulla O. 9 R. 13 (Topic discussed in N 6 to O. 9 R. 13 in AIR Com. Extra)

J. Swarup and Hari Swarup, for Appellant; B. L. Chaturvedi, for Respondent.

CASES REFERRED:

(A) ('40) AIR 1940 All 217: 1940 All LJ 200 (Pr 4)
(B) ('49) AIR 1949 All 423: ILR (1949) All 759 (Pr 4)
(C) ('24) AIR 1924 All 144: 45 All 669 (Pr. 5)
(D) ('44) AIR 1944 All 211: ILR (1944) All 297 (Pr 5)
(E) ('52) AIR 1952 All 652: 1950 All LJ 799 (Pr 5)

MOOTHAM J.:

This is a defendant's appeal from an order of the Civil Judge, Agra.

(2) The 29th February 1952, was fixed by the Civil Judge for the hearing of a suit in which the present respondent was the plaintiff and the present appellant the defendant. On that date counsel for the defendant applied for an adjournment as the defendant was not present and the hearing was adjourned to the 14th March. On the adjourned date the defendant was absent and his counsel stated that he had no instructions, whereupon counsel for the plaintiff asked the court to proceed to decide the suit under O. 17 Rule 3. The court purported to do so; it recorded the evidence of the plaintiff and two witnesses, delivered judgment in favour of the plaintiff and a decree was subsequently drawn up in accordance with the terms of the judgment.

(3) One month later, on the 14 April, the defendant applied to the court for the decree to be set aside under O. 9 R. 13. This application was dismissed by the learned Civil Judge in a brief order in which he said—

> "The application does not lie as the decision was on merits under O. 17 R. 3 Civil P. C. 'Order'. Rejected.

It is from this order that the present appeal has been filed.

(4) Sri Hari Sarup for the appellant has argued that as the circumstances of this case were not such as to make applicable the provisions of R. 3 of O. 17 the learned Civil Judge's order must be deemed to have been made under O. 17 R. 2, and that in consequence an application made under Order 9 R. 13 to set aside that order would lie. Sri B. L. Chaturvedi for the respondent contends that whether the order of the Judge was right or wrong, it was undeniably made under O. 17 R. 3 and that the proper remedy was by way of appeal or review.

In support of his argument counsel for the appellant relied on — 'Raja Singh v. Manna Singh', AIR 1940 All 217 (A), and — 'Rafiq Ahmad v. Mohammad Shafi', A. I. R. 1949 All 423 (B), both bench decisions of this Court. In each of these cases the lower court gave the plaintiff a decree under Order 17 R. 3. Applications were then made by the defendants for the decrees to be set aside under Order 9. In — 'Raja Singh's case (A)' the application was allowed and the plaintiff came in revision to this Court. In — 'Rafiq Ahmad's case (B)' the application was dismissed and against that order the defendant filed an appeal. In both cases this Court examined the circumstances

in which the decrees were passed by the lower courts, and being of opinion that those circumstances were not such as would entitle them to act under Order 17 R. 3 it held that the decrees must be deemed to have been made under R. 2 of that Order and that consequently an application under O. 9 R. 9 or O. 9 R. 13 would lie.

(5) A different view has however been taken in other cases to which counsel for the respondent drew our attention. In — 'Nasir Khan v. Itwari', A. I. R. 1924 All 144 (C) this Court declined in similar circumstances to consider whether the lower court which had made a decree in favour of the plaintiff purporting to act under O. 17 R. 3 was justified in doing so. The Court said—

> "The right of appeal does not depend on what the court ought to have done but on what it actually did. What it actually did was to pass a decree on the merits. Against such a decree the law allows an appeal. When the appeal comes up for decision, the appellate court has then to decide whether the order passed was a proper order and one which the court below had jurisdiction to pass. If it decides this question in the negative it will set the order aside."

In —'Udai Ram Gopi Ram v. Raghuraj Singh Khub Chand', A. I. R. 1944 All 211 (D) another bench of this Court was of opinion that a Judge who had passed a decree under O. 17 R. 3 had no jurisdiction to set it aside, and in a recent case, — 'Sri Krishen v. Radha Krishen', AIR 1952 All 652 (E) the Court, in a judgment delivered by Agarwala J., laid it down that

> "The question whether an application for restoration is maintainable must be decided upon an interpretation of the order which the court passes. If there is any doubt about the intention of the court passing the order as to whether it intended to proceed under O. 17 R. 3 or Order 17 Rule 2, in that case we can say that the order should be construed as one which 'ought' to have been passed. But this cannot be done when the court expressly passes an order under one of the two rules. In that case the aggrieved party should file an appeal against the order which is in fact a decree and not apply for restoration."

(6) We therefore find ourselves in the somewhat embarrassing position of having to decide between conflicting decisions of this Court. With great respect we are of opinion that the view taken in the cases which we have last mentioned is to be preferred. We think that if the order granting the plaintiff a decree is actually made by the court under O. 17 R. 3, an application by the defendant under O. 9 R. 13 will not lie and that the defendant's remedy is by way of appeal or review. This view appears to us not merely to have the merit of practical convenience — for it is important that the litigant should be in no doubt as to where his remedy lies — but sound in principle. What has to be considered is the power vested in the Judge who decided the suit; and if in so deciding it he purported to act under O. 17 R. 3 he could have, it appears to us, no jurisdiction under O. 9 R. 13 to set aside the decree which he had passed. His order may be wrong but so long as it stands he has no power to alter it.

(7) In the case now before us it is abundantly clear — indeed it is common ground — that the decree passed on 14-3-1952, was actually made by the Civil Judge under O. 17 R. 3. We are therefore of the opinion for the reasons we have stated that he was right in dismissing the application subsequently made under O. 9 R. 13 for that decree to be set aside.

(8) This appeal is accordingly dismissed with costs.

(9) The interim stay order is discharged.

B/K.S.B. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 223 (Vol. 41, C.N. 126)

DESAI J.

Ram Pukar Singh Watchman, Accused-Applicant v. The State.

Criminal Revn. No. 88 of 1952, D/- 25-9-1953, against order of Addl. Sessions J., Kanpur, D/- 21-12-1951.

(a) Penal Code (1860), S. 161 — Right of accused — (Prevention of Corruption Act (1947), S. 6).

Court is not bound to inform an accused, who is being prosecuted under S. 161, I. P. C. that he has a right to examine himself in defence and his conviction cannot be quashed merely on account of the Court's refusal or failure to inform him of the right. AIR 1954 All 204 Foll. (Para 1)

Anno: Penal Code, S. 161 N. 14.

(b) Penal Code (1860), S. 161 — Sanction — (Prevention of Corruption Act (1947), S. 6).

Valid sanction to prosecute by Superintendent, Watch and Ward — Magistrate wrongly thinking that sanction to investigate given by District Magistrate, to be sanction to prosecute — Mistake of magistrate held did not matter as long as there was vaild sanction. (Para 1)

Anno: Penal Code, S. 161 N. 13.

(c) Penal Code (1860), S. 161 — Sanction is necessary only to take cognizance — (Prevention of Corruption Act (1947), S. 6).

Whether the sanction had been given or not is to be seen before taking cognizance of the offence and not after it. If there is no sanction no cognizance of the offence can be taken at all. The sanction is required only for the purpose of taking cognizance of the offence; once the cognizance is taken its utility is exhausted and it is no longer needed, either during the enquiry into the guilt of the accused or for the purpose of convicting him. Whether an accused is guilty or not does not depend upon whether his prosecution was sanctioned or not; the existence of sanction is not an ingredient of any offence. Nor is it the law that an accused cannot be convicted unless the sanction by the appropriate authority of his prosecution has been proved. After the Court has taken cognizance of the offence, all that the prosecution has to prove, in order to secure conviction of the accused, is that he committed the crime, and there is no provision obliging it to prove any other fact such as the sanctioning of his prosecution. Only the Court has to be satisfied of the existence of the sanction. The accused is not the person required to be satisfied by it; as a matter of fact the law does not contemplate his presence even when the prosecution satisfied the Court. (Para 2)

Anno: Penal Code, S. 161 N. 13.

(d) **Penal Code (1860), S. 161 — Sanction — Presumption as to official acts — (Prevention of Corruption Act (1947), S. 6) — (Evidence Act (1872), S. 114).**

Sanction of Superintendent to prosecute produced — Court can presume that police report was placed before him and that he considered it and that it was he who signed the sanction — Presumption can be rebutted. (Para 2)

Anno: Penal Code, S. 161 N. 13; Evidence Act, S. 114 N. 29.

(e) **Penal Code (1860), Ss. 161 and 116 — Offence of offering bribe must be severely punished.** **(Para 4)**

Anno: Penal Code, S. 161 N. 10.

P. N. Shukla, for Applicant; H. L. Kapoor, for the State.

CASE REFERRED:

(A) ('54) AIR 1954 All 204: (Cri. Revn. No. 1379 of 1951) (Pr 1)

ORDER : The applicant has been convicted under sections 161 and 116 I. P. C. by the courts below and sentenced to a fine of Rs. 100/-. He has been found guilty of having offered a bribe to the Assistant Superintendent Watch and Ward Department. There is no dispute about the facts which have been proved beyond any doubt.

The applicant challenges his conviction on some legal grounds. One is that he was not informed by the trying Magistrate that he had right to examine himself in defence. It has been held by a Full Bench of this Court — 'Raja Ram v. State', AIR 1954 All 204 (A), only a couple of days ago that a court is not bound to inform an accused, who is being prosecuted under the Prevention of Corruption Act, that he had a right to examine himself in defence and that his conviction cannot be quashed merely on account of the court's refusal or failure to inform him of the right.

The occurrence took place on 4-11-49. The police investigated the case and finding it proved requested the Superintendent, Watch and Ward, to sanction the prosecution of the applicant. On 20-8-1950 the Superintendent, Watch and Ward, sanctioned the prosecution. Then the police sent up the applicant for trial. The learned Magistrate rightly took cognizance of the offence on the sanction of the Superintendent. In the report made by the police soliciting his sanction it was stated that the applicant had offered Rs. 30/- as bribe to the Assistant Superintendent, Watch and Ward. This information was sufficient for the purpose of deciding whether to sanction the prosecution. The learned Magistrate wrongly said in his judgment that after duly obtaining the Additional District Magistrate's permission the police submitted the charge sheet against the applicant.

On 20-3-1950 the police referred the complaint made against the applicant to the Additional District Magistrate and solicited his sanction for investigating into the complaint. On the same date the Additional District Magistrate authorised the police to investigate. It seems that the learned Magistrate did not carefully read the documents on the record, did not realise that what the Additional District Magistrate had sanctioned was the investigation by the police into the complaint against the applicant and not his prosecution, and that the sanction for his prosecution had been given by the Supeintendent, Watch and Ward. The mistake committed by the learned Magistrate is of no consequence. So long as there was a sanction given by the proper authority for the applicant's prosecution, it does not matter if the learned Magistrate thought that his prosecution had been sanctioned by some other authority.

(2) This signature of the Superintendent, Watch and Ward, on the sanction has not been proved. But there was no dispute about the signature. The police had submitted the report to him and on receipt of the sanction purporting to have been given by him on it prosecuted the applicant in the court of the learned Magistrate. The learned Magistrate was justified in presuming that the sanction purporting to have been given by the Superintendent, Watch and Ward, was in fact given by him. Once he took cognizance of the offence, no question of proving the sanction could arise subsequently. Whether the sanction had been given or not was to be seen before taking cognizance of the offence and not after it. If there were no sanction, no cognizance of the offence could be taken at all. The sanction was required only for the purpose of taking cognizance of the offence; once the cognizance was taken its utility was exhausted and it was no longer needed, either during the enquiry into the guilt of the accused or for the purpose of convicting him. Whether an accused is guilty or not does not depend upon whether his prosecution was sanctioned or not; the existence of sanction is not an ingredient of any offence. Nor is it the law that an accused cannot be convicted unless the sanction by the appropriate authority of his prosecution has been proved.

After the court has taken cognizance of the offence, all that the prosecution has to prove in order to secure conviction of the accused, is that he committed the crime, and there is no provision obliging it to prove any other fact such as the sanctioning of his prosecution. Only the court had to be satisfied of the existence of the sanction, and that too before taking cognizance, and once the prosecution satisfied it and it took cognizance, the prosecution could not be required, and is not required by any statutory provision, to satisfy it again or the accused. The accused is not the person required to be satisfied by it; as a matter of fact the law does not contemplate his presence even when the prosecution satisfies the court.

There is a presumption in favour of regularity of official acts. The learned Magistrate could presume that the sanction was given by the Superintendent as it purported to be that the police report was placed before, and considered by, him and that it was he who signed the sanction.

It was open to the applicant to rebut the presumption. But not only did he not lead any evidence to prove that the signature on the sanction was not that of the Superintendent but also he did not question the genuineness of the signature. When there was no controversy at all before the learned Magistrate about the sanction having been given by the Superintendent, Watch and Ward, the prosecution was not required to do anything such as producing evidence to prove the signature.

(3) There was no other point raised before me. The application is dismissed.

(4) Before parting with the case, I must remark that the sentence inflicted by the learned Magistrate was wholly inadequate. The offence of offering a bribe must be dealt with severely. The learned Magistrate had no justification for not inflicting a sentence of imprisonment upon the applicant. The offence committed by him could not be adequately punished by only a fine, and that too of Rs. 100 only.

B/R.G.D. Application dismissed.

A.I.R. 1954 ALL. 225 (Vol. 41, C.N. 127)

DESAI J.

Mohammad Illayas, Applicant v. State of Uttar Pradesh.

Criminal Revn. No. 254 and Cri. Revn. No. 1005 of 1952, D/- 20-10-1953, against order of S. J Saharanpur, D/- 11-1-1952.

(a) Criminal P. C. (1898), S. 476 — "Make a complaint thereof in writing."

Under S. 476, the Court has not to pass any order; it has not to order any person to be prosecuted for the offence. It has not even to order that a complaint be made against him. It has simply to record a finding that it is expedient to make a complaint and then to make a complaint and forward it to a Magistrate having jurisdiction. (Para 3)

Anno: Criminal P. C., S. 476 N. 13.

1949 Mitra: S. 476 P. 1410 N. "Recording.... finding" (Pts. 12 and 13 extra in N. 13 to S. 476 in A.I.R. Com.—Conflicting decisions given pell-mell in Mitra).

Criminal P. C., S. 476 N. 14.

1949 Mitra: S. 476 P. 1412 N. 1248 "Complaint .....section" (Pts. 12 to 15 extra in N. 14 to S. 476 in A.I.R. Com.—AIR 1934 Oudh 277, 57 IC 457, AIR 1933 Oudh 430 not noted in N. 14 to S. 476 in A.I.R. Com.).

(b) Criminal P. C. (1898), S. 476B — Subject-matter of appeal. View of Fawcett J. in AIR 1928 Bom 64, Dissented from.

It is not the recording of the finding about the expediency, or the non-recording of a finding about the expediency, that is the subject-matter of appeal; it is the making of, or the refusal to make, a complaint, that is the subject-matter of appeal. View of Fawcett J. in AIR 1928 Bom 64, Dissented from. (Para 3)

Anno: Criminal P. C., S. 476B N. 1 Pt. 2.

1949 Mitra: S. 476B, P. 1423 N. 1257 "Scope" (4 Pts. extra in N. 1 to S. 476B in A.I.R. Com.—3 Pts. extra in Mitra).

(c) Criminal P. C. (1898), Ss. 476 and 476B — Limitation — (Limitation Act (1908), Art. 154).

The making of a complaint under S. 476 is the "sentence or order" within the meaning of the Article. In other words, the period of limitation starts from the date on which the complaint is made; it does not start on the date on which the finding is recorded or from the date on which the complaint reaches the Court of a Magistrate having jurisdiction to try it. (Para 5)

Anno: Limitation Act, Art. 154 N. 2 Pt. 2.

(d) Criminal P. C. (1898), Ss. 419, 476 and 476B — Copy of complaint to accompany — Exclusion of time in obtaining copy — (Limitation Act (1908), S. 12(2)).

The provision in S. 419 is general and governs all appeals whether they are preferred under Chapter XXXI or under S. 476B. An appeal under S. 476-B must therefore be accompanied by a copy of the complaint. The time that was spent by the appellant in obtaining the copy must be deducted when computing the period of limitation; S. 12, Limitation Act, applies and the complaint is the "order" within its meaning. (Para 6)

Anno: Criminal P. C., S. 419 N. 2.

1949 Mitra: S. 419 P. 1234 N. 1128 "Copy..... judgment".

Criminal P. C., S. 476-B N. 1.

1949 Mitra: S. 476-B, P. 1423 N. 1257 "Scope" (4 Pts. extra in N. 1 to S. 476-B in A.I.R. Com.—3 Pts. extra in Mitra).

Limitation Act, S. 12 N. 32, Pt. 1.

(e) Limitation Act (1908), S. 5 — Appeal under S. 476-B, Criminal P. C. — Delay due to law being not clear — (Criminal P. C. (1898), S. 476-B).

Appeal under S. 476-B filed from recording of finding — Appeal dismissed as not being from making of complaint — Fresh appeal filed from making of complaint — Application under S. 5, Limitation Act, on ground that law was not clearly established that appeal was to be filed from making of complaint — Period of limitation held should be extended. (Para 6)

Anno: Limitation Act, S. 5 N. 13 Pt. 2.

D. Sanyal, for Applicant; S. C. Asthana, for the State.

CASES REFERRED:

(A) ('27) AIR 1927 Lah 54: 27 Cri LJ 1321 (Prs 4, 5)

(B) ('27) 106 Ind Cas 584: 29 Cri LJ 72 (Lah) (Prs 4, 5)

(C) ('28) AIR 1928 Bom 64: 29 Cri LJ 315 (Prs 4, 5)

(D) ('29) AIR 1929 Cal 521: 30 Cri LJ 974 (Prs 4, 5)

(E) ('43) AIR 1943 Sind 157: 45 Cri LJ 76 (Prs 4, 5)

(F) ('35) AIR 1935 Nag 199: 36 Cri LJ 1371 (Prs 4, 5)

(G) ('30) AIR 1930 Rang 201: 31 Cri LJ 793 (Pr 4)

ORDER: These are two applications in revision against an order passed by the Sessions Judge of Saharanpur dismissing the applicants' appeal under section 476-B, Cr. P. C. on the ground that they were barred by time.

(2) In proceedings under section 476 of the Code of Criminal Procedure a Magistrate found on 27-9-1950 that it was expedient in the interests of justice to file a complaint for the offence of section 193, I. P. C. which appeared to have been committed by them. What the learned Magistrate actually did was to write that he had seen the file and heard counsel for the parties, that a 'prima facie' case under section 476 read with section 195, Cr. P. C. was made out and that a complaint would be made against the applicants for their prosecution under section 193, etc. On the same date he made a complaint against them and it was sent to a court of competent jurisdiction.

The applicants filed an appeal under section 476-B, Cr. P. C. against the finding of the learned Magistrate. The appeal was dismissed on 6-11-1951 by the Sessions Judge who held that the appeal should have been filed, not against the finding but against the making of the complaint. On 14-11-'51 the applicants applied for a copy of the complaint made against them. They got it on 24-12-'51 and filed the appeal on 2-1-'52. As by that date the appeal had become barred by time, they applied for extension of the period of limitation under section 5 of the Limitation Act. The learned Sessions Judge dismissed their application and dismissed the appeal as barred by time.

(3) Section 476 lays down that when a court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195(1)(b) or (c), it,

"may, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the court, and shall forward the same to a Magistrate of the First Class having jurisdiction."

Section 476-B lays down that

> "any person against whom such a complaint has been made, may appeal to the court to which such former court is subordinate and the superior court may thereupon, direct the withdrawal of the complaint."

If in a proceeding under section 476, a court wants to have an inquiry made into an offence referred to in section 195(1)(b) or (c), it has to do two things. (1) to record a finding to the effect that it is expedient to have such an inquiry made and make a complaint thereof, and (2) to forward the complaint to a Magistrate having jurisdiction over the case.

It has not to pass any order; it has not to order any person to be prosecuted for the offence. It has not even to order that a complaint be made against him. It has simply to record a finding that it is expedient to make a complaint and then to make a complaint and forward it to a Magistrate having jurisdiction. An appeal can be filed by a person against whom a complaint has been made and not by a person against whom a finding has been recorded. Even if a court has actually said that a certain person be prosecuted for a certain offence, that gives no right to him to file an appeal against the "order". He can file an appeal only if a complaint has actually been made against him. If there is only a finding to the effect that it is expedient to make a complaint against him or if there is even an order to the effect that a complaint should be made against him, so long as no complaint has actually been made against him he has no right of appeal.

If the appeal is allowed the appellate court has to direct the withdrawal of the complaint. Unless a complaint has already been made, there can be nothing to be withdrawn. The appellate court is not required to set aside the finding about the expediency of making a complaint or the order, if any, made by the court, that the person be prosecuted. If in a proceeding under section 476 the court refused to make a complaint, the person who had applied for starting the proceeding under section 476 has been given a right to file an appeal against the refusal and if it is allowed, the appellate court is required to make a complaint. The right of appeal has been given in such a case not to a person on whose application the court has refused to record the finding that it is expedient in the interests of justice to make a complaint, but to a person on whose application it has refused to make a complaint.

If the appeal is allowed the appellate court is not required to record a finding about the expediency before making a complaint. It is clear from these facts that it is not the recording of the finding about the expediency, or the non-recording of a finding about the expediency, that is the subject-matter of appeal; it is the making of, or the refusal to make, a complaint, that is the subject-matter of appeal. That is the matter which gives rise to an appeal and that is the matter to be dealt with by the appellate court. The recording of, or the refusal to record, a finding about the expediency does not give rise to a right of appeal and is not to be dealt with by the appellate court.

(4) There are several authorities in support of what I have said above. One of the earliest cases is — 'Fitzholmes v. Emperor', AIR 1927 Lah 54 (A), in which Jailal J. accepted the contentions that section 476-B

> "contemplates that an appeal is to be filed after a complaint has actually been made and not before";

and that — "an appeal is allowed not from the finding of the court that a complaint should be made but from the complaint itself".

That case was followed in — 'Labha Mal v. Wasawa Mal', 106 Ind Cas 584 (Lah) (B) and — 'Daga Devji v. Emperor', AIR 1928 Bom 64 (C). In the Bombay case Fawcett J. (with whom Mirza J. concurred) observed:

> "An appeal in such a case is, in fact, one against the order of the court directing a complaint to be made. Under section 476 Criminal P. C., the court making the complaint has 'to record a finding' that enquiry, etc., should be made; and this 'finding' clearly comes under the word 'order' in Article 154, Limitation Act. Section 476-B gives the person affected a right of appeal from this order, but only after the complaint has been actually made."

While I respectfully agree with the statement that the right of appeal accrues only after the complaint has been actually made, I find it difficult to accept that the finding itself is an "order" and that the appeal is from that finding or order and not from the making of the complaint. In —'Ramjan Ali v. Moolji Seeka and Co.', AIR 1929 Cal 521 (D), Rankin C. J. and Buckland J. laid down that "until a complaint has been made no appeal can be preferred" under section 476-B. They followed — 'Fitzholmes v. Emperor', (A) and — 'Daga Devji v. Emperor', (C). Buckland J. also stated that

> "though the order to be appealed against is that directing a complaint to be made, nevertheless, for the reasons stated and contrary to the usual rule, time does not begin to run until the complaint has actually been made."

Section 476, as already explained, does not require at all that there should be any order by the Court directing a complaint to be made. Buckland J. has not explained how the finding about the expediency is to be treated as an order. He has assumed that there would be an order directing a complaint to be made, but the law does not require such an order. In — 'Naraindas v. Emperor', AIR 1943 Sind 157 (E), Lobo J. treated the recording of a finding and the making of a complaint as one act, an act distinct from that of forwarding the complaint to a Magistrate having jurisdiction. The question before the Court was whether limitation for an appeal runs from the date on which the complaint is made or the date on which it reaches the Magistrate having jurisdiction. In — 'Balgovind v. Jamnabai', AIR 1935 Nag 199 (F) the Judicial Commissioner's Court followed the cases of 'Fitzholmes (A)' and 'Daga Devji (C)'. In — 'K. C. Reddy v. Emperor', AIR 1930 Rang 201 (G) it was remarked that section 476-B does not say that an appeal has to be filed against the finding and that it has to be filed against the filing of the complaint.

(5) The limitation for an appeal under section 476-B is governed by Article 154 of the Limitation Act. The description of appeal —

> "under the Code of Criminal Procedure, 1898, to any court other than a High Court" —

given in the first column of the Article applies to such an appeal when the complaint is made by a Court which is subject to the appellate jurisdiction of a court other than a High Court. There

is no dispute on this score. The prescribed limitation is thirty days and it runs

"from the date of the sentence or order appealed from".

There is no "sentence or order" in a proceeding under section 476. The appeal under section 476-B is filed not from any "sentence or order" but from the making of a complaint. This Article 154 is the only Article that governs such an appeal and since there must be a starting point for the limitation of thirty days, it must be held that the making of a complaint is the "sentence or order" within the meaning of the Article. In other words, the period of limitation starts from the date on which the complaint is made; it does not start on the date on which the finding is recorded or from the date on which the complaint reaches the court of a Magistrate having jurisdiction to try it. In the cases of 'Fitzholmes (A)', 'Labha Mal (B)', 'Daga Devji (C)' and 'Ramjan Ali (D)' it was held that the limitation begins to run from the date on which the complaint is made. I respectfully differ from the view of Fawcett J. that the finding come under the word "order" in Article 154.

Actually neither the finding nor the making of complaint is an order. But one of them has to be given the meaning of "order" in order to give effect to the third column of the Article which has got to be applied, and there is no reason for treating the finding, and not the making of complaint, as the order, particularly when the appeal is preferred from the making of a complaint and not the finding. In the case of 'Narain Das (E)' it was held that the limitation runs from the date on which the complaint is signed and not that on which it reaches the Magistrate having jurisdiction. In — 'Balgovind v. Jamnabai', (F) the finding was recorded on 20-9-1934, the complaint was made on 6-10-1934 and the appeal filed on 5-11-1934 was held to be within time.

(6) In the present case the complaint was made on 27-9-1950 and the appeal should have been filed on or before 27-10-1950 regardless of whether the finding about the expediency was of that date or earlier. The appeal, however, was filed on 2-1-1952. The applicants applied for extending the period of limitation under section 5. They contended that the law was not clearly established that the appeal was to be filed from the making of a complaint and not from the recording of the finding. The previous appeal was within time but was dismissed because it was not from the making of the complaint but from the recording of the finding. Though no authority actually laying down that an appeal lies from the recording of a finding has been cited, there is no doubt there does exist some confusion on the point. Sometimes the confusion is created by the courts; instead of simply recording a finding about the expediency, they pass specific orders for the prosecution or for the making of a complaint.

The persons concerned are misled into thinking that the appeal is to be filed from those orders and not from the making of the complaint. Having regard to this confusion it can be said that the applicants acted in good faith in prosecuting their previous appeal from the finding and the period spent by them should be deducted when calculating the period of limitation. In any case the bona fides of the applicants would be a sufficient ground for ignoring the delay caused by their prosecuting the previous appeal. On 6-11-1951, when their appeal was dismissed they learnt that the appeal had to be filed from the making of the complaint. They spent little more than a month in obtaining a copy of the complaint. Under section 419 of the Code every appeal must

"be accompanied by a copy of the judgment or order appealed against".

This provision is general and governs all appeals whether they are preferred under Chapter XXXI or under section 476-B. Strictly speaking, a complaint is not a judgment or order and an appeal under section 476-B would not be required to be accompanied by a copy of the complaint. But the petition of appeal must be accompanied by some document. The complaint has been treated as a "sentence or order" within the meaning of Article 154, Limitation Act. Similarly, it can be treated as an "order" within the meaning of section 419. Since the Article governs the limitation for an appeal from an order, the right to an appeal is governed by section 476-B, and the procedure for the filing of an appeal is governed by section 419, the complaint, which is treated as an "order" within the meaning of any of these provisions, must be treated as an "order" within the meaning of the other provisions also.

I would, therefore, hold that an appeal under section 476-B must be accompanied by a copy of the complaint. The time that was spent by the applicants in obtaining the copy must be deducted when computing the period of limitation; section 12, Limitation Act, applies and the complaint is the "order" within its meaning also. They preferred the appeal as soon as they received the copy. They certainly spent eight days before applying for the copy. But they might not have been present in the Court of the Sessions Judge on 6-11-1951 when he dismissed their first appeal. Their counsel would have spent some time in informing them that they should file another appeal from the making of the complaint. I do not think that the period of eight days can be said to be too long.

There was thus a good case made out for extending the period of limitation under section 5 and the learned Sessions Judge acted improperly in rejecting their application. He did not take into consideration all the circumstances. He dismissed their application simply saying that the period of limitation could not be extended. He did not explain why it could not be extended. He did not clearly say that no sufficient case was made out for extending it. It may be that he thought that he had no jurisdiction to extend it in which case he was quite wrong.

(7) I allow this application, set aside the orders passed by the learned Sessions Judge and direct him to readmit the appeals to their original numbers and hear them on merits.

A/V.R.B. Application allowed.

A.I.R. 1954 All. 227 (Vol. 41, C.N. 128)

(FULL BENCH)

MALIK C. J., SAPRU AND CHATURVEDI JJ.

Hari Shankar Prasad Gupta, Applicant v. Sukhdeo Prasad and another, Opposite Party.

Civil Misc. Writ No. 753 of 1953, D/- 2-11-1953.

†(a) Representation of the People Act (1951), S. 86(2) (b) — 'Advocates of the High Court who have been in practice for a period of not less than ten years."

Per Full Bench: Under S. 86(2) (b), Representation of the People Act a person who is an advocate of the High Court and who has put in practice as a lawyer for a period of not less than ten years is qualified to be selected as a member of an Election Tribunal. The section cannot be interpreted to mean that the person should have practised 'as an advocate' of the High Court for a period of not less than ten years. (Paras 14, 17)

(b) Constitution of India, Art. 226 — Scope — Quo warranto, writ of.

Per Full Bench: The powers which the High Court enjoy under Article 226 are of a discretionary nature, though that discretion has to be exercised in accordance with judicial principles. Hence the High Court is not bound to interfere when the application for the issue of a writ of 'quo warranto' is a belated one. (Para 15)

In this case the High Court refused to interfere as the application was filed nearly one year after the proceeding before the Election Tribunal had commenced and when all most all the evidence had been adduced. (Paras 4, 15)

(c) Constitution of India, Art. 226 — Quo warranto, writ of.

Per Full Bench: The Court will not grant a 'quo warranto' in a case where a mere irregularity can be cured. (1872) 25 LT 459 and 1916-1 KB 595, Ref (Para 16)

Hence where the petitioner challenged the constitution of the Election Tribunal on ground that one of the members was not qualified to act as such member at the date of his appointment but at the date of the hearing of the petition he had become so qualified and there was nothing to bar his reappointment, the High Court refused to entertain an application under Article 226, Constitution of India. (Paras 4, 16, 18)

Gopalji Mehrotra, for Applicant; J. Swarup, for Opposite Party.

CASES REFERRED:

(A) ('53) AIR 1953 SC 210: 1953 SCJ 293 (SC) (Pr 3)
(B) ('50) AIR 1950 SC 27: 1950 SCR 88: 51 Cri LJ 1383 (SC) (Pr 11)
(C) (1872) 25 LT 459 (Pr 16)
(D) (1916) 1916-1 KB 595: 85 LJ KB 630 (Pr 16)

MALIK C. J.:

This writ petition has been filed by Hari Shankar Prasad Gupta under Art. 226 of the Constitution. The reliefs claimed by him are as follows:

(a) A writ in the nature of quo warranto be issued against the opposite-party no. 1 calling upon him to show the authority under which he has been duly appointed a Member of the Election Tribunal and

(b) a writ in the nature of prohibition be issued directing the opposite-party No. 1 not to proceed with the hearing of the Election Petition No. 224 of 1952.

(2) The applicant, Hari Shankar Prasad Gupta, was elected to the House of the People of Uttar Pradesh from the North Constituency, district Gorakhpur. Shibban Lal Saksena was a rival candidate. He filed an election petition challenging the election of the applicant. The petition was numbered as Election Petition No. 224 of 1952. The Election Commission appointed an Election Tribunal to hear this petition and Sri Brij Narain, District Judge, Gorakhpur, was appointed the Chairman of the Election Tribunal. The two members nominated by the Election Commission were, Sri Brij Behari Lal, Retired District Judge of Uttar Pradesh, and Sri Sukhdeo Prasad, Advocate, Gorakhpur.

The Election Tribunal proceeded with the hearing of the petition and examined as many as 43 witnesses for the petitioner, Sri Shibban Lal Saksena, and, on the close of his evidence 67 witnesses for Hari Shankar Prasad Gupta, the applicant. The Tribunal has said that the statement of Hari Shankar Prasad and a few short witnesses on his behalf remained to be recorded. It was at this stage that Hari Shankar Prasad Gupta filed an application before the Election Tribunal challenging the appointment of Sri Sukhdeo Prasad on the ground that he was not an advocate of 10 years' standing. This application was dismissed by the Election Tribunal by its order dated 28th August, 1953. There was an appeal filed before the Election Commission which was dismissed on 15th September, 1953. It was while that appeal was pending before the Election Commission that this writ petition was moved on 2nd September, 1953.

(3) The opposite party has raised two preliminary objections, firstly, that this Court has no jurisdiction to entertain the application and reliance was placed on a decision of the Supreme Court in — 'Election Commission, India v. Saka Venkata Rao', AIR 1953 SC 210 (A), and secondly, that certain necessary parties, namely, the Election Commission and the Registrar of the High Court have not been impleaded.

(4) It is not necessary for me to go into the preliminary objections as I propose to dismiss the application on the merits. The Election Tribunal as also the Election Commission have characterised the objection as a belated one. The Election Tribunal has said that

> "respondent no. 1 is an advocate practising in Gorakhpur and he could have raised the present objection in the beginning of the trial but he did not do so. As such the present belated application can be deemed to be for harassment of the petitioner as has been contended by the learned advocate for the petitioner."

The Election Commission has said that

> "in any opinion, therefore, this belated application challenging the due constitution of the tribunal is without substance and it is hereby rejected."

The fact that the application is a belated application cannot be denied. It is, however, urged that the applicant did not know that Sri Sukhdeo Prasad was not an advocate of ten years' standing. This is difficult to believe as the applicant & Sri Sukhdeo Prasad both belong to the Gorakhpur Bar. Even if Sri Sukhdeo Prasad was not qualified on the date of his appointment, there can be no doubt that he is qualified today and there is nothing to bar his reappointment now. On these grounds alone the petition should fail, but even on the merits. I am not satisfied that this application has any force.

(5) Reliance has been placed on S. 86 of the Representation of the People Act, 1951, (Act XLIII of 1951). Section 86 provides that the

Election Commission has to appoint an Election Tribunal of three persons, one of whom is to be selected out of "a list of advocates of that High Court who have been in practice for a period of not less than ten years and who are in the opinion of the High Court fit to be appointed as such members" (see clause (b) of sub-section (2) of section 86). It is not denied that Sri Sukhdeo Prasad is an advocate of this Court and his name was recommended by the High Court, as in its opinion he was fit to be appointed a member of the Tribunal.

The objection taken, however, is that he was enrolled as an advocate on the 30th September, 1943 and was, therefore, not an advocate of 10 years' standing. Before being enrolled as an advocate, Sri Sukhdeo Prasad had practised as a lawyer in the districts of Allahabad and Gorakhpur from 1927 to 1943. The submission of the learned counsel is that the clause must be interpreted to mean that the person should have practised 'as an advocate' of that High Court for a period of not less than ten years. This contention was overruled by the Election Tribunal as also by the Election Commission. They took the view that if a person is an advocate of the High Court and had been practising as a Lawyer for a period of not less than ten years, then he satisfied the requirements of clause (b) of sub-section (2) of section 86.

(6) There can be no doubt that both views are possible. It is possible to read clause (b) as meaning an advocate of that High Court who has been in practice for a period of not less than ten years or an advocate who has put in ten years' practice as an advocate. . In this connection it may be pertinent to mention that there is no substantial difference, in this state, in the qualifications of a pleader, a vakil High Court or an advocate. They have all to be graduates in law if they have not been called to the Bars prior to the Bar Councils Act, 1926 (Act XXXVIII of 1926), lawyers practising in the High Court were divided into two classes, advocates which term included barristers and Vakils High Court, while in the districts we had advocates, Vakils High Court as also pleaders. A pleader could, however, practise only in the district where he was enrolled, while a vakil High Court or an advocate could practise in any district.

(7) The question, therefore, arises whether in section 86 of the Representation of the People Act, 1951, the legislature intended to confine the list only to advocates of the High Court who had been in practice as advocates for not less than ten years or it intended to make the list wider and to include those persons who were enrolled as advocates and had been legal practitioners of not less than ten years' practice.

(8) In the Constitution the qualifications of a Judge of the Supreme Court and of a High Court are given in Article 124(3)(a), (b) and (c) and Article 217 (2) (a) and (b). Article 124(3) (b) requires that a person should be an advocate of at least ten years' standing and Art. 217(2)(b) is as follows:

> "A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and has for at least ten years been an advocate of a High Court in any state specified in the First Schedule or of two or more such Courts in succession."

(9) There can be no doubt that it is only advocates of 10 years' standing who can be considered for appointment to the Supreme Court or a High Court. If the legislature had intended that the same qualifications should be necessary in the case of a member of an Election Tribunal, the legislature could easily have used the same language as in the Constitution.

(10) I may here point out that under the Government of India Act, 1915, section 101, and the Government of India Act, 1935, section 220(3)(d) a pleader was also eligible for appointment as a Judge of a High Court. Section 220(3)(d) is as follows:

> "A person shall not be qualified for appointment as a Judge of a High Court unless he
>
> (d) has for at least ten years been a pleader of any High Court or of two or more such Courts in succession."

The words "a pleader" of any High Court in clause (d) must mean a person who is entitled to practise in a High Court. The language was changed in the Constitution as, after the Bar Councils Act, 1926, all persons entitled to practise in the High Court were called advocates and the previous nomenclature of barristers, advocates and vakils was changed.

(11) Learned counsel for the applicant has urged that the report of the Select Committee in this connection is helpful and he has referred us to the case of — 'A. K. Gopalan v. State of Madras', AIR 1950 SC 27 at pp. 38, 101 (B) in support of his argument that that report can be taken into consideration for the interpretation of the section. Without going into the question whether that report can be taken into consideration for the purpose of interpretation of the section it is difficult to see how that report helps learned counsel for the applicant. The words used in the Select Committee Report are "advocates of ten years' standing". For some reason the words "advocates of ten years' standing" were given up and in place of those words the legislature decided to use the words "advocates of the High Court who have been in practice for a period of not less than ten years."

(12) The Election Commission has pointed out that if these words are interpreted to mean an advocate of ten years' standing, then lawyers practising in a large part of this country will have to be excluded. The Commission has quoted by way of example lawyers practising in the High Courts of Assam, Orissa, Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, and Travancore-Cochin and the Judicial Commissioners' Courts of Bhopal, Himachal Pradesh and Vindhya Pradesh, where lawyers were enrolled as advocates only after the High Courts and the Judicial Commissioners' Courts came to be established. The reason behind the rule is that only persons of sufficient experience and character and integrity should be appointed as members of the Election Tribunal. The mere fact that an Advocate of a High Court has practised for a large number of years as a Vakil High Court or as a Pleader and not as an Advocate does not necessarily mean that he does not possess any of the qualities mentioned above.

(13) There is another difficulty in interpreting the section in the way the learned counsel for the applicant wants it to be interpreted. If the words "who have been in practice" are to

be read as governed by the words "Advocates of that High Court" not only there will be no such Advocate where the High Court established within ten years but also Advocates who have practised in other High Courts and have within ten years shifted to that High Court will not be qualified. By the amalgamation order of July 1948, the Oudh Chief Court and the Allahabad High Court were amalgamated and a Bench of this Court has held that after the amalgamation, the amalgamated High Court was a new High Court and the fact that it was not given a new name made no difference. In that case no Advocate of the new amalgamated High Court can be held to have practised as an Advocate of this Court for ten years.

(14) To my mind, the section can be interpreted to mean that the person selected is an Advocate and that he has put in practice as a lawyer for a period of not less than ten years. The Election Commission having taken that view I am not prepared to hold that they were wrong and interfere under Art. 226 of the Constitution. I would, therefore, dismiss this application with costs.

SAPRU J.:

(15) I am in agreement with the order proposed to be passed by my Lord the Chief Justice. I would like to point out that, apart from other considerations, the petition presented to this Court is of an extremely belated nature. Sri Sukhdeo Prasad, whose appointment as a member to the Election Tribunal has been challenged in this application by asking for a writ of 'quo warranto', was appointed on the 22nd September 1952. It was not until late in August 1953 that objection was raised to his functioning as a member of the Election Tribunal before the Tribunal itself. The Tribunal in its order dated the 28th August 1953 pointed out that the application challenging his appointment was filed after the petitioner's evidence had been concluded, respondent No. 1 had examined about 67 witnesses and only the statement of respondent no. 1 and some short witnesses remained to be recorded.

It is strange that it should not have occurred to the petitioner who is an advocate practising in Gorakhpur to take an objection to the appointment of Sri Sukhdeo Prasad, if he really entertained the belief that that appointment was invalid at the beginning of the trial. I am not prepared to accept the statement that the petitioner did not know or at all events could not have acquainted himself with the fact that the appointment of Sri Sukhdeo Prasad was irregular. Had he cared to look into the list of advocates of the Bar Council, he could have easily found out that Sri Sukhdeo Prasad on the date of his appointment had not completed 10 years' practice. The petition is, therefore, in any case a belated one and it strikes me that in the exercise of the powers which we enjoy under Art. 226 of the Constitution we are not bound to interfere on petition of this character. For it must be emphasised that the powers which we enjoy under Art. 226 are of a discretionary nature, though that discretion has to be exercised in accordance with judicial principles.

(16) I should also like to point out that admittedly Sri Sukhdeo Prasad is now qualified to be appointed as a member of the Tribunal, even on the assumption that the word "practice" means practice as an Advocate. It is a well recognised principle that the Court will not grant a 'quo warranto' in a case where a mere irregularity can be cured. For this proposition I would rely on — 'Bradley v. Sylvester', (1872) 25 L. T. 459 (C). This was a case in which the Court refused an application for a writ of 'quo warranto' against a clerk to a school board on the ground that he was improperly elected according to the provisions of a certain statute, considering that the majority of the board might, without assistance, remedy the impropriety themselves, the office being held during the pleasure of the board. Cockburn, C. J., observed:

> "Here the ground upon which we are asked to interfere is an impropriety in the election, and as the office is held at the pleasure of the board, it is competent for the board to do what might be accomplished by our interference."

On this ground too, in my opinion, this application must fail. This case is referred to with approval in — 'Rex v. Speyer; Rex v. Cassel', (1916) 1 KB 595 (D). At page 609 Lord Reading, C. J., emphasises that

> "whereas formerly a quo warranto was held to lie only where there was an usurpation of a prerogative of the Crown or of a right of franchise, a proceeding by information in the nature of quo warranto has long since been extended beyond that limit and is a remedy available to private persons within the limits stated by Tindal C. J. and subject always to the discretion of the Court to refuse or grant it."

I have come to the conclusion that this is a case, having regard to the belated nature of the petition and the dubious motive with which it has been presented, in which the Court should not exercise its discretion in favour of the petitioner.

(17) I now come to the question whether the interpretation which has been sought to be placed upon S. 86 of the Representation of the People Act, 1951, is a correct one. It is argued that under S. 86(2) the Election Commission was bound to nominate a person only from the list of advocates of the High Court who had been in practice for a period of not less than ten years. It is contended that the words "in practice" mean "has practised as an advocate". Undoubtedly there are difficulties in interpreting the words "in practice" as a lawyer because that might include attorney also. At the same time, I am not prepared to exclude the possibility that the words "in practice" mean any practising practitioner qualified to plead & act in courts within the jurisdiction of a High Court, provided that at the time of appointment he has achieved the status of an advocate. To place any other interpretation might indeed amount to disqualifying lawyers in a large part of this country. As has been pointed out by my Lord the Chief Justice, there are Courts which came into existence only after the coming into force of the Constitution. For this reason the interpretation that the words "in practice" have a wide meaning is not an altogether impossible one and I am not, therefore, prepared to hold that the only interpretation to be placed on these words is "has practised as an advocate". On both these grounds the application must fail.

CHATURVEDI J.:

(18) I agree with the judgment delivered by my Lord the Chief Justice and have nothing to add.

BY THE COURT :

(19) The application is dismissed with costs which we assess at Rs. 100/-.

(20) Learned counsel for the applicant has asked for a certificate under Art, 132 of the Constitution. As this case does not involve any substantial question of law as to the interpretation of the Constitution we decline to grant the certificate.

A/K.S.B. Application dismissed.

A.I.R. 1954 ALL. 231 (Vol. 41, C. N. 129)

V. BHARGAVA J.

Hira Singh and another, Applicants v. State through Mathura Das, Opposite Party.

Criminal Misc. No. 1315 of 1953, D/- 22-9-1953.

(a) Criminal P. C. (1898), S. 205 — Pardanashin lady — Order of exemption from appearance — Cancellation of.

The mere fact that an accused is a 'pardahnashin' lady does not entitle her to remain exempted from appearance all the time even if her presence is required for a proper conduct of the case. 6 All 59; AIR 1927 All 149 and AIR 1947 All 13, Disting. (Para 4)

Anno: Criminal P. C., S. 205 N. 6.

1953 Mitra: S. 205 P. 875 N. 690 "Pardanashin lady" (Pts. 4, 4a and 5 extra in N. 6 to S. 205 in A.I.R. Com.—Points noted by Mitra from 14 Cri. L. J. 604 (605), 15 Cri. L. J. 281 (283), 15 Cri. L. J. 539 (540) and 18 Cri. L. J. 187 not noticed in A.I.R. Com.).

Criminal P. C., S. 205 N. 10.

1953 Mitra: S. 205, P. 876 N. 691 "Appearance by pleader", last para. (Pts. 1 and 2 extra in N. 10 to S. 205 in A.I.R. Com.).

(b) Criminal P. C. (1893), Ss. 526 and 205 — Order for exemption from attendance passed — Cancellation of — Ground for transfer.

Mere cancellation of an order of exemption passed under S. 205 from personal attendance cannot be allowed in all cases to become a ground of transfer. If it be held that apprehension arises even after the order granting exemption is withdrawn on sufficient grounds in a proper case, it would mean that the discretion of the Magistrate, to enforce attendance even where justice requires it, would be completely taken away. Hence, the question of a reasonable apprehension has to be judged on the standard of the order cancelling the order of exemption being a proper or improper order or being in the exercise of judicial discretion or arbitrary power. (Paras 6, 7)

Anno: Criminal P. C., S. 526 N. 5.

1949 Mitra: S. 526 P. 1594 N. 1371 "Clause (a) .....trial" and P. 1598 N. 1372 "Instances.... apprehension".

Brahma Nath Katju, for Applicants; Shri Rama Deputy Government Advocate, for State.

CASES REFERRED:

(A) ('83) 6 All 59: 1883 All WN 207 (Pr 4)
(B) ('27) AIR 1927 All 149: 28 Cri LJ 94 (Pr 4)
(C) ('47) AIR 1947 All 13: 47 Cri LJ 704 (Pr 5)

JUDGMENT : I have heard learned counsel for the applicants and find that there is no force in this transfer application.

(2) The main ground taken is that the learned magistrate, Kumari Bimla Goel, in whose court the case is pending, first passed an order exempting Shrimati Parvati applicant no. 2 from personal attendance in court during the trial of the case but, subsequently, cancelled that order on an application presented by the counsel for the complainant and this raises an apprehension in the minds of both the applicants that they would not receive proper justice in her court. Learned counsel, in this connection, has drawn my attention to an order of my learned brother Gurtu, J. passed on the 3rd of September, 1952, in this very case when the applicants had come up to this Court for transfer of this very case from another court. Gurtu, J. in that order, held that the circumstances in which the order cancelling the exemption granted was passed, might have raised an apprehension in the minds of the applicants that they would not receive justice in that case. He further found another ground that a non-bailable warrant had been unjustifiably issued by the magistrate. On these two grounds, the case was transferred from the court of that magistrate.

(3) It is to be noticed that Gurtu, J. did not arrive at any clear finding that the cancellation of the exemption did actually raise a reasonable apprehension in the minds of the applicants. He only went to the extent of expressing his opinion that it "may raise an apprehension". It is not necessary for me to consider whether, in the circumstances in which the case came up before Gurtu, J., an apprehension did or did not arise that justice would not be meted out to the applicants in that court. I am only concerned with the circumstances in which the applicants have come up in this second application for transfer. In the affidavit filed in support of this transfer application, the allegation is that, after Kumari Bimla Goel had granted exemption to Shrimati Parvati applicant no. 2 from personal attendance in court, an application was moved by counsel for the complainant indicating that the presence of applicant no. 2 was necessary for a proper trial of the case on the date on which the prosecution witnesses were to be examined. That such a need can exist is clear. It might have been necessary for the prosecution to examine witnesses about the identity of applicant no. 2.

(4) Section 205 of the Code of Criminal Procedure gives a discretion to a magistrate to grant exemption from personal attendance to the accused person. Such discretion is to be exercised judicially. The mere fact that an accused is a 'pardahnashin' lady does not entitle her to remain exempted all the time even if her presence is required for a proper conduct of the case. Learned counsel has referred to me three cases of this Court, in two of which, viz., in the matter of the petition of Rahim Bibi, — '6 All 59 (A)' and — 'Mt. Tirbeni v. Mst. Bhagwati', AIR 1927 All 149 (B), it was held that, ordinarily, exemption from personal attendance should be granted to a 'pardahnashin' lady unless a strong 'prima facie' case was made out against her. These two cases are not applicable to the case before me because the applicants have come up to this Court by way of a transfer application and not as in those cases in revision against the order cancelling the order of exemption from personal attendance.

(5) The third case relied upon by learned counsel is — 'Bhajan Lal v. Emperor', AIR 1947 All 13 (C). In that case, there were serious allega-

tions against the magistrate that he had shown favour to two particular lawyers and it was as a result of that favour that the order cancelling exemption was passed and a non-bailable warrant had also been issued for the arrest of the 'pardahnashin' ladies. The learned Judge, after reciting these facts, remarked that he was satisfied that the applicants in that case had not made out any case against the integrity and fair-mindedness of the magistrate, nor was he satisfied that the magistrate was guilty of excess of zeal, let alone an act of indiscretion in the orders which he passed. The learned Judge, however, felt that, on a consideration of all the facts in that case, he was justified in arriving at the view that there was a reasonable apprehension in the minds of the accused that they would not get justice at the hands of that particular magistrate. What were those other facts, which led the learned Judge to that view, have not been made clear in his judgment and it is, therefore, not possible to apply that case to the facts of this case.

(6) It is obvious that the mere cancellation of an order of exemption from personal attendance cannot be allowed in all cases to become a ground of transfer. If the magistrate is given a discretion under section 205 of the Code of Criminal Procedure, the law intended to give that discretion with the specific object that, in appropriate cases, exemption should be granted and, in appropriate cases, the magistrate may withdraw that exemption. It is only if a magistrate withdraws the exemption without proper reasons that the Court may be justified in holding that a reasonable apprehension may arise that that particular magistrate would not do justice in that case. If the order of exemption is cancelled on sufficient grounds, no such apprehension should arise. If it be held that apprehension arises even after the order granting exemption is withdrawn on sufficient grounds in a proper case, it would mean that the discretion of the magistrate to enforce attendance even where justice requires it would be completely taken away.

(7) This would lead to the interpretation that once exemption has been granted under section 205 of the Code of Criminal Procedure or the accused happens to be a 'pardahnashin' lady, the court is bound to continue or grant the exemption and can never cancel that exemption, even though it may not be possible to try the case properly in the absence of the person seeking exemption. Clearly, therefore, the question of a reasonable apprehension has to be judged on the standard of the order cancelling the order of exemption being a proper or improper order or being in the exercise of judicial discretion or arbitrary power. In the present case, there is nothing in the affidavit to show that the presence of applicant no. 2 was not necessary on the particular date for which her attendance was directed to be enforced by the learned magistrate, Kumari Bimla Goel, and, in these circumstances, this can be no ground for transfer of the case from her court. Allowing this transfer application on this ground would only have the effect of giving the applicants the idea that hereafter applicant no. 2 can always refuse to attend the court during the trial of this case even if it is found that her presence is needed in that court.

(8) The second ground urged by learned counsel is that a reasonable apprehension was raised in the minds of the applicants that they would not receive proper justice in the court of Kumari Bimla Goel because she did not adjourn the case under section 526(8) of the Code of Criminal Procedure when the applicants communicated to her their intention to move this Court for transfer of that case. The affidavit filed on behalf of the applicants shows that 11th June, 1953 was fixed for hearing of the case. On that date, applicant no. 2 was required to attend but she did not appear and thus she disobeyed the direction of the court to be present on that date. It was in these circumstances that the application under section 526(8) of the Code of Criminal Procedure was presented before the learned magistrate. The magistrate naturally wanted an explanation for the absence of applicant no. 2 and, therefore, directed that a medical certificate be filed as also an affidavit on the 15th of June, 1953.

(9) The record is not here and it is not possible to find out what exactly transpired as a result of which the medical certificate was demanded but it is clear that it must have been demanded because some plea was put forward on behalf of applicant no. 2 that she had failed to attend the court on the 11th of June, 1953, because of illness. The case had to be adjourned for four days for the purpose of enabling applicant no. 2 to give an explanation for her absence on the 11th of June, 1953, when she had been required to attend the court personally and it was for this adjournment that ten rupees were awarded as costs to the complainant. On the 15th of June, 1953, after this matter was settled, the learned magistrate granted three weeks' time to the applicants to move this Court for transfer and this order was not conditional. In paragraph 6 of the affidavit, where a mention is made about the grant of this time of three weeks, a sentence has been added that applicant no. 1 was also ordered to pay Rs. 10/- as costs to the complainant on the 9th of June, 1953. This, at first, conveyed an idea that these costs were directed to be paid as a condition to granting time for three weeks to move this Court for transfer but, as a matter of fact this is not so. Rs. 10/- as costs mentioned in the last sentence of this paragraph were awarded on the 9th of June, 1953, and not on the 15th of June, 1953, when the case was adjourned to enable the applicants to move this court for transfer.

(10) The only other point argued by learned counsel for the applicants is that, after the order of Gurtu, J., dated the 3rd of September, 1952, transferring the case, the applicants were summoned twice unnecessarily in two different courts and this resulted in harassment. It is clear that harassment, if any, was not the result of any act on the part of the particular magistrate who is now trying the case, nor is it possible to hold that enforcement of attendance of applicant no. 2 on those two dates was a deliberate act on the part of the district authorities to harass the applicant.

(11) In these circumstances, there is no ground at all in this transfer application which is dismissed.

(12) Learned counsel has asked for a certificate under Article 134(1)(c) of the Constitution that it is a fit case for appeal to the Supreme Court but I am unable to grant the certificate as this case raises no such question of law as would justify grant of that certificate.

B/V.S.B. Application dismissed.

A.I.R. 1954 ALL. 232 (Vol. 41, C.N. 130)

RAGHUBAR DAYAL AND V. BHARGAVA JJ.

Narottam Saran, Applicant v. Govt. of the State of Uttar Pradesh and another, Opposite Party.

Civil Misc. (Writ) Petn. No. 944 of 1953, D/- 2-11-1953.

Constitution of India, Art. 226 — Scope — (Houses and Rents—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 3, 7-F).

A writ in the nature of 'certiorari' can be issued to judicial or quasi-judicial bodies. One acts in quasi-judicial capacity when one has to ascertain facts or law with respect to a certain dispute between the parties and in dealing which he is expected to act judicially even though he does not constitute a judicial body. (Para 3)

Sub-section (4) of S. 3 of the U. P. Act 3 of 1947 makes the order of the Commissioner in revision final subject to any order passed by the State Government under S. 7-F. But under S. 7-F the State Government is given absolute discretion to pass any order it considers necessary for the ends of justice on perusal of the order. It is not required to give notice to the parties or to afford them opportunities to lay or to argue their case before it. In passing such a discretionary order the State Government does not act in a quasi-judicial capacity. Therefore no writ of 'certiorari' can be issued to the Government in connection with its orders under S. 7-F of the Act. (Paras 5, 6)

Brij Lal Gupta, for Applicant.

RAGHUBAR DAYAL J.:

This is an application under Article 226 of the Constitution praying for the issue of a writ, order or direction in the nature of 'certiorari' calling for the record of the case and after perusal quashing the order of the State Government setting aside the order of the Commissioner and restoring that of the District Magistrate in the following circumstances.

(2) The applicant purchased a certain house in 1950 and applied to the District Magistrate, Moradabad for permission to file a suit for ejectment against opposite party No. 2. This application was rejected by the District Magistrate. He filed a revision against the refusal to grant him permission to eject opposite party no. 2 before the Commissioner in view of section 3, sub-section (2) of the U. P. (Temporary) Control of Rent and Eviction Act. The revision was allowed and the applicant was given permission under section 3 of the Act to file a suit for ejectment of opposite party No. 2 at the end of six months from the date of the order, which was the 19th of February, 1953. Opposite party No. 2 then approached the State Government on the 2nd July, 1953.

The Food Commissioner forwarded the application of opposite party No. 2 to the Commissioner saying that since there did not appear to be any irregularity in the orders of the District Magistrate his orders be allowed to stand and the permission given under section 3 of the Act to the owner be withheld. The applicant knowing of this order submitted a representation to the Government pointing out the facts having a bearing on the case and praying for the recall of the 'ex parte' order. This representation was rejected by the Government in its letter, dated the 8th of September, 1953. It said that the Government had after fully considering the matter decided to restore the order of the District Magistrate and that this decision of the Government was not open to amendment. It is against the Government's ordering the restoration of the District Magistrate's order that this application is directed.

(3) A writ in the nature of 'certiorari' can be issued to judicial or quasi-judicial bodies. We are of opinion that the District Magistrate or the Government do not act as any such body when dealing with the matter concerning the grant or refusal of permission to file a suit for ejecting a tenant.

The only reference to the District Magistrate's permission for filing a suit for ejectment against a tenant is to be found in the provisions of section 3, sub-section (1) of the Act and they are that subject to any order passed under sub-section (3) no suit shall, without the permission of the District Magistrate, be filed in any civil court against a tenant for his eviction from any accommodation, except on one or more of the following grounds. The section nowhere lays down what considerations the District Magistrate should bear in mind in dealing with an application praying for permission to file a suit for evicting a tenant. It does not lay down what procedure he should follow. He is not required to make any kind of enquiry and then to determine the matter in view of certain considerations. As an executive head of the district he is supposed to know the needs of the people and it seems he has been authorised to give permission to landlords to sue for ejectment when he finds that that would not affect adversely the convenience of the people in general. In the circumstances, he cannot be said to be acting in a quasi-judicial capacity.

One acts in that capacity when one has to ascertain facts or law with respect to a certain dispute between the parties and in dealing which he is expected to act judicially even though he does not constitute a judicial body. We have been referred to various cases, but we do not find anything in them which goes against what we have expressed and it is not necessary to refer to them.

(4) Sub-section (2) of section 3 of the Act provides for a revision to the Commissioner and its sub-section (3) further provides that the Commissioner, if satisfied that the District Magistrate has acted illegally or with material irregularity or has wrongly refused to act, may confirm or set aside the order of the District Magistrate. It is urged that in view of the provisions of sub-section (3) the District Magistrate has to act according to law and in accordance with some procedure and that if he was not to act in that fashion no question for the consideration of the Commissioner can arise. Absence of any considerations to guide the District Magistrate in the matter does not necessarily mean that the Commissioner cannot revise a certain order on any of the considerations mentioned in sub-section (3). The order of the District Magistrate may not refer to accommodation. The District Magistrate may not pass any order. These sub-sections (2) and (3) were enacted subsequent to the enactment of the Act and it is quite possible that the legislature overlooked providing the facts which could guide the District Magistrate in dealing with such matters. Merely because the Commissioner is asked to act in a certain manner would not change the nature of the act which the District Magistrate is to perform when he is asked to give permission for filing a suit for ejecting a tenant.

(5) Sub-section (4) of section 3 makes the order of the Commissioner in revision final subject to any order passed by the State Government under section 7-F. Section 7-F is :

> "The State Government may call for the record of any case granting or refusing to grant permission for the filing of suit for eviction referred to in section 3 or requiring any accommodation to be let or not to be let to any person under section 7 and may make such order as appears to it necessary for the ends of justice."

It is clear that the State Government is given absolute discretion to pass any order it considers necessary for the ends of justice on perusal of the order. The State Government is not required to give notice to the parties or to afford them opportunities to lay their case before it or to argue their case before it. In passing such a discretionary order the State Government cannot be said to act in a quasi-judicial capacity.

(6) We are, therefore, of opinion that no writ of 'certiorari' can be issued to the Government in connection with its orders under section 7-F of the Act and that therefore this application is not maintainable. We accordingly reject it.

A/H.G.P. Application rejected.

A.I.R. 1954 ALL. 234 (Vol. 41, C.N. 131)

MOOTHAM AND SAPRU JJ.

Majid Ahmad, Petitioner v. Asst. Returning Officer and others, Opposite Party.

Misc. Writ Nos. 884, 879 and 880 of 1953, D/-24-10-1953.

(a) **Municipalities — U. P. Town Areas Act (2 of 1914) (as amended by U. P. Act 5 of 1953), S. 6-I (2) — Rejection of nomination paper — Remedy under Art. 226 of Constitution — (Constitution of India).**

The right to vote or to stand as a candidate for election to a town area committee is a statutory right, and the remedy of the person aggrieved is restricted to the statutory relief. Where, therefore, the nomination paper of a candidate is rejected by the Returning Officer, his decision cannot be challenged under Art. 226, rejection of nomination paper being included in election as used in S. 6-I. AIR 1952 SC 64, Applied. (Paras 2 and 3)

(b) **Municipalities — U. P. Town Areas Act (2 of 1914), Preamble — Intention of Legislature.**

The intention of the Legislature to be derived from the provisions of the Act appears to be to assimilate the procedure in the case of a town area election as far as possible to that of a parliamentary election. (Para 4)

Jitendra Nath Varma and Ajit Ranjit Man Singh, for Petitioner; S. C., for Opposite Party.

CASES REFERRED:

(A) (1859) 6 CB (NS) 336: 28 LJCP 242 (Pr 2)
(B) ('52) AIR 1952 SC 64: 1952 SCR 218 (SC) (Prs 2, 3, 6)

MOOTHAM J.:

These are petitions under Art. 226 of the Constitution. In each case the petitioner desired to stand for membership of a town area committee and he duly filed his nomination paper. In each case the nomination paper was rejected by the Returning Officer. The petitioners now come to this Court and each seeks a writ in the nature of 'certiorari' to quash the order made by the Returning Officer.

(2) The first question is whether the petitioners can challenge the decision of the Returning Officer by a petition under Art. 226, or indeed in any manner other than by an election petition. In my opinion they cannot do so. The right to vote or to stand as a candidate for election to a town area committee is not a common law but a statutory right, and it is a well recognised rule that if in such a case the statute which creates the right provides also the means for enforcing it, the remedy of the person aggrieved is restricted to the statutory relief. This was laid down in — 'Wolverhampton New Water Works Co. v. Hawkesford', (1859) 6 CB (NS) 336 at p. 356 (A), a case which was approved by the Supreme Court in — 'N. P. Ponnuswami v. Returning Officer Namakkal' AIR 1952 SC 64 (B).

(3) Now sub-s. (2) of S. 6-I of the U. P. Town Areas Act (as amended by U. P. Act V of 1953) provides that

> "No election shall be called in question except by an election petition presented in accordance with the provisions of this Act",

and by an order, called The U. P. Town Areas (Application of Provisions of U. P. Municipalities Act, 1916) Order, 1953, made by the State Government under the provisions of S. 6H of that Act provision has been made for the determination by an election tribunal of disputes relating to elections. A specific remedy is therefore provided by the Act, and in view of the decision in —'Ponnuswami's case (B)', it appears to me no longer open to argument that 'election' as used in S. 6-I includes the rejection of a nomination paper. In — 'Ponnuswami's case (B)', the Supreme Court repudiated the contention that the law of elections in this country — the Court was of course considering parliamentary elections — contemplated two attacks on matters connected with election proceedings, the one while they were going on by invoking the extraordinary jurisdiction of the High Court under Art. 226 and another after they had been completed by means of election petition. In his judgment, with which the other members of the Court concurred, Mr. Justice Fazl Ali summed up his conclusions in these words:

> "Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to the schedule and all controversial matters and all disputes, arising out of elections should be postponed till after the elections are over, so that the election proceedings should not be unduly retarded or protracted.
>
> In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not made the subject of a dispute before any Court while the election is in progress."

(4) I can see no reason why any different principle should apply in the case of Town area elections. Indeed the intention of the legislature to be derived from the provisions of the Town Areas Act appears to be to assimilate the procedure in the case of a town area election as far as possible to that of a parliamentary election. Sri S. N. Kacker has argued that the right which the petitioner is now claiming is the right to contest the present election, and a remedy which may give him the right to contest a future election is no adequate remedy. In my opinion this submission states the petitioner's right in terms which are too wide; for his real complaint, his cause of action if I may use that expression, is the rejection of his nomination paper by the Returning Officer, and as Fazl Ali, J., pointed out, the only significance which the rejection of a nomination paper has

consists in the fact that it can be used as a ground to call in question the election. I am therefore of opinion that the petitioners are not entitled to the relief which they ask in these petitions.

(5) I would dismiss the petitions with costs.

SAPRU J.:

(6) I agree with the order proposed by my brother Mootham. The position as I see it is that under section 6-I(2) of the U. P. Town Areas Act, 1914, (Act II of 1914), more conveniently referred to hereinafter as the Act, no election can be called in question except by an election petition presented in accordance with the provisions of that Act. So far as election to a membership of the committee is concerned, the authority to which and the manner in which the election petition should be presented has been provided for by an Order adopting section 19 of the Municipalities Act. The question is whether this Court should interfere at this stage with the order of the returning officer rejecting the nomination paper. I am clearly of the opinion that this Court cannot interfere at this stage at all and for this I would rely upon the observations of the Supreme Court in — 'AIR 1952 SC 64 (B). Mr. Justice Fazl Ali who delivered the judgment of the Supreme Court made it clear that the word 'election' had been used in Part XV of the Constitution in

> "the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature."

He further pointed out that in conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress.

Section 6-I(1)(c) of the Act specifically bars the jurisdiction of the civil court to question the legality of any action taken or any decision given by the returning officer or by any other officer appointed under the Act in connection with an election. It is clear that it would not be competent for any civil court to give the relief which the petitioner is seeking from this Court. The question is whether we should, in exercise of the powers which we enjoy under Article 226 of the Constitution and bearing in mind the principle which has been laid down in section 6-I(1) of the Act give the petitioner the relief sought by him. I am clearly of the opinion that it would not be proper for this Court to interfere with the processes of the election. The correct remedy for the petitioner is to file an election petition to the authority empowered to receive it after the elections are over. This Court can give him no relief at this stage.

(7) For the reasons given above, I concur in the order proposed by my brother Mootham.

A/V.R.B. Petitions dismissed.

A.I.R. 1954 ALL. 235 (Vol. 41, C.N. 132)

AGARWALA AND CHATURVEDI JJ.

Shyam Lal, Applicant v. State of U. P. and another, Opposite Party.

Civil Misc. (Writ) No. 379 of 1953, D/- 10-10-1953.

(a) **Constitution of India, Art. 311 — Removal — Meaning — Compulsory retirement under R. 465A(2) does not amount to — (Civil Service Regulation Rr. 465A(2), 49) — (Words and Phrases — Removal). AIR 1952 Pepsu 69; AIR 1952 Pepsu 148. AIR 1952 Pepsu 152 and AIR 1953 Pepsu 24, Dissented from.**

The word 'removal' is not used in its widest connotation in Art. 311. It refers only to a removal which is for some fault or misconduct of the employee himself which he may try to explain. AIR 1953 SC 250, Rel. on.

The essential difference between "removal" by way of penalty as provided for in Rule 49 and other rules of the Civil Service Regulations and "retirement" on attainment of period of qualifying service as provided for in Rule 465A is that while "removal" under the former rules is always by way of penalty, "retirement" under Rule 465A is not at all by way of penalty, though it is true that the retirement under rule 465A may be taken recourse to in some cases because of some misconduct or fault of an officer who has already put in 25 years of service.

(Para 17)

Thus though rule 465A is on the border line between the rule of removal in rule 49 and retirement under the fundamental rule 56, it partakes more of the nature of retirement under fundamental rule 56 than of removal under rule 49. Juxtaposition of the words "dismissal, removal and reduction in rank" in Art. 311 shows that "removal" is of a quality similar to "dismissal and reduction in rank". As "removal" is sandwiched between "dismissal" and "reduction in rank", both of which are punishments, it must be held that a "retirement" under S. 465A is not comprised within the word "removal" in Art. 311. AIR 1951 All 793; AIR 1952 Raj 17; AIR 1952 Sau 49 (FB) and AIR 1953 Trav-C 140, Rel. on. AIR 1953 Mad 54, Distinguished; AIR 1952 Pepsu 69; AIR 1952 Pepsu 148; AIR 1952 Pepsu 152 and AIR 1953 Pepsu 24, Dissented from. (Paras 18, 19)

(b) **Civil Service Regulations, R. 465A — Validity of — (Civil Service (Classification, Control and Appeal) Rules (1930), R. 7) — (Government of India Act (1935), Ss. 247, 250).**

Rule 7 of the Civil Service (Classification, Control and Appeal) Rules, 1930 impressed the stamp of validity upon the Civil Service Regulations applicable to the all India services in respect of conditions of services, pay, allowances and pensions that were in force in 1930. This would include rule 465A of the Civil Service Regulations. It follows, therefore, that rule 465A of the Civil Service Regulations had become a valid rule as if it were made by the Secretary of State in Council.

(Para 24)

Further, the effect of Ss. 247 and 250 of the Government of India Act, 1935, is

merely to apply rules, made by the Secretary of State in Council after the commencement of the Act of 1935 to persons appointed by the Secretary of State in Council both before and after the commencement of the Act, 1935. Rule 465A which was made before the commencement of the Act of 1935, and which had been taken by the Secretary of State in Council as a rule having been made by himself and validated as such by rule 7 of the Civil Service (Classification, Control and Appeal) Rules, cannot, therefore, be said to be invalid, or not applicable to the applicant by reason of its not having been made by the Secretary of State in Council. (Para 28)

(c) Civil Service Regulations, Rr. 649 and 465A — Scope of.

Rule 649 deals with compulsory and premature retirement for a special cause "unfitness or further advancement" which is dealt with in R. 353a. Rule 465A, on the other hand, is a rule of retirement after completion of 25 years of service, when it is considered that his retention in the service is not in the public interest. The two rules deal with different matters though both of them may apply in the case of a particular individual at one and the same time. Rule 465A is not, therefore, at all affected by rule 649 in the case of Civil Service of Engineers. The rule that a special rule should be preferred to a general rule on the same subject does not apply to the case. (Paras 30, 31)

(d) Civil Service Regulations, Rule 465A — Rule not abrogated by R. 55 of the Fundamental Rules — (Fundamental Rules (1949), R. 55).

Rule 55 of the Fundamental Rules does not deal with the subject-matter which is dealt with in rule 465A and it cannot, therefore, be said that by reason of rule 55, rule 465A should be deemed to have been cancelled or abrogated. (Para 32)

(e) Constitution of India, Art. 311 — 'Showing cause' — Meaning — (Words and Phrases — Showing cause) — (Civil Service Regulations, R. 465A).

The expression "showing cause" as used in Article 311 does not imply that a mere opportunity of submitting an explanation is enough. It implies that adequate opportunity of leading evidence in support of the contentions of the person concerned and controverting the contentions raised against him must be given; and where necessary, opportunity of cross-examining witnesses of the other side and of addressing arguments should also be afforded. (Para 34)

Where the order is passed under the provisions of R. 465A of the Civil Service Regulations, no such opportunity is necessary; because the compulsory retirement contemplated under that rule is not covered by Art. 311. (Para 35)

Gopi Nath Kunzru and Jagdish Sahai, for Applicant; Advocate-General and Senior Standing Counsel, for Opposite Party.

CASES REFERRED:

(A) ('53) AIR 1953 SC 250: 1953 SCR 655 (SC) (Prs 8, 20)
(B) ('37) AIR 1937 PC 31: ILR (1937) Mad 532 (PC) (Prs 10, 12)
(C) (1895) 1895 AC 229: 64 LJ PC 119 (Prs 10, 11)
(D) (1896) 1896 AC 575: 65 LJ PC 82 (Pr 11)
(E) (1838) 5 Bing (NC) 262: 8 LJ CP 193 (Pr 12)
(F) ('37) AIR 1937 PC 27: ILR (1937) Mad 517 (PC) (Pr 12)
(G) ('48) AIR 1948 PC 121: 75 Ind App 225 (PC) (Prs 13, 33, 34)
(H) ('51) AIR 1951 All 793: 52 Cri LJ 1450 (Pr 20)
(I) ('52) AIR 1952 Raj 17: ILR (1951) 1 Raj 405 (Pr 20)
(J) ('52) AIR 1952 Sau 49: 4 Sau LR 294 (FB) (Pr 20)
(K) ('53) AIR 1953 Trav-C 140: ILR (1952) TC 756 (Pr 20)
(L) ('53) AIR 1953 Mad 54: ILR (1953) Mad 229 (Pr 20)
(M) ('52) AIR 1952 Pepsu 69: ILR (1952) Patiala 110 (Pr 20)
(N) ('52) AIR 1952 Pepsu 148: 1952 Cri LJ 1473 (Pr 20)
(O) ('52) AIR 1952 Pepsu 152: ILR (1952) Patiala 392 (Pr 20)
(P) ('53) AIR 1953 Pepsu 24 (Pr 20)
(Q) ('52) AIR 1952 All 63: ILR (1952) 2 All 783 (Pr 34)
(R) ('52) AIR 1952 All 99: ILR (1952) 2 All 949 (Pr 34)

AGARWALA J.:

Shyam Lal, applicant, was a member of the Indian Service of Engineers occupying the post of the Superintending Engineer, VI Circle in the Irrigation Department of the State of Uttar Pradesh. He was promoted to the rank of Superintending Engineer in August 1944 and was holding that post when the dispute in the case, that calls for decision, arose. The applicant passed his Civil Engineering Examination from the Thomason College, Roorkee, in 1922 standing first in his class. He was awarded the Council of India Prize of Rs. 1,000/- for being the best student of the year and a prize of Rs. 250/- for being the best Indian student of the year. He was also awarded the Cautley Gold Medal for the best Engineering design of the year. He was appointed in the Indian Service of Engineers in October 1923 by the Secretary of State for India in Council.

At the time of his appointment the applicant was given a letter of appointment by the Secretary of State for India in Council which prescribed 'inter alia' the conditions governing the applicant's terms of appointment conditions of service, promotion, leave, pension etc. A copy of the letter has been annexed to the petition. After the attainment of Independence by India a fresh covenant was entered into between him, and the Governor of Uttar Pradesh and the Governor-General of India, by which the applicant's original conditions of service were confirmed.

According to the applicant, he incurred the displeasure of certain colleagues in the service whose work he had the misfortune to criticise in connection with his routine duties as Superintending Engineer, and those persons started making wrong reports against him. On January 4, 1950, the U. P. Government addressed a letter No. 43-B/XIII/277-B-1948 to the Chief Engineer, Irrigation Branch, U. P. asking for the applicant's explanation in respect of certain charges. The charges related to

certain alleged excess payments by him to certain contractors which, in the opinion of the Government, were unjustified. One of the charges, however, related to dishonest conduct.

(2) The applicant submitted his explanation to the charges to the Chief Engineer. It appears that thereafter the Chief Engineer sent his own note in reply to the applicant's explanation to the Union Public Service Commission, which decided that the charge relating to dishonesty was not proved while the other charges were proved. On the arrival of this report, the President of India passed an order on the 17th of April 1953 compulsorily retiring the applicant from service with effect from the date of the handing over of the charge by the applicant. Before the order could be served on him, the applicant made an application to this Court under Article 226 of the Constitution, praying that a writ of certiorari be issued quashing the President's order dated the 17th April, 1953, ordering the compulsory retirement of the petitioner. In this petition he alleged that the order had not yet been served on him and that it might be served on him at any time. He prayed for an 'ad interim' order directing the opposite parties, namely, the State of Uttar Pradesh and the Union of India to refrain from relieving the petitioner of his present post and from carrying into execution the aforesaid order.

The grounds on which the petition was based was that the applicant was not given any reasonable opportunity to show cause against the action proposed to be taken against him, that he was merely asked to submit an explanation which he did but was not given an opportunity of controverting by evidence and argument the charges which were levelled against him or the remarks which were made against him by the Chief Engineer. When this application was presented to us, we considered that a 'prima facie' case had been made out and acceded to the request for the grant of an interim order, and directed that the order of 17th April 1953 be not carried into effect till the decision of this petition. Later, on the representation of the Advocate-General on behalf of the State, the interim order was modified and we directed that the Government may not if they like, take any work from the applicant but may pay him the salary till the decision of the application. We understand that the applicant has been drawing his salary during this time.

(3) We have now heard learned counsel on both sides and we have come to the conclusion that the applicant is not entitled to the relief claimed by him. The applicant relies upon Article 311 of the Constitution. That Article provides—

> "No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.
>
> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

There is a proviso to sub-article (2) which is not relevant for the purpose of the present case. In substance, Article 311 provides a twofold protection to an employee in the civil service of the Union or of a State— (a) that such an employee shall not be dismissed or removed by an authority subordinate to that by which he was appointed and (b) that such an employee shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The applicant's case is that he was 'removed' from service and, as such, he was entitled to a reasonable opportunity of showing cause against his removal, which he was not given.

(4) The alleged 'removal' of the applicant was under paragraph 465A of the Civil Service Regulations which provides as follows:

"For officers mentioned in Article 349A the rule for the grant of retiring pension is as follows:

(1) An officer is entitled, on his resignation being accepted, to a retiring pension after completing qualifying service of not less than 25 years or in the case of officers of Imperial Services of the Forest, Geological Survey, Public Works, Railway and Telegraph Departments and any others covered by Article 635 who entered the service before the 6th day of December, 1932, not less than twenty years.

(2) A retiring pension is also granted to an officer who is required by Government to retire after completing twenty-five years' qualifying service or more."

Then there are two notes to this paragraph. Note I reads—

> "Government retains an absolute right to retire any officer after he has completed twenty-five years' qualifying service without giving any reasons, and no claim to special compensation on this account will be entertained. This right will not be exercised except when it is in the public interest to dispense with the further services of an officer."

It is not necessary to quote Note 2.

(5) The applicant was, according to him, removed under sub-paragraph (2) of paragraph 465A read with note I. The applicant had completed 25 years of qualifying service. He had not attained the age of 55 years which is an age of superannuation and which he would do on the 10th of January 1955. Retirement under this rule does not entail any reduction in the pension which the applicant may be entitled to. It is conceded in the present case that no such reduction was ordered in his case and no other punishment was inflicted on him.

(6) On behalf of the opposite party it is alleged that a compulsory retirement under paragraph 465A is not "removal" within the meaning of Article 311 of the Constitution, and further that even if it be so, the applicant was given a reasonable opportunity of showing cause against his removal, inasmuch as he was asked to submit an explanation which he did, and nothing more, in the circumstances of the case, was necessary to be done.

(7) Therefore, two questions fall for decision — (1) whether "removal" within the meaning of Article 311 includes "retirement", as may be ordered under paragraph 465A of the Civil Service Regulations, and (2) whether, if removal includes retirement under

that paragraph, a reasonable opportunity was given to the applicant? A third question also arises in the case and it is whether paragraph 465A is a valid rule or regulation and whether it is applicable to the applicant.

(8) The word "removal" means in its dictionary meaning "displace" or "discharge" from a certain position. In its widest scope it would include every kind of displacement of a person from a post he holds. It would, therefore, also in that sense include a compulsory retirement on the attainment of the age of superannuation under rule 56 of the Fundamental Rules. It may also be said that it would include, in that larger sense, the termination of the service of an employee for any reason whatever, for instance on the expiry of his term of office which he held. It is obvious that a wide meaning such as this cannot be given to the word "removal" as used in Article 311 of the Constitution. The Article requires that a reasonable opportunity is to be given to an employee to show cause against the action proposed to be taken against him. There can be no question of showing cause when a service is terminated, because a person has attained the age of superannuation, or because his term of service which he could hold under a contract under which he was employed, expires. In all these cases the action of terminating an employee's service is taken not because of any misconduct or fault of the employee but because his term of office has come to an end by the automatic operation of some rule applicable to him or by some term of the contract of his service.

A person can be asked to show cause against an action proposed to be taken against him, if the action proposed to be taken against the applicant is of such a nature that it may possibly be avoided if properly explained. If the termination of service is ostensibly not for any fault of the employee, no question of explanation can arise. Therefore, it must be held that "removal" within the meaning of Article 311 must refer to a removal which is for some fault, or misconduct of the employee himself which he may try to explain. The word "removal" is not used in its widest connotation in Article 311, as has recently been laid down by the Supreme Court in — 'Satish Chandra Anand v. Union of India', AIR 1953 SC 250 (A). In that case a temporary employee's term of service was terminated by means of a notice as required by the terms of the contract of his service. The Supreme Court pointed out that such termination of service did not amount to "removal" within the meaning of Article 311. We have, therefore, necessarily to put some limitation on the connotation of the word "removal" in Article 311.

Under paragraph 465A of the Civil Service Regulations, there may be compulsory retirement of a person who has completed 25 years of qualifying service. On completion of that period of service, the employee is granted full pension, as would be available to him after completing that period of service, and he is entitled to all emoluments as he would be entitled to if his services were terminated at that particular point of time. With the exception of the fact that he may stand to lose monetarily by a premature retirement from service he suffers no other stigma. But the difficulty that arises is that paragraph 465A itself provides that this premature retirement of an employee will not be made unless it is in the public interest to do so.

(9) The argument on behalf of the applicant is that this is tantamount to saying that the employee is blame-worthy or, at any rate, has some defect or disqualification for which he is compulsorily retired under that paragraph; and, it is urged that, for that reason, it is natural and just that he should be afforded reasonable opportunity of showing why he should not be prematurely retired and put on a level different from his compeers in the service. We have given our best consideration to this matter and although much can be said for either view, we have finally come to the conclusion that the contention advanced on behalf of the State is the correct one and must be accepted. A little consideration of the history of the rule enacted in Article 311 of the Constitution would confirm this conclusion.

(10) Before the Government of India Act, 1919, there was no restriction on the power of the Crown to dismiss a servant, employed in the civil service, at pleasure. The general English rule was that servants of the Crown could be dismissed at the pleasure of the Crown. There was only one exception to this rule and it was this that where an appointment was made under an Act of Parliament providing dismissal for good cause, the servant could not be dismissed at pleasure. This distinction between the two classes of cases was pointed out by the Privy Council in — 'Venkatarao v. Secretary of State', AIR 1937 PC 31 (B) where their Lordships quoted the opinion of Lord Hobhouse as delivered in — 'Shenton v. Smith', (1895) AC 229 (C).

> "It appears to their Lordships that the proper grounds of decision in this case have been expressed by Stone J. in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law suit, but by an appeal of an official or political kind .....As for the regulations, their Lordships again agree with Stone J. that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servant."

(11) A special case such as was contemplated in the above cited passage occurred in — 'Gould v. Stuart', 1896 AC 575 (D) where the Board, consisting of three members, two of whom had sat in 'Shenton's case (C)', held that the respondent Stuart held office in New South Wales under certain conditions expressly enacted in the body of the New South Wales Civil Service Act, 1884, and that these express provisions of the statute were

> "inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure."

(12) This rule was applied to servants in the employ of the East India Co. — 'G. Gibson v. The East India Co.', (1838) 5 Bing (NC) 262 (E). After the resumption of the Government of India by the Crown the same rule con-

tinued to be in force up to 1919 when the Government of India Act was amended by the insertion of section 86B. That section imposed one restriction upon the dismissal of a civil servant at the pleasure of the Crown. The restriction was that no civil servant might be dismissed by any authority subordinate to that by which he was appointed. Subject to this there was no restriction upon the power of the Crown to dismiss any person in the Civil Service at pleasure. Section 96B, however, made reference to the rules made by Government and while enacting the rule that the Crown could dismiss a person in Civil Service at pleasure, it made it

"subject to the provisions of this Act and of the rules made thereunder".

Courts in India differed as to the precise scope of this phrase. One view was that the power of the Crown to dismiss at pleasure was not unqualified but was subject to the provisions of the rules applicable to the service to which the person concerned belonged. The other view was that these rules and regulations did not limit the power of the Crown to dismiss a servant at pleasure but were merely rules of administration which would ordinarily be observed by the Executive Government, but if not observed, itself conferred no right which could be enforced in a court of law by a dismissed servant.

The matter went up to the Privy Council in two cases — 'Venkata Rao v. Secretary of State (B)', to which a reference has already been made and — 'Rangachari v. Secretary of State', AIR 1937 PC 27 (F). In both of these cases the Privy Council upheld the latter view, namely, that the phrase "subject to the provisions of this Act and of the rules made under the Act" did not limit or qualify the unfettered discretion of the Crown to dismiss a servant in the Civil Service at pleasure, that the remedy for the violation of the rules and regulations was political and not legal. In the Government of India Act, 1935, the position was altered. Under that Act, over and above, the restriction on the pleasure of the Crown to dismiss a Civil Servant at pleasure which was already embodied in Section 96B, another restriction was imposed and it was that a Civil Servant could not be "dismissed or reduced in rank" unless the person concerned was given a reasonable opportunity of showing cause against the action proposed to be taken against him. By this provision what was embodied in some of the rules was given a statutory recognition.

Under rule 55 of the Civil Service (Classification, Control and Appeal) Rules which were made under the provisions of the Government of India Act, 1919, a Government servant in the civil service of the Crown was entitled to get a reasonable opportunity of defending himself against the action proposed to be taken against him. A similar provision was included in section 240 of the Government of India Act, 1935, and the right of opportunity being given for showing cause was thus given a statutory recognition. Henceforth, the power of the Crown to dismiss a servant at pleasure, which meant without giving any opportunity to the dismissed servant, was no longer unfettered. The rule, which had merely administrative or political efficacy having now been given statutory recognition, imposed a statutory fetter on the power of the Crown to dismiss a servant at pleasure, but the cases to which the fetter applied were of (a) dismissal and of (b) reduction in rank. The word "removal" was not used in the Government of India Act, 1935.

(13) Under rule 49 of the Civil Service (Classification, Control and Appeal) Rules several kinds of punishments could be inflicted for good and sufficient reason on a civil servant. These included dismissal, reduction in rank and also removal. The distinction between "dismissal" and "removal" was that while dismissal entailed a liability upon a dismissed servant not to be able to seek a Government service again, "removal" did not have that effect. In the case of "removal" Government servant could be granted under rule 353 or 353A, Civil Service Regulation, a compassionate allowance or even pension but to a reduced extent. Upon "dismissal" there was no question of the grant of any pension. "Removal" was, as used in rule 49, by way of punishment.

A question arose under the Government of India Act, 1935, whether the statutory protection afforded by section 240 in case of "dismissal" and "reduction in rank" also extended to the case of removal though the word "removal" was not used in that section. In — 'High Commr. for India v. I. M. Lall,' AIR 1948 PC 121 (G), Mr. I. M. Lall, a member of the Indian Civil Service was removed from the Indian Civil Service but not dismissed in the technical sense. The Privy Council considered the provisions of section 240, sub-section (3) as applicable to the case of removal as well which word was assumed to be comprised within the word "dismissal."

(14) When the present Constitution was framed, in addition to the word "dismissal" an opportunity was taken to add the word "removal" alter the word "dismissal" and before the phrase "reduction in rank". As the phrase stands now, "Dismissal, removal and reduction in rank", it reminds us of the identical phrase used in rule 55 of the Civil Service (Classification, Control and Appeal) Rules. Rule 55 says:

"Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of 'dismissal,' 'removal' or 'reduction' shall be passed on a member of a service (other than an order based on facts which had led to his conviction in a criminal court or by a court-martial) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself".....

This rule follows rule 49 which prescribes the penalties which may, for good and sufficient reason, be imposed upon members of the services. There can be no doubt whatsoever that the phrase "dismissal, removal or reduction", as used in rule 55, has reference to "dismissal, removal and reduction in rank" which are three out of several penalties provided in rule 49. In the Civil Service Regulations there are rules providing for pension in case of "removal from service". Rules providing for pension on "removal" of a person inter alia are rules 353 and 353A. Rule 353 deals with pension when a person is removed for misconduct, inefficiency or insolvency. The rule says that—

"no pension may be granted to an officer dismissed or removed for misconduct, insolvency or inefficiency; but to officers so dismissed

or removed compassionate allowances may be granted when they are deserving of special consideration provided that the allowances granted to any officer shall not exceed two-thirds of the pension which would have been admissible to him if he had retired on medical certificate".

(15) Rule 353A deals with pension when a person is removed from service when found unfit for further advancement. It says that—

"a person belonging to one of the following services, who is proved to be unfit for further advancement, is removed from service by the secretary of State on the recommendation of the Local Government and the Government of India, he may with the sanction of the Secretary of State, be granted a pension not usually exceeding, and not necessarily so great as, that which would have been admissible to the officer if he had been invalidated on medical certificate".

Removal 'from service under Rule 353A is also spoken of as "compulsory retirement" but this has nothing to do with 'retirement' under Rule 405A.

(16) "Retirement" under the rules is of two kinds (a) retirement on reaching the age of superannuation which is fixed at 55, and in some cases at 60, and (b) "retirement" on completion of 25 years of service. This last is dealt with in rule 465A which we have already quoted.

(17) "Retirement" under both these provisions is not spoken of as "removal" in any of the rules. It is conceded that "retirement" on reaching the age of superannuation is not "removal" within the meaning of Article 311. The essential difference between "removal" by way of penalty as provided for in rule 49 and other rules and "retirement" on attainment of period of qualifying service as provided for in rule 465A, is that while "removal" under rule 49 and the other rules is always by way of penalty, "retirement" under rule 465A is not at all by way of penalty. The reasons for which a person may be retired under rule 465A are not specifically mentioned in that rule. The general reason given is that "it is not in the public interest" to retain the services of the officer concerned any longer. The reason why a person's continuance may not be in the public interest may be wholly unconnected with any misconduct or fault on his part. It is true that the retirement under rule 465A may be taken recourse to because of some misconduct or fault of an officer who has already put in 25 years of service, but the question is whether the retirement contemplated under that rule is intended to be by way of punishment or not.

(18) It has to be noted that the rule 465A speaks of retirement after completion of a sufficiently long service. If it were intended to be a provision by way of punishment, it could, one would have thought, be applicable to a person at any period of his service. The compulsory retirement after a sufficiently long period of service is to our mind of the class of retirement upon the attainment of a particular age, that is to say, the age of superannuation. This is not to say that the two retirements are identical. No doubt they are different retirements — one at the age of superannuation which is common to everybody and the other at an earlier age; but even in the first case, a servant can be retained in service for a further term for reasons to be recorded. Retirement under rule 465A is to be for some reason, i. e. the retention of the servant concerned not being in the public interest; and yet when all this has been said, the two sorts of retirements are essentially different from the "removal" spoken of in rule 49 or which may be imposed by way of penalty or punishment. The effect of rule 465A and the fundamental rule 56 taken together is that civil servants normally retire at the age of 55, that their services may be retained for special reasons to be recorded, and similarly their services may be terminated earlier after completion of 25 years of service for special reasons. In our opinion, though rule 465A is on the border line between the rule of removal in rule 49 and retirement under the fundamental rule 56, it partakes more of the nature of retirement under fundamental rule 56 than of removal under rule 49. Juxtaposition of the words "dismissal, removal and reduction in rank" in Article 311 shows that "removal" is of a quality similar to "dismissal and reduction in rank" as "removal" is sandwiched between "dismissal" and "reduction" in rank", both of which are punishments.

(19) In our opinion, "removal" also, therefore, appears to be 'by way of punishment'. Consequently, it must be held that a "retirement" under section 465A is not comprised within the word "removal" in Article 311.

(20) This view is consistent with almost all the cases decided so far by the various High Courts in India except one court. The cases in support of this view are — 'Jayanti Prasad v. State of Uttar Pradesh', AIR 1951 All 793 (H). Delivering the judgment of the Bench it was observed by one of us—

"Article 311 applies only to a case in which a person is dismissed or removed or reduced in rank. These are technical words used in cases in which a person's services are terminated for misconduct. They do not apply to cases in which a person's period of service determines in accordance with the conditions of his service."

The same view was taken in — 'Kewalmal v. Heta Ram', AIR 1952 Raj 17 (I); — 'State of Saurashtra v. Bholanath Jatashanker', AIR 1952 Sau 49 (FB) (J) and — 'Varadaraja Iyer v. State of Trav-C', AIR 1953 Trav-C 140 (K). The decision in — 'C. Sambandam v. General Manager, South Indian Rly., Tiruchirapalli', AIR 1953 Mad 54 (L) is not contrary to the view that we have taken. In that case a wireman of the South Indian Railway was served with a notice under rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949, and he was dismissed under that rule. The rule itself provided for termination of services of a person who was engaged in subversive activities. The servant was given an opportunity to show cause against the charge framed against him, but he contended that he was not given a second opportunity for showing cause against the action proposed to be taken against him. He therefore applied under Article 226 of the Constitution, alleging that his dismissal was contrary to the provisions of Article 311. In argument it was urged on behalf of the State that under rule 143(4) of the Indian Railway Establishment Code services could be terminated by giving a notice after a certain period; but the Court held that the services of the

employee were not terminated under rule 148 (4) though they could have been; and as they were terminated under rule 148(3), and no second opportunity for showing cause against the action was given to him, his dismissal was irregular. The facts of the present case are wholly dissimilar to the facts of that case.

The only High Court which has taken a different view is the Pepsu High Court in three cases, namely, — 'Rama Iyer v. The State', AIR 1952 Pepsu 69 (M); — 'Ishar Das v. State of Pepsu', AIR 1952 Pepsu 148 (N); — 'Shambhu Dayal v. Patiala and East Punjab States Union', AIR 1952 Pepsu 152 (O) and — 'Anup Singh v. The State', AIR 1953 Pepsu 24 (P). These were all cases decided before the decision of the Supreme Court in 'Satish Chandra's case (A)'. The view taken was that the word "removal" includes a compulsory retirement under a rule of the State of Pepsu similar to that embodied in rule 465A. The context in which the word "removal" is used and the source from which it is taken and the history of rule were not referred to. The main ground of decision was that there was no reason why the word "removal" should not be treated to have been used in its larger sense. We have already shown the reason why it could not be taken to have been used in its larger sense, and why it should be confined to cases in which "removal" is by way of punishment or penalty. The discussion of the word "removal" in AIR 1953 SC 250 (A) clearly supports our view that the word "removal" was intended to import the idea of punishment or penalty.

(21) This leads us to the other part of the argument of the learned counsel for the applicant. According to him, rule 465A was not validly made and is not a statutory rule at all and, therefore, the applicant's removal under that rule is invalid. His argument is that the Civil Service Regulations in which rule 465A occurs were not made by the Secretary of State for India in Council, and only the rules made by the Secretary of State in Council could apply to the applicant who was appointed by him to the all India Service of Engineers and, as such, his removal was illegal. Before the Government of India Act, 1919, came into force certain rules and regulations applicable to the Civil Servants of the Crown in India had been made by various authorities. As these rules and regulations were not made under any statutory power, it was doubted whether they were of any legal validity. It was, therefore, provided in sub-section (4) to section 96B of the Government of India Act, 1919 as follows:

"For the removal of doubts it is hereby declared that all rules or other provisions in operation at the time of the passing of Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the civil service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied or added to by rules or laws made under this section."

(22) Thus all rules and regulations and other provisions which were in operation at the commencement of the Government of India Act, 1919, were validated and recognised as statutory. If rule 465A was in force at that time, it was validated under sub-section (4) to section 96B. It has, however, not been shown to us that this rule was in force at that time. All that has been shown to us is that in 1922 rule 465A was amended. When it was actually made is not known. The rule, as it appears in its present form was finally adopted in the year 1922. It could not therefore, be said to have been validated and made statutory by sub-section (4) of section 96B of the Government of India Act, 1919. Under sub-section (2) of that section the Secretary of State in Council was empowered to make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. He was also empowered to delegate the power of making rules to the Governor-General in Council or to local Governments or authorise the Indian legislature or local legislatures to make laws regulating the public services. This sub-section did not empower the Secretary of State in Council to delegate any power concerning rules relating to pensions.

The power to make rules regarding pension was contained in sub-section (3) of that section. That sub-section provided that the right to pensions and the scale and conditions of pensions of all persons in the civil service of the Crown in India appointed by the Secretary of State in Council, shall be regulated in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof. This sub-section did not empower the Secretary of State in Council to delegate his power to make rules regarding the pension to any other authority, and as we have already noted it has not been shown to us that rule 465A was in existence at the commencement of the Act of 1919. Therefore subject to what follows rule 465A which in its present form was made in 1922 could not be said to have been a statutory rule or a rule made by the Secretary of State in Council binding on the applicant as such.

The Secretary of State for India in Council however made certain other rules from time to time under sub-sections (2) and (3) of section 96B. These rules appear in two classes (a) the Civil Service (Classification, Control and Appeal) Rules which were first made in December 1920 and were modified from time to time and ultimately published as rules of 1930 and modified subsequently as well and (b) Fundamental Rules. These latter are contained in section 2 of the compilation entitled "Fundamental Rules and the Supplementary Rules issued by the Government of India in 1949, III Edition."

(23) In rule 7 of the Civil Service (Classification, Control and Appeal) Rules it is stated—

"Where by these rules power is delegated to, or conferred upon, any authority to make rules regulating the classification, the methods of recruitment, the conditions of service, the pay, allowances and pensions, or the discipline and conduct of any class of the Civil Services specified in rule 14, the rules, notifications and orders, by whatsoever authority made, regulating these matters in respect of that class which were in opera-

tion on the date these rules were made shall remain in operation except in so far as they may be inconsistent with these rules or may be specifically cancelled or modified in exercise of the aforesaid power by the authority to which it is delegated."

Rule 26 of these rules lays down :

"Rules regulating the conditions of service, the pay and allowances and the pensions of members of the all-India Services shall be made by the Secretary of State in Council".

(24) Since by rule 26 of the aforesaid rules the Secretary of State in Council is conferred the power of making rules for regulating the conditions of service, the pay, allowances, and pension of members of the all-India Services and he validated by Rule 7, the previous rules by whatsoever authority made which were in operation on the date these rules were made, that is to say in 1930, they must be taken to have been recognised as valid by rule 7. Rule 7, therefore, in our opinion, impressed the stamp of validity upon the Civil Service Regulations applicable to the all-India services in respect of conditions of services, pay, allowances and pensions that were in force in 1930. This would include rule 465A of the Civil Service Regulations. It follows, therefore, that rule 465A of the Civil Service Regulations had become a valid rule as if it were made by the Secretary of State in Council when the action was taken against the applicant.

(25) Reference was made in this connection by learned counsel for the petitioner to section 247 of the Government of India Act read with section 250 thereof.

(26) Section 247 laid down the conditions of service of all persons appointed to a civil service or a civil post by the Secretary of State and Section 250 laid down that the provisions of the last four preceding sections including S. 247 and any rules made thereunder shall apply to any person who was appointed before the commencement of part III of this Act by the Secretary of State in Council to a civil service of, or a civil post under, the Crown in India as they apply to persons appointed to a civil service or civil post by the Secretary of State.

(27) Section 247 referred to persons appointed after the commencement of the Act of 1935 and the effect of section 250 was that the rules made by the Secretary of State in Council regulating the conditions of service of all persons appointed after the commencement of the Act of 1935 were to apply to persons who had already been appointed before the commencement of part III of the Act by the Secretary of State in Council.

(28) The effect of these sections was, therefore, merely to apply rules, made by the Secretary of State in Council after the commencement of the Act of 1935 to persons appointed by the Secretary of State in Council both before and after the commencement of the Act of 1935. We are here not concerned with any rule made by the Secretary of State in Council under section 245 after the commencement of the Act of 1935. We are here concerned with rule 465A which was made before the commencement of the Act of 1935, and which had been taken by the Secretary of State in Council as a rule having been made by himself and validated as such by rule 7 of the Civil Service (Classification, Control and Appeal) Rules, as already stated. It cannot, therefore be said that rule 465A of the Civil Service Regulations was invalid, or not applicable to the applicant by reason of its not having been made by the Secretary of State in Council.

(29) It was next urged that rule 465A did not apply to the service to which the applicant belonged, namely, to the all-India Service of Engineers. This contention was based upon rules 649 and 650 of the Civil Service Regulations. Rules 649 and 650 are embodied in Chapter XXX of the Civil Service Regulations which are applicable to Civil Engineers and Telegraph Officers. Section III of this Chapter relates to compulsory retirement. Rules 649 and 650 are in this section. Rule 649 says :

"The compulsory retirement of Civil Engineers of the Public Works Department or the Engineering Department of State Railways, who are proved to be unfit for further advancement, is regulated by Article 353A. But any Civil Engineer of these Departments, who on reaching the age of 50 years has not attained the rank of Superintending Engineer, is liable to be called on to retire by the Government of India."

Rule 650 says :

"All Civil Engineers in the Public Works and Railway Departments, Civilian Under Secretaries in the Public Works Secretariat of the Government of India or of a Local Government or Administration, and Civilians in the Superior Railway Revenue Establishment, and in the Superior Establishment of the Telegraph Department, are required to retire on attaining the age of 55 years."

Rule 650 is clearly a rule of retirement at the age of superannuation which is fixed as 55 years. Rule 649 is a rule of compulsory retirement before attaining that age— firstly on the ground of unfitness for further advancement, as regulated by Article 353A, and secondly on reaching the age of 50 years, provided the person concerned has not attained the rank of Superintending Engineer. As the applicant had attained the rank of Superintending Engineer the second part of rule 649 does not apply to him. The first part of the rule does apply to him, so does rule 650.

(30) The argument is that since the first part of rule 649, which regulates premature compulsory retirement before the attainment of the age of superannuation as applicable to the members of the Service of Civil Engineers is specially provided for, the general rule embodied as applicable to all services including the all-India Services of Civil Engineers, as embodied in section 465A, Civil Service Regulations, would not apply to the all-India service of Civil Engineers. It is pointed out that where a special rule is provided in a statute or body of rules, this special rule has to be given preference to a general rule on the same subject. The proposition of law thus enunciated by learned counsel for the applicant is undoubted, but it does not apply to the present case for the simple reason that rule 649 does not deal with the subject which is dealt with in rule 465A. Rule 649 deals with compulsory and premature retirement for a special cause "unfitness for further advancement" which is dealt with in rule 353A of the Civil Service Regulations.

(31) Rule 465A, on the other hand, is a rule of retirement after completion of 25 years of service, when it is considered that his reten-

tion in the service is not in the public interest. The two rules deal with different matters though both of them may apply in the case of a particular individual at one and the same time. We do not think that rule 465A is at all affected by rule 649 in the case of Civil Service of Engineers.

(32) Then it was said that rule 465A must be deemed to have been abrogated or cancelled by rule 65 of the Fundamental Rules. Rule 56 provides for compulsory retirement on the attainment of the age of superannuation which has been fixed at 55 years. It also provides that a person may be retained in service after that age up to the age of sixty if he continues to be efficient. He must not be retained in service after that date except in very rare circumstances and with the sanction of the local Government. The rule also provides for compulsory retirement of Civil Engineers of the Public Works Department who have reached the age of 50 years. They may, however, be required by Government to retire on reaching the age of 50 years, if they have not attained to the rank of Superintending Engineer. Rule 55 does not deal with the subject-matter which is dealt with in rule 465A and it cannot, therefore, be said that by reason of rule 55, rule 465A should be deemed to have been cancelled or abrogated.

(33) It was urged on behalf of the State by the learned Advocate General that even if Article 311 of the Constitution applied to the case of retirement, under rule 465A, reasonable opportunity was, in fact given to the applicant by this Court. His case was that Article 311 speaks of only one opportunity to be given at the time of imposing punishment. It does not speak of any opportunity being given at the time of investigation of the charges against the person concerned. In support of his argument learned Advocate General referred to certain observations in AIR 1948 PC 121 (G). In that case their Lordships pointed out that—

> "Sub-section (3) of Section 240 of the Government of India Act, 1935, was not intended to be, and was not, a reproduction of R. 55, Civil Services (Classification, Control and Appeal) Rules, framed under section 96B, Government of India Act, 1919, which was left unaffected as an administrative rule. Rule 55 is concerned that the civil servant shall be informed "of the grounds in which it is proposed to take action" and to afford him an adequate opportunity of defending himself against charges which have to be reduced to writing; this is in marked contrast to the statutory provision of "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. No action is proposed within the meaning of the sub-section until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined on. Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. There is no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry under rule 55, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, for that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry."

It was argued on the basis of this observation that under Article 311(2) the reasonable opportunity, which is required to be given, is against the action proposed to be taken which means against the punishment proposed to be imposed and that since it was not necessary to give any opportunity to lead evidence or to defend oneself by tendering evidence or advancing argument, it was enough that an opportunity of submitting an explanation was given which was condoned in the present case.

(34) It was urged that the phrase "showing cause" does not necessarily imply that any opportunity, over and above the opportunity of submitting an explanation, need be given. This contention, in our opinion, is not well-founded. The phrase "showing cause" has been the subject-matter of discussion in more than one case in this Court. In — 'Avadhesh Pratap Singh v. State of U. P.', AIR 1952 All 63 (Q) it was held that where an opportunity is required to be given of "showing cause", the opportunity must be adequate. Enabling a mere representation to be made is not the same thing as giving an opportunity of showing cause. The expression "showing cause" was considered to connote an opportunity of leading evidence in support of one's allegations and in controverting such allegations as are made against one. This was followed in — 'Ravi Pratap Narain Singh v. State of Uttar Pradesh', AIR 1952 All 99 (R). In that case the argument now advanced before us on the basis of the observation made by the Privy Council in 'I. M. Lal's case (G)', was also advanced, but it was rejected and the Bench deciding that case dealt with this observation in the following words :

> "It cannot be held that their Lordships ever meant to say that, at the subsequent stage when a civil servant was called upon to show cause under sub-section (3) of section 240, Government of India Act, 1935; he need not be given any opportunity at all to give evidence. All that their Lordships said was that it would not be reasonable that the civil servant should ask for a repetition of the enquiry that had already been made under rule 55 if that enquiry had been duly carried out. This remark does not exclude the right of a civil servant to give any evidence which he may not have been appropriately required to give at the stage of the earlier enquiry under rule 55. In fact, the remark that it would not be reasonable that a civil servant should ask for a repetition of the enquiry held under rule 55 would appear to contain an implication that if there had not been an earlier enquiry duly carried out, it would have been held that the civil servant had a right at this subsequent stage to adduce evidence when showing cause why the proposed action should not be taken against him. The views of their Lordships of the Privy Council in that case, therefore, only go to confirm our view."

We respectfully agree with this view. In our opinion, the expression "showing cause" as used in Article 311 does not imply that a mere opportunity of submitting an explanation is enough. It implies that adequate opportunity

of leading evidence in support of the contentions of the person concerned and controverting the contentions raised against him must be given; and where necessary, opportunity of cross-examining witnesses of the other side and of addressing arguments should also be afforded. No such thing was done in the present case.

(35) Though reasonable opportunity of showing cause against the action proposed to be taken against the applicant was not given, the order of the 17th of April 1953 having been passed under the provisions of rule 465A of the Civil Service Regulations, no such opportunity was necessary; because the compulsory retirement contemplated under that rule is not covered by Article 311 of the Constitution.

(36) The result, therefore, is that this application fails and is dismissed. In the circumstances, we direct the parties to bear their own costs.

(37) Mr. Gopi Nath Kunzru, on behalf of the petitioner prays that a certificate may be given to the applicant to the effect that the case involves a substantial question of the interpretation of the Constitution and is otherwise a fit one for appeal to the Supreme Court. We think that the case involves a substantial question of the interpretation of the Constitution and we also think that it is otherwise a fit case for appeal to the Supreme Court. We, therefore, grant the certificate prayed for.

A/D.R.R. Application dismissed.

A.I.R. 1954 ALL. 244 (Vol. 41, C.N. 133)

MALIK C. J. AND CHATURVEDI J.

Dori Lal, Applicant v. Lal Sheo, Opposite Party.

Civil Revn. No. 725 of 1948, D/- 29-10-1953, against decision of Civil J., Pilibhit, D/- 16-7-1948.

(a) Arbitration Act (1940), S. 30 — Legal misconduct.

An arbitrator, who has given due notice of the proceeding to the parties is entitled to proceed ex parte if one party does not choose to appear. There is no provision in the Arbitration Act requiring the arbitrator to give a second notice of his intention to proceed ex parte against a person who is absent after service of notice. The fact, therefore, that the arbitrator did not give a second notice of his intention to proceed ex parte cannot amount to legal misconduct. AIR 1920 Cal 853, Foll.; Case law Ref. (Para 3)

Anno: Arb. Act, S. 30 N. 12.

(b) Civil P. C. (1908), S. 115 — Interference with finding of fact.

The question whether there was sufficient cause for non-appearance is one of fact and the High Court will not interfere with the finding on such question. (Para 3)

Anno: Civil P. C., S. 115 N. 2.

1953 Mulla: S. 115 P. 408 N. "Limits..... jurisdiction" (Pts. 4, 6 to 11 extra. N. 2 to S. 115 in A.I.R. Com.).

Shankar Sahai Verma, for Applicant; B. Dayal, for Opposite Party.

CASES REFERRED:

(A) (1841) 61 RR 825: 9 Dowl PC 550 (Pr 3)
(B) ('32) AIR 1932 Bom 68: 135 Ind Cas 174 (Pr 3)
(C) ('30) AIR 1930 Mad 646: 126 Ind Cas 735 (Pr 3)
(D) ('35) AIR 1935 Bom 127: 59 Bom 268 (Pr 3)
(E) ('20) AIR 1920 Cal 853: 47 Cal 951 (Pr 3)

MALIK C. J.:

This is a Civil Revision under section 115 of the Civil Procedure Code.

(2) The plaintiff filed a suit for recovery of a certain sum of money. The defendant denied his liability to pay the amount. The matter was referred to arbitration and the father of lawyer appearing for the plaintiff was appointed arbitrator. The arbitrator on the 16th of January, 1948, fixed the 22nd of January, 1948, for hearing and he gave notice of the date to counsel for the parties on the 16th of January, 1948. On the 22nd of January, 1948, the defendant did not appear and the plaintiff produced his evidence and on the 23rd of January, 1948, the arbitrator gave his award. The award was filed in the court of the learned Munsif to be made a rule of the court. The defendant objected to the award being made a rule of the court on the ground that he had no information of the date fixed.

The learned Munsif held that the defendant had no notice of the date fixed and the arbitrator was, therefore, guilty of legal misconduct and he set aside the award. The plaintiff appealed and the lower appellate court has held that notice to the counsel on the 16th of January, 1948, was notice to the defendant and it cannot, therefore, be said that the defendant, who was represented and whose pleader was informed, had no notice of the date. As regards the defendant's contention that the registered post-card sent by defendant's pleader to the defendant on the 16th of January did not reach him in time, the learned Judge was not satisfied that this was true. There was an endorsement on the post-card on the 21st of January, 1948, that the defendant was not found in the village. The next endorsement is of the 24th of January, 1948, that the defendant refused to accept the post-card as the date had already passed; and then there is a note of the 26th of January, 1948, that the post-card was refused.

The information of the date having been conveyed by the pleader to the defendant in a post-card the learned Judge suspected that the defendant deliberately evaded taking delivery of the post-card on the 21st January otherwise there was no reason why the post-card which had reached the village on the 21st January should not have been offered to him for delivery till the 24th January. It is not denied that the arbitrator had given due notice of the date to the counsel for the parties. It was, therefore, open to the arbitrator to proceed ex parte if a party did not appear and if the arbitrator proceeded ex parte it could not be said that he was guilty of legal misconduct. This was the view taken by the learned District Judge who allowed the appeal, set aside the order of the lower court and passed a decree in terms of the award.

(3) This revision has been filed under section 115 of the Code of Civil Procedure and it is submitted that the lower appellate court erred in the exercise of its jurisdiction in accepting the award as the arbitrator was guilty of legal misconduct in proceeding ex parte against the defendant. It is urged that, even if a party has been duly served, an arbitrator cannot proceed ex parte, unless he issues to him a second notice to show cause why he should not proceed ex parte against him.

This submission is based on certain observations in — 'Gladwin v. Chilcote', (1841) 61 RR 825 (A) and reliance is also placed on — 'Pratapsingh v. Kishanprasad and Co.', AIR 1932 Bom 68 (B); — 'Venkata Subbayya v. Venkataramanayya', AIR 1930 Mad 646 (C), as also — 'Munici-

pality of Ahmedabad v. Ravjibhai Bhailal', AIR 1935 Bom 127 (D). In none of these cases it has been held that an arbitrator, who has given due notice of the proceeding to the parties, is not entitled to proceed ex parte if one party does not choose to appear. In the — 'Gladwin case (A)', it was said that it would be better that the arbitrator should give a notice that he wanted to proceed 'ex parte'. Learned counsel admits that there is no provision in the Arbitration Act requiring the arbitrator to give a second notice of his intention to proceed 'ex parte' against a person who is absent after service of notice.

In — 'Udaichand Panna Lall v. Debibux Jewanram', AIR 1920 Cal 853 (E), Mookerjee J. has pointed out that :

"There is no statutory rule however that if an arbitrator proceeds ex parte without giving notice of his intention to proceed in that manner, the award made by him must be set aside. In the absence of such an inflexible statutory provision, the procedure commended in — '(1841) 61 RR 825 (A)', and the other cases mentioned can be regarded only as a rule of prudence and convenience."

Again, the learned Judge has said :

"There is obvious good sense in the view that notice that the arbitrator will proceed with the reference on a certain day is notice that he will then proceed ex parte if one of the parties absents himself without sufficient reason."

We respectfully agree with the observations quoted above. The fact, therefore, that the arbitrator did not give a second notice of his intention to proceed ex parte cannot amount to legal misconduct. It is, however, urged that in the circumstances of the case the arbitrator was not justified in proceeding ex parte; in other words, that the defendant had sufficient cause for non-appearance as his lawyer was not able to get into touch with him. This raises a question of fact rather than a question of jurisdiction. We do not think it is possible for us to interfere under section 115 of the Code of Civil Procedure.

(4) The revision has no force and is dismissed with costs.

B/K.S.B. Revision dismissed.

A.I.R. 1954 ALL. 245 (Vol. 41, C.N. 134)

MOOTHAM AND SAPRU JJ.

Audesh Pratap Singh, Petitioner v. Brij Narain and others, Opposite Party.

Writ Petn. No. 250 of 1953, D/- 17-11-1953.

(a) Representation of the People Act (1951), Ss. 90 (4), 83 and 84 — Election petition not claiming precise relief — (Constitution of India, Art. 226).

Section 90(4) of the Act provides that an Election Tribunal may — not must — dismiss an election petition which does not comply with the provisions of any of the Sections 81, 83 or 117 of the Act. Section 84, which is not included among those sections, declares the relief which may be claimed by a petitioner. Even if the view be taken that failure on the part of a petitioner to specify the precise declaration which he claims involves a non-compliance with the provisions of S. 83, the question whether the petition should be dismissed remains a matter which lies within the discretion of the tribunal and if the tribunal does not dismiss the petition in the exercise of his discretion it cannot be interfered with under Art. 226 of the Constitution of India. (Para 5)

(b) Representation of the People Act (1951), S. 83(3) — Order allowing amendment of particulars in list — (Constitution of India, Article 226).

Sub-section (3) of S. 83 while it does not provide for any amendment of the petition specifically empowers the Tribunal to order not only better, but further, particulars in regard to any matter referred to in the List to be furnished. The Act while not making any provision for the amendment of the petition gives the Tribunal a very wide discretion as regards the amendment of the list accompanying the petition. The case which a respondent has to meet is to be found in the petition supplemented by the particulars in the list; whether that case has been so radically changed by an amendment of the particulars in the list must depend on the facts, but the High Court would not be justified in interfering with an order of the Tribunal allowing an amendment unless it is quite clear that the Tribunal has over-reached itself. An amendment may cause inconvenience to the respondent, but this can be compensated by costs. (1874) LR 9 CP 165, Dist. (Para 10)

Hence, where the Tribunal in the exercise of his discretion allows the petitioner to add to the number of villages mentioned in List II where undue influence was exercised on voters, and corrupt practices were adopted because in its opinion such amendment was necessary for the purpose of ensuring a fair and effectual trial of the petition, the order allowing the amendment cannot be said to have altered the nature of the original petition and cannot be interfered with under Article 226 of the Constitution. (Para 11)

Gopinath Kunzru and Amarnath Kaul, for Petitioner; G. Mehrotra and S. C. Khare, for Opposite Party.

CASE REFERRED:

(A) (1874) LR 9 CP 165: 43 LJCP 103 (Prs 9, 10)

MOOTHAM J.:

This is a petition under Art. 226 of the Constitution. The petitioner, Sri Audesh Pratap Singh, and respondents Nos. 4 to 11 were candidates for election to the Uttar Pradesh Legislative Assembly from the Bikapur East General Constituency in the district of Faizabad at the last general election, and on the 3rd February, 1952, the petitioner was declared by the Returning Officer to be duly elected. On the 14th May the respondent No. 4, Sri Mahadeo, filed an election petition challenging the election of the petitioner on a number of grounds including the exercise of undue influence on the electors in a large number of villages in the constituency.

(2) The election petition was referred to an Election Tribunal sitting at Gorakhpur of which the first respondent is the Chairman and the second and third respondents are members. Objection is taken in the petition now before us to two orders passed by the Election Tribunal. In his petition before the latter body Sri Mahadeo claimed two main reliefs, namely,

(a) that the election of Sri Audesh Pratap Singh be declared void and that he, Sri Mahadeo, be declared duly elected, and

(b) that in case he be not declared duly elected the entire election be declared to be void and a re-election be ordered.

(3) It was contended before the Tribunal that as under S. 84 of the Representation of the People Act, 1951 Sri Mahadeo could claim only one relief the petition was defective and should be dismissed. After hearing argument, the Tribunal rejected the submission by an order dated the 6th January, 1953. That is the first order to which objection is taken.

(4) The petition was accompanied by a list as is required under S. 83(2) of the Act, the list being in three sections described as List I, List II and List III. In List II, Kurwa, a hamlet of village Jaising Mau, was specified as the place at which interference with the free exercise of their electoral rights by voters took place. On the 20th November, 1952, Sri Audesh Pratap Singh filed his written statement. Issues were framed and thereafter evidence was recorded. On the 27th January, 1953, objection was taken on behalf of Sri Audesh Pratap Singh to evidence being led by Sri Mahadeo with regard to corrupt practices particulars of which were not included in the List accompanying the petition.

After hearing counsel the Tribunal, on the 28th January, 1953, passed the following order:

"We have heard the learned counsel of the parties at length. Section 83(2) lays down that the petition shall be accompanied by a list signed and verified in like manner setting forth full particulars of any corrupt or illegal practice which the petitioner alleges included as full a statement as possible as to the names of the parties alleged to have committed such corrupt or illegal practices and the date of commission of each of such practices. The List II filed with the petition does not comply with this provision. The effect of non-compliance can be against the petitioner involving even rejection of the petition. So we think it proper to give an opportunity to the petitioner to give further and better particulars."

On the following day the fourth respondent appears to have filed an application for leave to amend the consolidated list accompanying his petition in a number of particulars, and on the 30th January the Tribunal, having again heard counsel for the parties at length, made the second order to which objection is taken.

"Section 83(3) of the Act lays down that the List can be amended as well as further and better particulars can be given. The petitioner seeks to amend the List and he gives further and better particulars of the instances mentioned in Schedule 2 of the List. We think the prayer of the petitioner as contained in the statement he has given today reasonable and so we allow the amendment so far as Items Nos. 3, 10 and 11 of this application are concerned, but the petitioner will have to pay Rs. 30/- as costs to the opposite party."

By virtue of this order Sri Mahadeo was allowed to amend List II accompanying his petition by the addition of the names of two further villages, Jabhopur and Karpapur, as places at which the voters were subjected to undue influence at the instance of Sri Audesh Pratap Singh. The reliefs which the latter now seeks are, first, the issue of a writ in the nature of 'certiorari' to quash the orders of the Election Tribunal dated the 6th and the 30th January, 1953, and secondly, a writ in the nature of prohibition prohibiting the respondents Nos. 1 to 4 from proceeding with the hearing of the election petition.

(5) We consider first the order made by the Tribunal on the 6th January. Section 90(4) of the Act provides that an Election Tribunal may — not must — dismiss an election petition which does not comply with the provisions of any of the sections 81, 83 or 117 of the Act. Section 84 which is not included among those sections, declares the relief which may be claimed by a petitioner. Even if the view be taken that failure on the part of a petitioner to specify the precise declaration which he claims involves a non-compliance with the provisions of S. 83, the question whether the petition should be dismissed remains a matter which lies within the discretion of the Tribunal. In our opinion the Tribunal's order of the 6th January was an order which it had jurisdiction to make and is one with which we cannot interfere.

(6) With regard to the order of the Tribunal made on the 30th January the principal contention urged on behalf of the petitioners is that the Election Tribunal had no jurisdiction under S. 83 of the Representation of the People Act, 1951, to allow the particular amendment of List II which it permitted to be made. A second contention is that the Election Tribunal in allowing the amendment did not act in good faith.

(7) The second of these contentions can be disposed of shortly. The evidence of the alleged bad faith is to be found in paragraphs 17 to 20 of the affidavit of Harbhan Dutt, the mukhtar-i-am of the petitioner, filed on the 13th March, 1953. In these paragraphs extracts are given from orders made by the same Tribunal in two other cases in which it dismissed election petitions on the ground that the petitions did not fully satisfy the statutory requirements for which provision is made in Chap. II of Part VI of the Act, and to an order made in a third petition dismissing an application made by the petitioner in that case for amendment of the List accompanying his petition on the ground that to do so would be tantamount to allowing him to file a fresh list. The circumstances in which the orders were made by the Election Tribunal in the cases referred to in this affidavit are not before us, and on such wholly inadequate material it is impossible for us to conclude that in allowing the amendment in the present case the Tribunal acted otherwise than in good faith.

(8) The more substantial submission on behalf of the petitioner is that the Tribunal exceeded its power in allowing the amendment of List II. Now it is clear that this Court is not a court of appeal from a decision of the Election Tribunal and that it cannot quash or modify an order made by the Tribunal on the ground that it is not an order which this Court itself would have been disposed to make. The Court can, in our opinion, interfere in the present case only if it is satisfied that the Election Tribunal has by allowing the amendment to List II thereby conferred upon itself a jurisdiction to decide a petition which is substantially different from that referred to it by the Election Commission. If it has done that it has, in our opinion, exercised a jurisdiction not vested in it by law.

(9) Section 83 of the Representation of the People Act, 1951, reads as follows:

"83. 'Contents of Petition. : (1) An election petition shall contain a concise statement of the material facts on which the petitioner relies and shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908) for the verification of pleadings.

(2) The petition shall be accompanied by a list signed and verified in like manner setting forth, full particulars of any corrupt or illegal practice which the petitioner alleges, including

as full a statement as possible as to the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of each such practice.

(3) The Tribunal may, upon such terms as to costs and otherwise as it may direct at any time allow the particulars included in the said list to be amended or order such further and better particulars in regard to any matter referred to therein to be furnished as may in its opinion be necessary for the purpose of ensuring a fair and effectual trial of the petition."

The argument of Sri Gopi Nath Kunzru who appears for the petitioner is that the amendment which the Election Tribunal has allowed has made the petition a new petition so far as the allegation of undue influence is concerned, and as such amendment was made after the expiry of the period within which a petition could be filed the Tribunal had no jurisdiction to allow it. Sri S. C. Khare for the respondents on the other hand contends that no question of jurisdiction arises as the action taken by the Tribunal was fully within the powers conferred upon it by sub-s. (3) of S. 83. Sri Kunzru has relied strongly on the case of — 'Maude v. Lowley', (1874) LR 9 CP 165 (A).

In that case the petition as originally framed complained of the employment, contrary to the prohibition contained in S. 7 of the Corrupt Practices (Municipal Elections) Act, 1872, as paid canvassers, at an election for the North ward of the borough of Leeds, of persons who were on the register of burgesses for that ward. After the expiry of the period within which an election petition could be filed the petitioner obtained the leave of a Judge to amend his petition by adding after the words "the said ward" that is the North ward— the words "and other wards". The Court of Common Pleas held that the Judge had no power to allow the amendment, upon the ground that its effect was substantially to make the amended petition a fresh petition and as it was made after the expiry of twenty-one days, the period within which a petition could be filed, to allow it would be to confer upon the petitioner a privilege which no other person could possess. Keating, J., was of the view that anything which materially adds to the charge, especially if it introduces an additional charge, would constitute not an amendment but a fresh petition.

(10) This is a strong case, but upon consideration we are of opinion that it can be distinguished from that which is before us. In — '(1874) LR 9 CP 165 (A)', the Court had to consider the effect of an amendment of the petition itself; in the present case, the amendment sought to be made is not an amendment of the petition but in the particulars included in the list which has to accompany the petition. The charge of undue influence is to be found in paragraph (8) of Sri Mahadeo's petition before the election tribunal. It is a long paragraph in which it is alleged that the electors in a large number of villages within the constituency of Bikapur East were subjected to undue influence by or at the instance of Sri Audesh Pratap Singh and his supporters; a general description of the form which the alleged undue influence is said to have taken is stated; and the paragraph concludes with the statement that particulars so far ascertained of the exercise of undue influence and intimidation are given in List II attached to the petition. No amendment of the petition was sought; and the Tribunal would have had no power to allow it if it had been asked for.

Sub-s. (3) of S. 83 while it does not provide for any amendment of the petition does provide that the Tribunal may

"at any time, allow the particulars included in the said list to be amended.....as may in its opinion be necessary for the purpose of ensuring a fair and effectual trial of the petition."

"Amendment" includes not only the correction of minor errors but the addition of new matter. The sub-section, it is to be observed, also specifically empowers the Tribunal to order not only better, but further particulars in regard to any matter referred to in the List to be furnished. The structure of the Act differs from that of the Corrupt Practices (Municipal Elections) Act, 1872, for while not making any provision for the amendment of the petition it gives the Tribunal a very wide discretion as regards the amendment of the list accompanying the petition. The case which a respondent has to meet is to be found in the petition supplemented by the particulars in the list; whether that case has been so radically changed by an amendment of the particulars in the list must depend on the facts, but we are of opinion that this Court would not be justified in interfering with an order of the Tribunal allowing an amendment unless it is quite clear that the Tribunal has over reached itself. An amendment may cause inconvenience to the respondent, but this can be compensated by costs.

(11) In the present case the Tribunal has in the exercise of its discretion allowed Sri Mahadeo to add to the number of villages mentioned in List II. It has, we must assume, allowed this to be done because in its opinion such amendment was necessary for the purpose of ensuring a fair and effectual trial of the petition. We are, upon a careful consideration of the circumstances, unable to hold that the Tribunal's order is one which has in effect substantially altered the nature of the original petition, it is one which in our opinion the Tribunal had jurisdiction to make and is therefore one with which we cannot interfere.

(12) This petition fails and is dismissed with costs which we assess at two hundred rupees.

A/K.S.B. Petition dismissed.

A.I.R. 1954 ALL. 247 (Vol. 41, C.N. 135)

HARISH CHANDRA J.

Ram Asray, Applicant v. State through Shamsher Singh and others, Opposite Party.

Criminal Revn. No. 408 of 1952, D/- 29-10-1953, against order of S. J., Sultanpur, D/- 4-2-1952.

(a) Criminal P. C. (1898), S. 139-A — Scope, object and applicability.

The object with which Section 139-A was enacted, seems to be that where the existence of the public right is denied the Magistrate has to make an inquiry. If it is not denied, then the section will not apply. The mere fact that the person against whom an order under Section 133 is made denies that the land over which the alleged obstruction is said to have been made is not part of a public way will not attract the application of Section 139A. AIR 1929 Cal 507, Rel. on. (Para 5)

Anno: Criminal P. C., S. 139A N. 2.

1953 Mitra: S. 139A, P. 358, N. 357A "Procedure", Para. 1.

(b) Criminal P. C. (1898), Ss. 138, 537 — Nomination of jury — How made — Irregularity in nomination — Effect.

It is not illegal on the part of a Magistrate to address an inquiry to the complainant with a view to ascertaining the names of respectable persons living in the neighbourhood who would be willing to serve on a jury. The Magistrate has, however, to see that he does not appoint friends or partisans of the complainant. The criterion to be applied to a case of this kind is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law as if he was a party to the litigation and whether as a matter of fact the jurors nominated by the Magistrate could rightly be described as friends or supporters of that person. AIR 1914 All 491 and AIR 1931 All 257, Rel. on. (Para 8)

Thus where there was nothing whatsoever to indicate that the three persons whose nomination was accepted by the Magistrate on the suggestion made by the complainant were his friends or supporters and no objection whatsoever was made by the other party to their nomination in the lower Courts or in the revision application:

Held that the irregularity, if any, could not be said to have occasioned a failure of justice and that a mere irregularity in the appointment of a jury would not be a ground for setting aside such proceedings. AIR 1933 Pat 676, Ref. (Para 9)

Anno: Criminal P. C., S. 138 N. 7.

1953 Mitra: S. 138, P. 352 N. 348 "Section imperative", 349 "Appointment of jury" and "Persons.....jurors" (2 Pts. extra in N. 7 to S. 138 in A.I.R. Com.—1 Pt. extra in Mitra).

Criminal P. C., S. 537 N. 6.

1953 Mitra: S. 537 (Topic discussed in N. 6 to S. 537 in A.I.R. Com., extra).

Suraj Nath Singh, for Applicant; J. N. Waghray, for Opposite Party Nos. 2 to 11.

CASES REFERRED: Paras

(A) (V16) AIR 1929 Cal 507 (507, 508): 31 Cri LJ 973 5
(B) ('96) 23 Cal 499 (501) 7
(C) (V1) AIR 1914 All 491 (492): 12 All LJ 1241: 16 Cri LJ 40 8
(D) (V18) AIR 1931 All 257 (258): 32 Cri LJ 563 8
(E) (V20) AIR 1933 Pat 676 (677): 35 Cri LJ 54 9

HARISH CHANDRA J.:

This is an application in revision arising out of an order passed by a Sub-Divisional Magistrate in the district of Sultanpur directing the applicant, Ram Asrey, to remove a certain encroachment on a public way by demolishing a portion of his house on the south-east corner. He went up in revision before the learned Sessions Judge who dismissed his application. He has now come up to this Court in revision.

(2) The facts are simple. After a local inspection the Sub-Divisional Magistrate, Sadar, passed an order on the 15th October, 1950 under section 133 of the Code of Criminal Procedure directing the applicant and one other person to remove the alleged encroachments by the 25th October, 1950 or "to show cause on that day why they should not be made to do so". Ram Asrey appeared on the 25th October, 1950 and filed an objection in which he said that his residential house had not encroached upon the public way by even an inch and that it had been re-constructed on its old foundations. He accordingly prayed that a jury be appointed in accordance with law to decide the matter. On the 2nd November, 1950, the Magistrate directed Ram Asrey to furnish three names for appointment as jurors on the next date and said that he would nominate four other persons to act on the jury. He apparently meant that he would nominate three persons to be members of the jury and one to act as foreman. On the 9th January, 1951 Ram Asrey nominated three persons and the learned Sub-Divisional Magistrate directed that they be included in the jury. On the same date the complainant also nominated three persons and the learned Magistrate directed that they be also included in the jury and at the same time he nominated one Sri Jagannath Prasad, a Vakil, as the foreman. The jurors submitted a report finding by a majority that the original order of the Magistrate was reasonable and proper and the Magistrate accordingly made the order absolute on the 11th May, 1951.

(3) This order is challenged on two grounds. The first objection is that the procedure indicated in section 139-A was not followed by the learned Magistrate. According to that section where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order is made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 137 (procedure where the opposite party appears to show cause) or section 138 (procedure where jury is claimed), inquire into the matter.

(4) It would appear, however, that the applicant, when he appeared on the 25th October, 1950, did not deny the existence of public right in respect of the way upon which he was alleged to have made an encroachment. No doubt, when he appeared, he was not put a question by the Magistrate as indicated in section 139A. But no such question was necessary when the applicant appeared and himself filed a written statement in which he admitted that the way which he was alleged to have encroached upon was a public way.

(5) In the case of — 'Rajani Kanta v. Ibrahim Sarkar', AIR 1929 Cal 507 (A), the facts were very similar and it was held that in such circumstances section 139A did not apply. The object, as pointed out in that judgment, with which section 139A was enacted, seems to be that where the existence of the public right is denied the Magistrate has to make an inquiry. If it is not denied, then the section will not apply. The mere fact that the person against whom an order under section 133 is made denies that the land over which the alleged obstruction is said to have been made is not part of a public way will not attract the application of section 139A. In the circumstances the learned Magistrate was quite right in not following the procedure indicated in section 139A. No doubt the provisions of section 139A are mandatory. But when the applicant appeared and admitted the existence of a public right in the way upon which he was said to have made an encroachment, there was no occasion to follow the further procedure provided in that section.

(6) The other objection raised on behalf of the applicant is that the appointment of members of the jury was irregular and that the irregularity is such as vitiates the proceeding. According to section 138 the jury is to consist of an un-

even number of persons, not less than five, of whom the foreman and one half of the remaining members are to be nominated by the Magistrate and the other members by the applicant. It is said that the Magistrate in accepting names of the three persons nominated by the complainant acted irregularly.

(7) It was held in a Calcutta case, — 'Upendra Nath v. Khitish Chandra', 23 Cal 499 (B), that it is the duty of the Magistrate to exercise his own independent discretion in appointing members of the jury whose appointment devolves upon him under the provisions of section 138 and that he cannot merely accept persons who may be put forward by the party opposed to the applicant and that a jury constituted in violation of the provisions of section 138 was not legally constituted and was not capable of making a legally binding award.

(8) In the Allahabad case of — 'Farzand Ali v. Hakim Ali', AIR 1914 All 491 (C), it was, however, pointed out by this Court that it is not illegal on the part of a Magistrate to address an inquiry to the applicant with a view to ascertaining the names of respectable persons living in the neighbourhood who would be willing to serve on jury. The Magistrate has, however, to see that he does not appoint friends or partisans of the applicant. As pointed out in that judgment the criterion to be applied to a case of this kind is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law as if he was a party to the litigation and whether as a matter of fact the jurors nominated by the Magistrate could rightly be described as friends or supporters of that person. This case was followed in another case of this Court, — 'Abdul Shakur Khan v. Emperor', AIR 1931 All 257 (D).

(9) In the present case, as we have seen, the learned Magistrate had clearly expressed his intention in the order passed on the 2nd November, 1950, that the applicant would furnish three names while he himself would nominate the remaining members as well as the foreman. In the circumstances, his acceptance of the three persons nominated by the complainant as members of the jury may, I think, be treated as a nomination by himself. There is nothing whatsoever to indicate that the three persons whose nomination was accepted by the Magistrate on the suggestion made by the complainant were his friends or supporters. No objection whatsoever was made by the applicant to their nomination. Even before the learned Sessions Judge it was not suggested that these three members of the jury were friends or partisans of the complainant and were in any way inimical to the applicant. Nor has such an allegation been made in the grounds of revision before me and the irregularity, if any, cannot be said to have occasioned a failure of justice and I agree with the view expressed in the case of — 'Digambar Ramsingh v. Emperor', AIR 1933 Pat 676 (E), that a mere irregularity in the appointment of a jury would not be a ground for setting aside such proceedings.

(10) I am, therefore, satisfied that the proceedings before the learned Sub-Divisional Magistrate were in order and reject the application.

B/D.R.R. Application dismissed.

A.I.R. 1954 ALL. 249 (Vol. 41, C.N. 136)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Raj Narain and others, Appellants v. State.

Criminal Appeal No. 277 of 1952, D/- 6-10-1953, against order of S. J., Rae Bareli, D/- 27-8-1952.

(a) Penal Code (1860), S. 149 — In furtherance of common intention.

If one member of an unlawful assembly suddenly takes it into his head to commit an offence which does not appear to have been in furtherance of any common intention, the other members of the assembly cannot be liable for the offence committed by that member.

Thus where one of the members of the unlawful assembly all of a sudden struck the deceased on the head and the blow proved to be fatal, the other accused cannot be held guilty under Section 304 read with S. 149. (Para 10)

Anno: Penal Code, S. 149 N. 4.

(b) Penal Code (1860), Ss. 451, 456 — Applicability.

Accused entering house of a person with common intention of abducting his wife — No evidence of precaution by accused to conceal their presence — Woman abducted by the accused — Accused held guilty of an offence under S. 451 and not under S. 454. (Para 12)

Anno: I.P.C., S. 451 N. 1; S. 454 N. 1.

(c) Penal Code (1860), Ss. 146, 147 — Conviction of less than five persons.

Satisfactory evidence that more than five persons took part in abduction and criminal trespass — All persons are members of unlawful assembly — Conviction of only three of them under S. 147 is legal. (Para 13)

Anno: I. P. C., S. 146 N. 9.

(d) Penal Code (1860), S. 304 — Sentence.

Single lathi blow not effecting fracture of skull resulting in death — Sentence of ten years rigorous imprisonment held severe — Sentence reduced to five years rigorous imprisonment. (Para 15)

Anno: I. P. C., S. 304 N. 6.

H. K. Ghose, for Appellants; M. L. Trivedi, for Addl. Govt. Advocate, for the State.

JUDGMENT : The appellants Raj Narain, Kallu and Banwari have been convicted by the Sessions Judge of Rae Bareli and have been sentenced to various terms of imprisonment under sections 304, 342, 366, 454, 149 and 147 of the Indian Penal Code. Raj Narain has been sentenced to ten years' rigorous imprisonment while the other two have been sentenced to seven years' rigorous imprisonment under section 304 of the Indian Penal Code. Raj Narain has been sentenced to five years' rigorous imprisonment and the other two appellants to four years' rigorous imprisonment under section 366 of the Indian Penal Code. Kallu and Banwari have been sentenced to six months' rigorous imprisonment while Raj Narain has been sentenced to nine months' rigorous imprisonment under section 342 of the Indian Penal Code. Kallu and Banwari have been awarded one year's rigorous imprisonment under section 454 of the Indian Penal Code. Raj Narain has further been sentenced to two years' rigorous imprisonment under section 149 and Kallu and Banwari to one year's rigorous imprisonment under section 147 of the Indian Penal Code.

(2) Briefiy stated the story for the prosecution was that Pearey Lal deceased wanted to marry and he expressed this intention to Raj Narain appellant who was a distant 'bhanja' of Pearey Lal. Raj Narain succeeded in getting a woman for him and he brought her to Pearey Lal some time about June or July, 1951. He demanded Rs. 300/- from Pearey Lal which sum was paid to him and Raj Narain went away. He used to visit Pearey Lal off and on and some 15 or 20 days before the occurrence Raj Narain came to the house of Pearey Lal in the company of two other persons, including Kallu appellant, and told him that he would take away the woman. Pearey Lal told him that he could take away the woman if he returned Rs. 300/- which had been taken by him. Raj Narain then held out a threat of taking away the woman by force and went away. A report was lodged by Pearey Lal at the police station about this occurrence on the 8th January, 1952, at about 11 a. m The appellants in the company of 7 or 8 persons came to the house of Pearey Lal and others and they entered the house. Two of them are said to have caught hold of Pearey Lal while the other two held his brother Bhagwati. The remaining two then dragged away the woman from the house and while leaving the house they chained the outer door. Pearey Lal and Bhagwati raised an alarm and the neighbours ran up and unchained the door when Pearey Lal told them that his wife had been taken away by force by Raj Narain and his companions. These persons and some others then went in pursuit of the abductors and they overtook them near the grove of Siddhu at a distance of about half a mile from the house of Pearey Lal. There was some exchange of hot words and Raj Narain appellant then gave a lathi blow on the head of Pearey Lal who fell down and died. Raj Narain's companions then took away the woman.

(3) First information report was lodged by Bhagwati, brother of Pearey Lal, the same day at 6 p. m. at police station Salon, which was at a distance of 8 miles from the place of occurrence. The police came to the place of occurrence and the dead body of Pearey Lal was sent to the mortuary for post mortem examination. After the case was investigated six persons, including the appellants, were sent up for trial.

(4) The defence of Raj Narain was that the woman had come to his house for protection some time in Asarh and that he had taken this woman to be kept at the house of Pearey Lal as he apprehended that the Thakurs of his village would interfere if he himself kept the woman at his house. He went to the house of Raj Narain a few days before the occurrence when the woman complained of him of ill treatment and he therefore brought her back a few days after from the house of Pearey Lal. When he had reached a short distance from the village with the woman he was attacked by Pearey Lal in the company of 22 or 23 other men and Pearey Lal then struck him with a lathi which he warded off and he also then plied his lathi in self-defence. The other two appellants denied their complicity in the affair and stated that they had been impleaded on account of enmity.

(5) The lower Court found that the woman who had been taken away had been forcibly abducted by the appellants who had also committed culpable homicide not amounting to murder and the other offences with which they were charged in furtherance of a common intention. He therefore convicted the appellant and sentenced them as mentioned above. The case was, however, not established against the other three accused who were acquitted. The appellants have now come up in appeal.

(6) Bhagwati mentioned the names of several persons who were present at the time of the occurrence. Of these Parsu Pasi, Ganga Bishen Brahman, Badri Pasi and Ori have been examined on behalf of the prosecution. Besides these Bhagwati, the own brother of Pearey Lal, deceased, who was present at the house at the time of the alleged abduction, as also at the time when Pearey Lal was assaulted near Siddhu's grove has also been examined. Bhagwati narrates the incident as it happened from the time when the appellants in the company of several other persons entered the house and took away the woman by force after chaining the outer door. He also states that some 15 or 20 days before the occurrence Raj Narain and some others had come to their house and had threatened to take away the woman who had become the wife of Pearay Lal and that Pearay Lal had told them that he would not be willing to part with the woman except on repayment of Rs. 300/- which had been paid by him in this connection to Raj Narain. A copy of the report which was lodged at the police station about this occurrence has also been filed. It is Ex. 9. In this report which was made by Pearay Lal himself he states that Raj Narain had arranged to get him a wife and had taken Rs. 300/- from him in this connection. Bhagwati also states that some sort of ceremony including 'bhanwars' was performed when Pearay Lal took the woman as his wife in 'Asarh' before the occurrence.

Rameshwar Singh mukhia was also examined on behalf of the prosecution to prove that Pearay Lal had borrowed some money from him in this connection and had told him that he had to pay Rs. 300/- for the woman who was to be given to him as his wife by Raj Narain. The other witnesses examined on behalf of the prosecution were not present at the ceremony of marriage which was performed but they do state that this woman lived as the wife of Pearay Lal till she was taken away by the appellants. Ori states that he was attracted to the house of Pearay Lal on hearing the alarm and when he went to the house he found the door chained from outside. Bhagwati asked him to unchain the door and when it was unchained Bhagwati and Pearay Lal told him that Pearay Lal's wife had been taken away by force by Raj Narain and others. In the meantime the other witnesses, Parsu Pasi and Ganga Bishen Brahman also arrived and both of them went in the direction in which the abductors had taken the woman. They further stated that Pearay Lal who was a few paces ahead of them overtook Raj Narain and others and tried to stop them when there was an exchange of hot words between Raj Narain and Pearey Lal. Raj Narain then gave a lathi blow on the head of Pearay Lal and he fell down and died. The evidence of these witnesses has been read out by the learned Counsel for the appellants. Nothing has, however, been pointed out in the cross-examination to discredit the testimony of any of these witnesses. None of them has any reasons to have any leanings towards the complainant or any bias against the appellants.

(7) The report of the post mortem examination of the body of Pearay Lal reveals three injuries on his person. Two of them were abrasions on the arms and one was a contused wound

on the head. Although the skull was not fractured, death was found to be due to concussion of the brain.

(8) It has been argued on behalf of the appellants that Raj Narain acted in self-defence and reliance has been placed on the evidence of Badri Pasi who stated that while hot words were being exchanged between Pearay Lal and Rai Narain both of them raised their hands. No evidence has been led in defence on behalf of the appellants to prove that Pearay Lal assaulted or attempted to assault Raj Narain first. The evidence of all the prosecution witnesses, on the other hand, shows that Pearay Lal did not attempt to strike Raj Narain and that it was Raj Narain appellant who gave the first lathi blow to Pearay Lal. There is, therefore, nothing in the evidence to justify the existence of the right of private defence. Moreover, it is in evidence that the woman who was being abducted by the appellants had become the wife of Pearay Lal and as such Raj Narain and his companions had no right to take her away by force. This woman has not been examined evidently because it was not possible for the prosecution to have produced her as she had been taken away by Raj Narain and his companions and her whereabouts were not known to Bhagwati or anybody else who was interested in the prosecution. Raj Narain appellant in his statement before the Sessions Judge stated that after he had struck a lathi blow he took away the woman to his house and there she was asked by him to go wherever she liked and that her whereabouts were not known to him.

(9) The story for the defence appears to be rather improbable. Raj Narain appellant stated that he went to the house of Pearay Lal all alone and that 20 or 25 persons in the company of Pearay Lal attacked him while he was bringing the woman with him without any objection having been made by Pearay Lal. If 20 or 25 persons had tried to stop Raj Narain, who was all alone, from taking the woman it is difficult to believe that Raj Narain would have succeeded in taking her away in the teeth of interference and obstruction on behalf of Pearay Lal and 20 or 25 other persons. The defence story is, therefore, improbable and there is nothing to show that the version given by the prosecution was not substantially correct.

(10) It remains now to be seen if all or any of the offences for which the appellants have been convicted have been established against them. All the three appellants have been convicted under section 304 of the Indian Penal Code on the ground that each of them was possessed of the common intention of committing the offence. The evidence for the prosecution shows that the main objective of the appellants and their companions was to take away the woman by force. At no stage was it suggested on behalf of the prosecution that the appellants or their companions had any intention to commit the murder of Pearay Lal. It also does not appear from the evidence that even when there was an exchange of hot words between Pearay Lal and Raj Narain at the place of occurrence a common intention to murder Pearay Lal had developed. If one member of an unlawful assembly suddenly takes it into his head to commit an offence which does not appear to have been in furtherance of any common intention, the other members of the assembly cannot be liable for the offence committed by that member. In the present case it appears that Raj Narain all of a sudden struck Pearay Lal on the head and the blow proved to be severe resulting in the death of Pearay Lal. The other two appellants cannot, therefore, be held guilty under section 304 read with section 149 of the Indian Penal Code.

(11) As regards the offence under section 342 for which all the appellants have been held guilty, it has not been proved as to which of the persons accompanying Raj Narain had chained the door from outside. It could not be the intention of the unlawful assembly to chain the door and it could also not be said to be in furtherance of any common intention. Presumably it struck somebody while the abductors were taking the woman to chain the door in order to stop Pearay Lal from chasing them. In the absence of direct evidence to prove as to which of the persons of the unlawful assembly was responsible for this act, the appellants cannot be found guilty under section 342 of the Indian Penal Code.

(12) Then again all the appellants have been convicted under section 454 of the Indian Penal Code. There is no evidence on behalf of the prosecution to prove that the appellants took precautions to conceal their presence while entering the house of Pearay Lal and the utmost that can be said in this respect on the evidence on record is that the appellants entered the house of Pearay Lal with the common intention of abducting the woman. They would therefore be guilty under section 451 of the Indian Penal Code and not under section 454. Their conviction under section 454 of the Indian Penal Code, cannot, therefore, stand.

(13) The offence under section 366 of the Indian Penal Code has clearly been established against all the appellants as their common intention was to take away the woman who had become the wife of Pearay Lal by force. They have been, therefore, rightly convicted under section 366 of the Indian Penal Code. Although the number of persons ultimately convicted in this case was only three, there is satisfactory evidence to establish that there were more than five persons who had taken part in the abduction and the criminal house trespass. The appellants were, therefore, members of an unlawful assembly and have been rightly convicted under section 147 of the Indian Penal Code.

(14) No question of a conviction under section 149 arises as the offence of culpable homicide was not one of the common objects of the unlawful assembly.

(15) The learned Sessions Judge has sentenced Raj Narain appellant to ten years' rigorous imprisonment under section 304 of the Indian Penal Code. The sentence appears to err on the side of severity. It was a single blow which caused the death of Pearay Lal and this blow had also not resulted in the fracture of the skull. It appears to me that a sentence of five years' rigorous imprisonment shall meet the ends of justice. Kallu and Banwari cannot be held guilty under section 304 of the Indian Penal Code and their conviction under this section cannot stand. The conviction under section 342 of all the three appellants also cannot stand. The whereabouts of the woman who was abducted are not known and it appears that she had gone from place to place before she entered into a sort of marriage with Pearay Lal. It is not known whether she was agreeable to go away with Raj Narain when he took her away although the fact that she had been dragged leads to the inference that she was an unwilling party to the abduction. A sentence of two years' rigorous imprisonment under

section 366 of the Indian Penal Code for each of the appellants would in my judgment meet the ends of justice. The conviction under section 454 is altered to one under section 451 of the Indian Penal Code in the case of all the three appellants and six months' rigorous imprisonment under section 451 would be sufficient in the circumstances. The conviction of Raj Narain under section 149 is also set aside but the conviction and sentence of Kallu and Banwari under section 147 should stand.

(16) As a result the conviction of Raj Narain under section 304 of the Indian Penal Code is maintained but the sentence of imprisonment is reduced to five years' rigorous imprisonment. The conviction and sentence of Kallu and Banwari under section 304 and the conviction and sentence of all the three appellants under section 342 are set aside. The conviction under section 454 is altered to one under section 451 of the Indian Penal Code and the sentence is reduced to six months' rigorous imprisonment. The conviction of all the three appellants under section 366 I. P. C. is also maintained but the sentence is reduced to two years' rigorous imprisonment. The conviction and sentence of Kallu and Banwari under section 147 I. P. C. are maintained but the conviction of Raj Narain under section 149 is set aside. The sentences to run concurrently. The appellants are on bail and they shall surrender to their bail to serve out the remaining part of their sentences.

B/D.R.R. Order accordingly.

A.I.R. 1954 ALL. 252 (Vol. 41, C.N. 137)

DESAI J.

Ram Singh and others, Applicants v. Panchayati Adalat and others, Opposite Party.

Criminal Misc. Writ No. 197 of 1953, D/- 11-11-53.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 85 — Limitation for application under S. 85 — (Limitation Act (1908), Art. 181).

The limitation prescribed under S. 85 is not for the making of an application by the aggrieved party but for the calling for the record of the case. The law is that the record must be called for within sixty days from the date of the order and not that an application for revision must be made within that period. But if the record itself has to be summoned within sixty days, the application must of necessity be made within sixty days. Hence, it seems that the less unreasonable view to take is that the Legislature has intended to prescribe sixty days as the period of limitation for making an application under Section 85.

Article 181 of the Limitation Act is not intended to govern such an application. (Para 3)

Anno: Lim. Act, Art. 181 N. 22.

(b) Limitation Act (1908), Ss. 29(2) and 12(2) — Construction of S. 29(2) — Applicability of S. 12 (2) on principle or by way of analogy — AIR 1930 Pat 14 and AIR 1952 All 816, Dissented from.

Section 29(2) makes applicable the provisions contained in several sections when the period of limitation prescribed for any suit, appeal or application is to be determined. It may be that in a certain case the provisions of one of those sections (for instance, S. 12) cannot be applied because it does not contain the facts to which the provisions of that section can be applied or, in other words there may be a case in which though due regard is to be had to the provisions of one of those sections, no effect can be given to its provisions. In such a case, it is not competent to the Court to modify the language of the section in order to give effect to its principle or to apply it by way of an analogy. For example, while the time requisite for obtaining a copy of the order sought to be reviewed can under S. 12(2) be excluded, the time requisite for obtaining a copy of the order sought to be revised is not required to be excluded. AIR 1927 Lah 858 (2); AIR 1932 All 598; AIR 1931 All 673; AIR 1918 All 389 (FB), Rel. on; AIR 1930 Pat 14; AIR 1952 All 816, Dissented from. (Paras 4, 5)

Anno: Limitation Act, S. 12 N. 4; S. 29 N. 3.

(c) Limitation Act (1908), S. 3 and S. 12 — Extension of time on ground of justice and equity — AIR 1930 Pat 14, Dissent from.

The High Court has not been vested with any power to make rules touching the Limitation Act. Hence merely on the ground of justice and equity, the period of limitation cannot be extended by excluding time which is not required to be excluded. AIR 1930 Pat 14, Dissented from. (Para 8)

Anno: Limitation Act, S. 3 N. 3 Pt. 2.

(d) U. P. Panchayat Raj Act (26 of 1947), S. 85 — Application for revision — Deduction of time spent on obtaining copy of order of panchayati adalat — (Limitation Act (1908), S. 12).

Though the period of limitation for making an application under Section 85 of the Panchayat Raj Act is to be determined in consonance with the provisions of S. 12(2) read with S. 29 (2) of the Limitation Act, the time spent in obtaining a copy of the order sought to be revised cannot be excluded as it is not an application referred to in S. 12(2). (Para 9)

However, as the word "appeal" is used in S. 12(2) as in Article 182, Limitation Act, in a general sense, and not in a narrower sense as in Arts. 150 to 157, an application under S. 85 of the Panchayat Raj Act though one for revision is to be construed as an appeal within the meaning of S. 12(2) of the Limitation Act. An applicant, therefore, is entitled to deduction of time spent by him in obtaining a copy of the order of the panchayati adalat. AIR 1926 PC 22; AIR 1932 PC 165; AIR 1941 Mad 589; AIR 1947 All 390, Rel. on; AIR 1942 Oudh 392, Expl. (Paras 12, 14)

Anno: Limitation Act, S. 12 N. 5.

(e) Limitation Act (1908), Arts. 150 and 182 — Meaning of word "appeal" in different articles.

There is a difference between an "appeal" ('simpliciter') and an "appeal under the Code of Civil Procedure" or "of Criminal Procedure." When the word is used with reference to an Act, it must have the same meaning as is given to it in that Act. But when it is used in a general sense, it can be given an extended meaning. In Articles 150 to 157 the word "appeal" is not used in a general sense and is qualified by the words "under the Code of Criminal Procedure" or "under the Code of Civil Procedure." In Article 182, the word is used without any such qualification. That is why it is interpreted there in a general sense to include an application for revision also. AIR 1937 Mad 385 (FB), Criticised. (Para 11)

Anno: Limitation Act, Art. 182 N. 33 Pt. 1.

(f) U. P. Panchayat Raj Act (26 of 1947), S. 85 — Application for revision — Rules framed by Government — Exclusion of time — (Limitation Act (1908), S. 12).

'Semble': The mere fact that the Rules framed by the Government require an application for revision under S. 85 to be accompanied by the copy of the order sought to be revised does not entitle the applicant to deduct the time spent in obtaining the copy. AIR 1928 PC 103; AIR 1931 All 673; AIR 1918 All 389 (FB), Ref. (Para 13)

V. K. S. Chaudhury, for Applicants; S. C. Asthana, for Opposite Party.

CASES REFERRED: PARAS

(A) (V14) AIR 1927 Lah 858 (2) (859): 9 Lah 244 6
(B) (V19) AIR 1932 All 598 (599): 54 All 282 6, 7
(C) (V17) AIR 1930 Pat 14 (17, 18): 9 Pat 172 6, 8
(D) (V18) AIR 1931 All 673 (673): 53 All 684 7, 13
(E) (V39) AIR 1952 All 816 (Pr 6): 1952 All LJ 183 7, 8
(F) (V5) AIR 1918 All 389 (390): 40 All 1 (FB) 7, 13
(G) (V13) AIR 1926 PC 22 (26): 49 Mad 335 (PC) 10
(H) (V28) AIR 1941 Mad 589 (590): 189 Ind Cas 651 10
(I) (V19) AIR 1932 PC 165 (167): 60 Cal 1 (PC) 10
(J) (V34) AIR 1947 All 390 (Pr 4): ILR (1947) All 191 10
(K) (V24) AIR 1937 Mad 385 (388, 390): ILR (1937) Mad 616 (FB) 11
(L) (V29) AIR 1942 Oudh 392 (393, 394): 200 Ind Cas 608 12
(M) (V15) AIR 1928 PC 103 (104): 6 Rang 302 (PC) 13

JUDGMENT: The applicants pray for the issue of a writ of certiorari or any other writ, order or direction quashing the orders passed by the panchayati adalat of Bhojipura and by the Sub-divisional Magistrate. The applicants were prosecuted by the opposite-party No. 3 for offences of Sections 426, 323 and 506, I. P. C. before the panchayati adalat. The panchayati adalat convicted them of the offences and fined them on 12-8-1952. On 15-9-1952 they applied for a copy of the order and on 31-10-1952 they applied to the Sub-divisional Magistrate under Section 85 of the Panchayat Raj Act for revision of the order. The Sub-divisional Magistrate dismissed the application on the ground that having been filed more than sixty days from the date of the order, it was barred by time. He thought that under S. 85 of the Panchayat Raj Act an application for revision of a panchayati adalat's order must be filed within sixty days of it. As the application was made after more than sixty days, it was thought by him to be barred by time. It is contended before me that the applicants were entitled under the Limitation Act to deduct the time spent by them in obtaining the copy of the panchayati adalat's order and that if it was deducted their application was within time. They also questioned in the application the validity of the panchayati adalat's order on several grounds.

(2) Their counsel has confined the application only to challenging the order of the Sub-divisional Magistrate. The merits of the panchayati adalat's order are not before me.

(3) It is laid down in Section 85 of the Panchayat Raj Act that if there has been a miscarriage of justice or if there is an apprehension of miscarriage of justice in any case, the Sub-divisional Magistrate

"may, on the application of any party or on his own motion, at any time in a pending case ....., and within sixty days from the date of ..... order, call for the record of the case and may.....quash any.....order passed by the panchayati adalat."

The limitation prescribed under this provision is not for the making of an application by the aggrieved party but for the calling for the record of the case. The law is that the record must be called for within sixty days from the date of the order and not that an application for revision must be made within that period. I do not know why the Legislature prescribed the period of limitation not for the doing of an act by a party but for the doing of an act by the Court. If it be said that no period of limitation is prescribed by the Legislature for an application under S. 85 of the Act, the limitation would be governed by the residuary Article 181 of the Limitation Act. This article does not govern an application for revision under the Codes of Criminal and Civil Procedure but it does not follow that it would not govern an application for revision under S. 85 of the Panchayat Raj Act also. This revision is different from the revision filed under the Codes.

Section 115 of the Code of Civil Procedure and Section 435 of the Code of Criminal Procedure do not mention any applications to be made for the exercise of revisional powers; they simply provide for the summoning of the record by the Courts of revision. As they deal only with the summoning of the records by the Courts of revision, there does not arise any question of a period of limitation for making an application for revision. But S. 85 of the Panchayat Raj Act specifically refers to an application to the Sub-divisional Magistrate for the exercise of his revisional powers and therefore it must be governed by some limitation. It is clear that if the record itself has to be summoned within sixty days, the application must of necessity be made within sixty days. If it is made after sixty days, it would be dismissed if not on the ground that it is barred by time, at least on the ground that the record cannot be summoned. It is evident that Article 181 of the Limitation Act is not intended to govern such an application. It seems to me that the less unreasonable view to take is that the Legislature has intended to prescribe sixty days as the period of limitation for making an application under Section 85.

(4) Section 29(2) of the Limitation Act provides that

".....for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(a) the provisions contained in Section 4, Sections 9 to 18 and Section 22 shall apply."

Therefore, while determining the period of limitation of sixty days prescribed for an application under Section 85 of the Panchayat Raj Act provisions contained in Section 12 must be applied. What this means is that the period of limitation must be determined in consonance with the provisions of Section 12. The Court must have regard to the provisions of the whole of the section and must apply them but only so far as they can be applied. The Court is not required or authorised to make any alterations in the provisions in order to make them applicable, if otherwise they would not be applicable, it is not required or authorised to apply only their principle or analogy. It must be borne in mind that Section 29 (2) makes applicable the provisions contained in several sections when the period of limitation

prescribed for any suit, appeal or application is to be determined. It may be that in a certain case the provisions of one of those sections cannot be applied because it does not contain the facts to which the provisions of that section can be applied or, in other words, there may be a case in which though due regard is to be had to the provisions of one of those sections, no effect can be given to its provisions. In such a case, it is not competent to the Court to modify the language of the section in order to give effect to its principle or to apply it by way of an analogy.

(5) Section 12(2) provides that—

"In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment,.. ..... the time requisite for obtaining a copy of the decree, sentence, or order appealed from or sought to be reviewed shall be excluded."

Under this provision the time requisite for obtaining a copy is to be excluded only while computing the period of limitation prescribed for an appeal, an application for leave to appeal or an application for a review of judgment. It is not to be excluded while computing the period of limitation prescribed for any other application. An application under Section 85 of the Panchayat Raj Act is neither one for leave to appeal, nor one for a review of judgment. Therefore, while computing the period of limitation prescribed for it, the time requisite for obtaining a copy of the order cannot be excluded. This conclusion receives support from the fact that the time that is to be excluded is specifically stated to be the time requisite for obtaining a copy of the order sought to be reviewed. The time requisite for obtaining a copy of the order sought to be revised is not required to be excluded.

(6) The view that I have expressed above is supported by many authorities. In — 'Nafisuddin v. Secy. of State', AIR 1927 Lah 858 (2) (A) it was held that an application under S. 18 (1) of the Land Acquisition Act, 1894, is not an application for which any provision is made by Sec. 12 of the Limitation Act and that the time spent in obtaining a copy of the award cannot be deducted while computing the period of limitation prescribed for making an application under S. 18 (1) of the Land Acquisition Act. That decision was followed by this Court in — 'Kashi Prasad v. Notified Area of Mahoba', AIR 1932 All 598 (B). It was pointed out in that case that S. 12 of the Limitation Act refers to an application for review of a judgment and to no other application and that the time requisite for obtaining a copy of the award cannot be excluded without materially modifying the language of Section 12. A Bench of the Patna High Court applied the principle of Section 12 to an application under Section 66(2) and (3) of the Income-tax Act in — 'Mohan Lal v. Commr. of Income-tax', AIR 1930 Pat 14 (C). I may respectfully point out that Section 29 of the Limitation Act applies the provisions of Section 12 and not the principle behind them.

(7) In — 'In the matter of Gulab Chand Chotey Lal', AIR 1931 All 673 (D), a Bench of this Court held that in computing the period of limitation prescribed for an application under Section 66(3) of the Income-tax Act, the time spent in obtaining copies of the orders of the Income-tax Officer and the Assistant Commissioner of Income-tax is not to be excluded because Section 12, Limitation Act, does not apply to an application under Section 66 (3) of the Income-tax Act. In — 'Amritsar Sugar Mill Co. Ltd. v. Commr., Sales Tax, U. P., Lucknow', AIR 1952 All 816 (E), while computing the period of limitation prescribed for an application under Section 11(2) of the U. P. Sales Tax Act, No. 15 of 1948, the time spent in obtaining a copy of the order of the revising authority was excluded on the ground that it was just and equitable that the benefit of Section 12 of the Limitation Act should be available. No reference was made in that case to the decisions in the cases of — 'Kashi Prasad (B)' and 'Gulab Chand (D)'. It also goes against the doctrine of — 'Narsingh Sahai v. Sheo Prasad', AIR 1918 All 389 (FB) (F). That was a case of second appeal from an appellate decree. The memorandum of appeal was accompanied also by a copy of the judgment of the Court of first instance, as it was required to be under a rule framed by the High Court. Though the copy had to accompany the memorandum of appeal and the memorandum was liable to be rejected if it had not, the Full Bench refused to exclude the time spent in obtaining it. The Court observed:

"Section 12 of the Indian Limitation Act is perfectly clear and its language is in no way ambiguous. It lays down in Clause (3) of S. 12 of the Act that where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded. Nothing further is said, and we are unanimous in holding that this Court has no power by any rule that it may make to alter the period of limitation prescribed by the Indian Limitation Act."

(8) This Court has power to alter, amend and add to rules of procedure laid down by the Code of Civil Procedure, vide Section 122, but nowhere has any power been given to it to touch the Limitation Act. Therefore, merely on the ground of justice and equity, the period of limitation cannot be extended by excluding time which is not required to be excluded. Moreover, as the decision in the case of — 'Amritsar Sugar Mill Co. Ltd. (E)' was about an application under the U. P. Sales Tax Act, the decision is not binding upon me. In — 'AIR 1930 Pat 14 (C)' the period spent in obtaining a copy of an order under S. 31 or S. 32 of the Income-tax Act was excluded in computing the period of limitation for an application under Section 66 (2) and (3). That was done on general principles. With great respect to the learned Judges, I do not think it could be excluded on this ground.

(9) I, therefore, hold that though the period of limitation for making an application under S. 85 of the Panchayat Raj Act is to be determined in consonance with the provisions of S. 12(2) of the Limitation Act, the time spent in obtaining a copy of the order sought to be revised cannot be excluded as it is not an application referred to in it.

(10) It was argued on behalf of the applicants that the application is an appeal within the meaning of Section 12 (2) of the Limitation Act. In — 'Raja Rajeswara Setupati v. Kamid Rowthen', AIR 1926 PC 22 at p. 24 (G), an application for revision under Section 115, Civil P. C. was treated as "an appeal in the form appropriate to such a case from the Munsif's Court." Section 73 of the Madras Village Courts Act provided for an application of revision to be made within sixty days against an order of a panchayat Court. In — 'Standard Type Foundry v. Venkataramaniah', AIR 1941 Mad 589 (H) it was held that the application was an appeal within the meaning of Section 12 (2) and was not covered by the other heads mentioned in it. It was observed on p. 590 that:

"It is difficult to say that the remedy by way of revision is essentially different from the remedy by way of appeal" and that "the term appeal occurring in Article 182 (2), Limitation Act, is not used in a restricted sense so as to exclude revision petitions."

Their Lordships of the Judicial Committee said in — 'Nagendra Nath v. Suresh Chandra', AIR 1932 PC 165 at p. 167 (I)

"There is no definition of appeal in the Civil Procedure Code, but their Lordships have no doubt that any application by a party to an appellate Court asking it to be set aside or revise a decision of a subordinate Court is an appeal within the ordinary acceptation of the term."

That decision was followed by a Bench of this Court in — 'Ajudhia Prasad v. U. P. Government', AIR 1947 All 390 (J) and it was stated that the word "appeal" in Article 182 of the Limitation Act should not be interpreted in the narrower sense of the term as used in the Code of Civil Procedure.

(11) It was also followed by a Full Bench of the Madras High Court in — 'Chidambara v. Ramanadar', AIR 1937 Mad 385 (K). It was contended before the Full Bench that the same word occurring in two provisions of an Act should not be construed in two different senses and that as the word "appeal" has a narrower meaning in Articles 150 to 157, it would be wrong to give it an extended meaning in Article 182. The Full Bench repelled the contention by saying that it is recognised that if sufficient reasons exist, a word can be construed in one part of an Act in a different sense from that it bears in another part and that cogent reasons exist for giving an extended meaning to the word "appeal" in Art. 182. With great respect to the learned Judges, I think the correct reply to the contention was that there is a difference between an "appeal" ('simpliciter') and an "appeal under the Code of Civil Procedure" or "of Criminal Procedure." When the word is used with reference to an Act, it must have the same meaning as is given to it in that Act. But when it is used in a general sense, it can be given an extended meaning. "An appeal under the Code of Civil Procedure" must mean a proceeding that is described in the Code as an appeal and cannot possibly be given an extended meaning so as to include an application for revision. Similarly "an appeal under the Code of Criminal Procedure" must mean a proceeding that is described in the Code of Criminal Procedure as an appeal and cannot include an application for revision. In Articles 150 to 157 the word "appeal" is not used in a general sense and is qualified by the words "under the Code of Criminal Procedure" or "under the Code of Civil Procedure." In Art. 182, the word is used without any such qualification. That is why it is interpreted there in a general sense to include an application for revision also.

(12) The word "appeal" is used in Section 12 (2) in a general sense and is not qualified by any of the phrases mentioned above. Therefore, it must be construed in the same manner in which it is construed in Article 182. In other words, an application for revision is an appeal within the meaning of that provision. It was remarked by Agarwala, J. in — 'Kallu Mal v. Municipal Board, Nawabganj', AIR 1942 Oudh 392 at p. 393 (L) that Section 12, Limitation Act, does not apply to an application for revision probably because no period of limitation is prescribed in the Limitation Act for it. The learned Judge did not mean to say that the word "appeal" in S. 12 does not include an application for revision. He did not mean to exclude this as an additional reason for not specifically including an application for revision within the scope of Section 12. I, therefore, hold that an application under S. 85 of the Panchayat Raj Act is an appeal within the meaning of S. 12 (2) of the Limitation Act.

(13) I was not impressed with the argument in the alternative that even if the application were not an appeal, since it was required by a rule of the Rules framed by Government to be accompanied by a copy of the order sought to be revised, the time spent in obtaining the copy ought to be excluded. Section 12 (2), Limitation Act, is the only provision dealing with exclusion of time on the ground that it was required for obtaining a copy. Neither does it lay down that the time can be excluded only if the copy actually accompanies the appeal or application nor does it lay down that the time spent in obtaining a copy of a decree, sentence or order must be deducted, even though it is not a decree, sentence or order appealed from or sought to be reviewed, merely because it is required by law to accompany the appeal or application. The Judicial Committee decided in — 'Jijibhoy v. T. S. Chettyar Firm', AIR 1923 PC 103 (M) that the time required for obtaining copies of the decree and judgment must be excluded even though by rules of the Court it is not necessary to obtain them. The reason is that Section 12 makes no reference to the Code of Civil Procedure or any other Act and does not say why the time is to be excluded, but simply enacts it as a positive direction. The rules framed by this Court in regard to references under S. 66 (3) of the Income-tax Act require an application to be accompanied by copies of the orders of the Income-tax Officer, the Assistant Commissioner and the Commissioner disposing of the case,

"but the mere fact that these orders are required does not connote that the applicant has a right to extend the period of limitation by the period required for obtaining copies of orders other than those of the Commissioner of Income-tax under reference."

See — 'in the matter of Gulab Chand Chotey Lal (D)' at page 686. See also the case of — 'Narsing Sahai (F)' in which the Full Bench refused to deduct the time spent in obtaining a copy of the judgment of the trial Court even though it was required to accompany the memorandum of second appeal.

(14) The applicants were entitled to deduction of the time spent by them in obtaining a copy of the order of the panchayati adalat. When it is deducted, their application was within time and should have been heard on merits by the Sub-divisional Magistrate. The Sub-divisional Magistrate by refusing to hear it, failed to exercise jurisdiction vested in him. I, therefore, order a writ of certiorari to issue quashing the order of the Sub-divisional Magistrate dated 15-4-1953. I direct him to restore the revision application to its original number and hear it on merits.

A/V.S.B. Writ issued.

A.I.R. 1954 ALL. 255 (Vol. 41, C.N. 138)
(LUCKNOW BENCH)

RANDHIR SINGH J.

Shiva Behari, Applicant v. State.

Criminal Revn. No. 27 of 1953, D/- 28-9-1953, against order of 2nd Addl. S. J., Sitapur, D/- 24-11-1952.

(a) Factories Act (1948), S. 106 — Scope.

Section 106 does not enjoin that cognizance would also be taken within three months of the offence. All that it requires is that a complaint should be made within three months. If a complaint is made in proper time, but the Magistrate does not choose to issue orders on the complaint for some time, the complaint cannot be said to be bad. (Para 3)

(b) Factories Act (1948), S. 62 — Scope.

The words of Section 62 clearly indicate that the register should be available to the Inspector at all times, that is, should be produced immediately on demand. If the manager of the factory does not happen to be on the premises at the time of the inspection, he should make arrangements that the register is made available to the Inspector whenever the Inspector chooses to go and inspect the factory. The evident intention of the legislature is that the register should be at the place where work is going on. (Para 4)

D. N. Bhattacharji, for Applicant; M. L. Trivedi for Addl. Government Advocate, for the State.

ORDER: The applicant in this case has been convicted under section 92 of the Factories Act, 1948, for having contravened the provisions of section 62 of the Factories Act.

(2) It appears that one Sri P. C. Joshi, Inspector of Factories, U. P. inspected the factory of the applicant at Sitapur on the 16th March, 1952, which was a Sunday. He found some persons working there and demanded the registers of workers. The registers of workers were not produced by anybody present and the Inspector of Factories had to come away. He reported the matter and ultimately a complaint was sent by the Chief Inspector of Factories to the City Magistrate, Sitapur. This complaint was received on the 11th June, 1952, when it was ordered to be transferred to the Factory Magistrate, for necessary action. The Magistrate to whom this case was transferred ordered on the 17th June, 1952, that summons might issue to the applicant. The case was then tried and the applicant was convicted and sentenced to a fine of Rs. 100/-. He went in revision to the Sessions Judge who maintained the conviction but reduced the sentence to a fine of Rs. 20/-. The applicant has come up in revision.

(3) The first point which has been urged on behalf of the applicant is that cognizance of the offence having been taken more than three months after the offence was committed the conviction was bad in view of the provisions of section 106 of the Factories Act. Section 106 of the Factories Act is as follows :

"No Court shall take cognizance of any offence punishable under this Act unless complaint thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector:

Provided that where the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed."

It appears, therefore, that no court shall take cognizance of any offence punishable under the Factories Act unless a complaint thereof was made within three months of the date on which the commission of the offence came to the knowledge of the Inspector. It has been argued on behalf of the learned Counsel for the applicant that the Magistrate who finally took cognizance of the case issued his first order on the 17th June and as such took cognizance of the offence on the 17th June, a day after the expiry of three months of the date of the offence. This section does not enjoin that cognizance should also be taken within three months of the offence. All that it requires is that a complaint should be made within three months. In the present case the complaint which resulted in the conviction of the applicant was received by a Magistrate who was competent to take cognizance of the case on the 11th June, 1952. This was within three months of the date when the offence came to the knowledge of the Inspector. If a complaint is made in proper time, but the Magistrate does not choose to issue orders on the complaint for some time, the complaint cannot be said to be bad. There is thus no force in the contention of the learned Counsel for the applicant on this point.

(4) Another point which has been pressed on behalf of the applicant is that the Inspector of Factories should have given reasonable time and opportunity to the applicant to produce the register. Section 62 of the Factories Act is as follows:

"(1) The manager of every factory shall maintain a register of adult workers, to be available to the Inspector at all times during working hours, or when any work is being carried on in the factory, showing—

(a) the name of each adult worker in the factory;

(b) the nature of his work;

(c) the group, if any, in which he is included;

(d) where his group works on shifts, the relay to which he is allotted;

(e) such other particulars as may be prescribed."

This Act, therefore, requires that a register of adult workers shall be maintained by the manager of every factory to be available to the Inspector at all times during working hours or when any work is being carried on in the factory. The words of the section, therefore, clearly indicate that this register should be available to the Inspector at all times, that is, should be produced immediately on demand. If the manager of the factory does not happen to be on the premises at the time of the inspection, he should make arrangements that the register is made available to the Inspector whenever the Inspector chooses to go and inspect the factory. The evident intention of the legislature is that the register should be at the place where work is going on. The applicant in the present case admitted that he was not present at the time of the inspection and came to the factory about half an hour after the Inspector had come. He also admits that the register was not made available to him at the time when he demanded it.

There had, therefore, been a clear breach of section 62 of the Factories Act. The contention of the learned Counsel that time should be allowed to a manager of a factory, who is not even present at the time of the inspection at the factory to produce the register at some future time, does not appear to be correct.

(5) No other point has been pressed in revision.

(6) The application for revision is, therefore, dismissed.

B/D.H.Z. Revision dismissed.

A.I.R. 1954 ALL. 257 (Vol. 41, C. N. 139)

MUKERJI AND CHATURVEDI JJ.

Sagir Ahmad and others, Petitioners v. The Govt. of the State of Uttar Pradesh and others, Opposite Party.

Misc. Writ No. 414 of 1953 and Civil Misc. Writ Nos. 537, 579 to 582, 587 to 595, 597 to 603, 617 to 620, 622, 623, 626 to 629, 633, 634, 638, 639, 651 to 654, 677 of 1952, and 339 to 342, 351 to 355, 363, 372 to 374, 397, 416 to 464, 504 and 505 of 1953, D/- 17-11-1953.

(a) Uttar Pradesh State Road Transport Act (1950) (2 of 1951), Preamble and S. 3 — Act cannot be challenged on ground that it infringed Art. 19(6) — (Constitution of India, Art. 19(6) (before its amendment)).

The State cannot take advantage of Art. 19(6) in its amended form in judging the validity of U. P. Act, 2 of 1951, passed before the amendment. (Paras 28, 112)

The right which has been affected by the U. P. Act, 2 of 1951 is not any unrestricted right to use the national highways because there was, after the passing of the Motor Vehicles Act, no such right. (Para 26)

The right of the individual to utilize motor vehicles for purposes of trade was restricted to such an extent under the Motor Vehicles Act as to be almost non-existent; the right was only available when a permit for the exercise of that right was available to the person from the appropriate authority under the Motor Vehicles Act. The impugned Act (U. P. Act 2 of 1951) when it takes away that right of the individual, if it does so, then, it is not taking away any right of the individual to carry on any occupation, trade or business. (Para 27)

Whether a restriction is reasonable or not has to be judged in the setting of time and circumstances. It has also to be viewed in the light of the economic and social needs of the community obtaining at any particular time. It may further have to be judged in certain cases having regard to geographical conditions. The legislature must be deemed to be a good judge of the things that can subserve the common good of the people and the view of the legislature should, therefore, be entitled to great weight by Courts when they have to determine whether or not certain restrictions which have been placed on the rights of the individuals are in the interests of the general public. (Para 33)

There is no gainsaying the fact that transport services are essential to the life of a community and that it is conducive to the interests of the general public to have an efficient system of transport services. The resources of a State are always greater than the resources of individual operators and if for nothing else, on this alone it is 'prima facie' more desirable that a service vital to the needs of the community should be operated by the State rather than by individuals. The question of co-ordination and other similar questions also play a vital role in making such services efficient and for these purposes again, if for nothing else, the State stands in a better position than does an individual. (Para 33)

A monopoly in favour of the State in respect of such services held could not be said to be an unreasonable restriction on the rights of the individuals if the U. P. legislature has thought it fit to create one by Act, II of 1951. (Paras 33, 120)

The Act could not therefore be challenged on the ground that it infringed Art. 19 (g) of the Constitution. (Para 34)

(b) Uttar Pradesh State Road Transport Act, 1950 (2 of 1951), S. 3 — Act is not discriminatory — S. 3 is not ultra vires — (Constitution of India, Art. 14).

Whenever there is a proper classification, viz. a classification which bears a reasonable and just resemblance to the subject-matter of the legislation then it cannot be contended that the legislation was in the teeth of the guarantee contained in Art. 14. In determining whether the classification bears a proper resemblance to the subject-matter of the legislation, Courts have not to look to the objects which were sought to be achieved by the legislation. It is permissible for a Court to take into account the title, the preamble, as also the framework of the legislation to determine the true scope and nature of it. In determining the purpose of the legislation and further in determining whether the provisions contained in the legislation are likely to achieve the objects with which the legislation was forged courts must lean in favour of the view that the objects are likely to be achieved since the legislature was of that view. Case law Ref. (Para 46)

All reasonable classifications which have a proper and just resemblance to the subject-matter of the legislation cannot be hit by the guarantee contained in Art. 14. Therefore, the only question that arises for determination in this connection is whether the classification visualised or indicated in Cl. (6)(ii) of Art. 19 is a reasonable classification. Having in mind the scope of the U. P. Act 2 of 1951 which necessarily would fall within the scope of sub-cl. (ii) of Cl. (6) the classification indicated must be held, at least after the amendment became effective, to be a reasonable classification in relation to the field of legislation which is indicated in that sub-clause. The idea of the State coming into the field of trade and commerce was not for the first time visualised by the Constitution makers when they put in Cl. (6)(ii) in Art. 19 of the Constitution. (Para 48)

The question whether a classification is reasonable and proper or not must be judged more on common sense than on legal subtleties. (Para 49)

Classification is almost inherent in the concept of a monopoly. Therefore, the only question that arises for determination is whether this classification is reasonable or not. That the classification in the impugned Act bears a reasonable resemblance to the subject-matter of the legislation cannot be seriously disputed for the whole object with which the impugned legislation had been passed is to provide a State road transport service which would be a suitable and an efficient road transport ser-

vice and which would subserve the common good of the people of the State.
(Para 49)

By the process of classification the State has the power of determining who should be regarded as a class in relation to a law enacted on a particular subject. This power in some degree was likely to produce some inequality but if the law dealt with the liberties of a number of well defined classes then the law was not open to the charge of denial of equal protection on the ground that it had no application to other persons. Equal protection claims under Art. 14 always are examined with the presumption that the State action is reasonable and just. Unless it can be shown that the discrimination that has been resorted to or the power to discriminate has been given without reason it cannot be said that there is unequal treatment.
(Para 50)

It cannot be contended reasonably that the State Government would "without reason" discriminate or that there is in S. 3 of the impugned Act a power to discriminate 'without reason' given to the State Government. The State Government cannot arbitrarily associate individual with itself in running the transport services or arbitrarily exclude individuals from association with itself; it can only associate or leave out persons in the interests of the general public or for subserving the common good. The legislative policy in regard to the matter is clear and definite and it is only the effective method of carrying out that policy that a discretion has been vested by the statute on the State Government to make selective application of the law to certain classes or groups of persons. Therefore S. 3 of the impugned Act does not confer on the State Government a power which could be utilized by them arbitrarily for making discrimination. Section 3 of the impugned Act is not ultra vires.
(Para 51)

(c) Constitution of India, Arts. 19(6)(ii) and 14 — There is no conflict between Art. 19(6)(ii) and Art. 14. **(Para 47)**

†(d) Uttar Pradesh State Road Transport Act 1950 (2 of 1951), S. 11(2) — Validity.

The provisions of S. 11(2) of the Act are 'ultra vires' the State Legislature. AIR 1952 All 866, Foll.
(Para 54)

(e) Uttar Pradesh State Road Transport Act, 1950 (2 of 1951), Preamble — State does not acquire any property or interest in commercial undertaking — (Constitution of India, Art. 31).

The right to compensation under the Constitution does not arise on mere deprivation of property. The right to compensation arises only when after deprivation there has been a vesting in the State of that property or there has been deprivation by acquisition.
(Para 59)

In order to judge whether there is a right to compensation or not the property acquired must be traceable to the earlier owner who has been deprived of it before any question of compensation can, under the Indian Constitution, arise. The right to get compensation under American Constitution is on a slightly different footing.
(Para 62a)

A privilege or an immunity or a right in order to be property must be available against all others. The right under the permit to ply vehicles under Motor Vehicles Act is not a right available against all others.
(Para 61)

The petitioners' common law right to use the 'public highways' in a particular manner under a permit cannot be any right in property or an interest in an undertaking within the meaning of Art. 31 of the Constitution.
(Para 66)

Under the Motor Vehicles Act everyone who could obtain the necessary permit was entitled to run buses or motor vehicles on such routes as were permitted. The State could, and as a matter of fact did, run motor bus services on many of the routes on which private operators operated their services. By depriving the private operators of their right to run buses on certain routes and by deciding to run those routes itself the State did not acquire the right which was of the petitioners, whether such right was "property" or an interest in a commercial or industrial undertaking. The vehicles which were being operated by the private operators have not been acquired by the State, nor has any other tangible property which was used by the petitioners for their business been acquired. What has been done is that the petitioners have been prohibited from operating their buses on certain routes. This right of the petitioners has in no way been vested in the State, inasmuch as the State always had an equal right with the petitioners to run their buses on those routes. It cannot be argued that the moment a monopoly in this matter was created in favour of the State the same moment, notionally at any rate, certain rights of the individual operators vested in, or was acquired by, the State. If this were so, then every individual who had a potential right to apply for a permit and get it, could say that his right also has been acquired by the State and as such he was entitled to compensation. The right to claim compensation is not founded on any such notional or far-fetched conception. The right to compensation is available when there has been in substance and in reality an acquisition.
(Para 63)

Moreover what was done by the impugned Act was to place reasonable restriction on the rights of the petitioners and there was no "taking" of any property of the petitioners. When once it is found that the restriction imposed is reasonable and there is no actual "taking" then no question of compensation can arise.
(Para 67)

Consequently the Uttar Pradesh State Road Transport Act is not 'ultra vires' inasmuch as it makes no provision for compensation, for, there was no occasion to make any provision for any compensation.
(Para 68)

(f) Uttar Pradesh State Road Transport Act, 1950 (2 of 1951), Preamble — Act is not hit by Art. 301 — Scope and applicability of Art. 301 — (Constitution of India, Art. 301).

By Art. 304 it is competent for the Legislature of a State to impose such reasonable restrictions on the freedom of trade, commerce or intercourse as may be

required in the public interest. There, however, is a proviso that no Bill or amendment for the purposes mentioned above shall be introduced or moved in the Legislature of a State without the previous sanction of the President. The guarantee contained in Art. 301, therefore, is not an unqualified guarantee. Art. 301 more or less is complementary to the general provision contained in Art. 19(g), inasmuch as Art. 301 gives a kind of territorial protection to trade, commerce and intercourse, a protection which incidentally enures to the benefit of those who engage in trade, business and commerce or carry on intercourse of the type visualised under this Article. The protection which Art. 301 contemplates is what may be termed, "trade in motion" so that the restriction has to be, when it is being judged, restriction on the flow of goods as such, and not in the flow of goods through the agency or medium of any particular individual or group of individuals. (Para 71)

In order to determine whether there has been an infringement of Art. 301 of the Constitution or not, the "pith and substance" of the enactment must be seen. 1949-2 All ER 755, Relied on. (Para 72)

Uttar Pradesh State Road Transport Act, 1950 (2 of 1951) is not hit by the provisions of Art. 301 of the Constitution. (Para 74)

(g) Uttar Pradesh State Road Transport Act, 1950 (2 of 1951), S. 7 — Validity.

Section 7 gives a right to the executive authority to make certain orders in respect of specified matters; by this section the executive authority has not been vested with the power to either cancel or modify any previous legislation. Section is not therefore 'ultra vires'. (Para 75)

(h) Uttar Pradesh State Road Transport Act, 1950 (2 of 1951), Ss. 4, 5 and 6(2) — Applicability.

Notification under publishing scheme — Objections for consideration of "Governor" invited — No "prescribed authority" under Act — Objections considered by Deputy Secretary of Government — Held that the power that the State Government could exercise under the provisions of S. 5(2) of the Act could properly be called the exercise of executive power — It certainly was not the exercise of a judicial power of the State even though the nature of the power was 'quasi' judicial. Under S. 5(2) objections had to be considered either by the State Government or if the State Government so directed, by the "prescribed authority"; that there could be no delegation of this power, that is to say, the State Government could not, nor could the "prescribed authority" if there was any under S. 5(2), delegate the power to anybody else to consider the objection — This was so because of the provisions of S. 10 of the Act; that the State Government had by the rule framed by it under the Act constituted the Transport Commissioner "the "prescribed authority" under the provisions of S. 5(2) and, therefore, it was either for the State Government itself or for the Transport Commissioner to hear those objections. The notification stating that the Governor was to consider the objections indicated that it was the State Government which was to consider them. The hearing of the objections by the Deputy Secretary must, therefore, be deemed to have been a hearing by the Governor through an office subordinate to him in view of the fact that the ultimate notification that was published after the objections had been entertained and heard stated that "the Governor is pleased to order the publication of the scheme hereto annexed which has been confirmed under sub-section (2) of S. 5 of the said Act." The schemes finally published were not open to challenge on the ground that the petitioners had either no opportunity of raising objections or that the objections had been decided by an improper authority or that the procedure followed in deciding those matters was an illegal procedure. (Paras 77, 78, 79, 80)

(i) Uttar Pradesh State Road Transport Act, 1950 (2 of 1951), Ss. 4 and 5 — Rules under Act, Rule 3 — Publication of Scheme is not the essence of the matter. **(Para 82)**

(j) Uttar Pradesh State Road Transport Act, 1950 (2 of 1951), Ss. 4 and 5 — Notification under, in English and Hindi — Contradiction between — Under Art. 348(1)(b)(iii), notification in English must prevail over Hindi notification — (Constitution of India, Art. 348(1)(b)(iii)). **(Para 83)**

(k) Uttar Pradesh State Road Transport Act, 1950 (2 of 1951), Preamble — Extra-territorial operation.

The Act could certainly give power to the State Government not to let anyone operate his bus within the territory of the State irrespective of the fact whether he was operating his bus on a permit obtained from an authority within the State or because of a permit granted to him by an authority outside the State. Under the Act no power has been conferred on the State Government to operate extra-territorially. (Para 84)

G. S. Pathak, V. D. Bhargava, R. S. Pathak, Chhail Behari Lal Saxena, S. N. Sahai, S. N. Katju, S. S. Dhawan, for Applicants; Advocate-General and Standing Counsel, for Opposite Party.

CASES REFERRED :

(A) ('51) AIR 1951 All 257: ILR (1951) 1 All 269 (FB) (Prs 5, 26, 29, 52, 71, 87, 101, 114, 123, 131, 132, 135)
(B) ('52) AIR 1952 All 866: 1952 All LJ 412: 1952 Cri LJ 1676 (FB) (Prs 17, 54, 55, 138)
(C) (1949) 1949-2 All ER 755: 1950 AC 235 (Prs 30, 31, 33, 72, 115, 127, 134)
(D) ('50) AIR 1950 SC 163: 1950 SCR 566 (SC) (Prs 32, 117)
(E) ('52) AIR 1952 SC 196: 1952 SCR 597: 1952 Cri LJ 966 (SC) (Pr 33)
(F) ('51) AIR 1951 SC 41: 1950 SCR 869 (SC) (Prs 37, 46)
(G) (1919) 249 US 152: 63 Law Ed 527 (Prs 39, 46)
(H) ('52) AIR 1952 SC 75: 1952 SCR 284: 1952 Cri LJ 510 (SC) (Prs 40, 50, 108, 109)
(I) ('51) AIR 1951 SC 332: (Special Ref. No. 1 of 1951) (Prs 40, 50, 54)
(J) ('52) AIR 1952 SC 123: 1952 SCR 435: 1952 Cri LJ 805 (SC) (Prs 42, 50, 109)
(K) ('53) AIR 1953 SC 404: 1953 Cri LJ 1621 (SC) (Prs 45, 109)

(L) ('52) AIR 1952 SC 192: 1952 SCR 583 (SC) (Pr 60)
(M) ('46) AIR 1946 Bom 216: 47 Cri LJ 594 (Prs 60, 124)
(N) ('46) AIR 1946 Cal 140: ILR (1945) 2 Cal 604 (Prs 60, 125)
(O) 68 Comm-W LR 261 (Prs 60, 126)
(P) 52 Comm-W LR 189 (Pr 73)
(Q) 53 Comm-W LR 493 (Pr 73)
(R) ('51) AIR 1951 SC 118: ILR (1951) Hyd 221 (SC) (Pr 118)
(S) ('53) AIR 1953 SC 373: 1953 SCR 1049 (SC) (Pr 119)
(T) ('53) AIR 1953 Mad 279: ILR (1953) Mad 304 (Pr 120)
(U) (1936) 1936 AC 578: 105 LJ PC 115 (Pr 134)

MUKERJI J.:

These are 106 connected petitions under Article 226(1) of the Constitution of India. All these petitions raise more or less the same questions for decision — at any rate the main questions which fall for determination in these cases are the same. These are all petitions by persons who have been operating motor vehicles for gain on the public highways of the State. These petitioners had the necessary "permit" to operate their vehicles under the Motor Vehicles Act of 1939. The Uttar Pradesh Government has, by virtue of powers conferred upon it by the Uttar Pradesh State Road Transport Act, 1950 (U. P. Act No. II of 1951), hereinafter referred to as the impugned Act, in effect stopped some of the petitioners from plying their vehicles on the public highways and instead commenced plying vehicles of its own.

(2) All the petitions have more or less sought common reliefs. The main relief sought is that a writ in the nature of mandamus be issued to opposite parties Nos. 1 and 2, namely, the Government of the State of Uttar Pradesh and the Minister of Transport, Uttar Pradesh, to withdraw the declaration made under section 3 of the impugned Act and to withdraw certain notifications whereby they have stopped the vehicles of the petitioners and have substituted therefor their own vehicles. There is a specific prayer for a writ of mandamus as against the opposite parties directing them not to ply and operate the State Road Transport Services on any of the routes on which the petitioners ply their vehicles.

(3) The main controversy in the case has centred round the State's power to take over motor transport services of the State so as to run these services itself. This controversy has to be viewed in the light of some history. It is common knowledge that in recent years transport of passengers and goods by motor vehicles has grown in this country greatly. The nature of the country and its needs clearly appear suited to such a growth and consequently these services attracted the attention of private operators as also of the State which has always to bear in mind and keep an eye on the services that fall in the category of public utility services.

(4) In 1914 the Indian Legislature passed a Motor Vehicles Act (Act VII of 1914), whereby it imposed certain conditions on individuals who possessed motor vehicles and who wished to use those vehicles on the public highways. In 1939 the Act of 1914 was largely altered. In the statement of objects and reasons of this Act it was stated that the Act of 1914, which had been made to suit the conditions of motor vehicle traffic at an early stage of its development, was no longer adequate to deal with the conditions which had come into existence on account of the rapid growth of motor transport in the country.

The framers of the 1939 Act visualized that in the interest of safety and public convenience as also for the development of a co-ordinated system of transport a much closer control was required. It was further visualized that it was necessary to have "power" by which it was possible to effectively regulate motor transport.

Before the Act of 1939 came on to the statute book the Government of India appointed a committee of enquiry in 1933 to investigate and report on the question of the desirability of co-ordinating road and rail traffic in the country. The committee made its report and its report indicated that it was in the vital interests of the community to have a scheme of co-ordination of road and rail traffic because of the unfair competition that subsisted between the transport services and because such competition was detrimental to the national interest.

(5) Sometime in the year 1948 or so the State of Uttar Pradesh conceived the plan of operating State buses on some of the national highways of the State. The State first came into this service as a competitor with private operators, but later it attempted to acquire a monopoly of some of the routes by taking resort to certain provisions of the Motor Vehicles Act of 1939. There was, therefore, a controversy raised by the private operators whose interests were affected and these operators challenged the power of the State to effect a monopoly in its own favour by resorting to certain powers which had apparently been conferred on the executive authority of the State under the Motor Vehicles Act.

Under the Motor Vehicles Act there was power vested in an authority called the transport authority to grant and regulate permits in respect of public vehicles and the State through this agency regulated private transport in such a manner as to eliminate private operators from some of the routes and thus laying those routes free for operation by State buses only. After the Constitution came into force, and with it the guarantee to the individual under Article 19(g) of freedom "to practice any profession, or to carry on any occupation, trade or business", the bus owners whose interests were affected moved petitions in this Court under Article 226 of the Constitution for seeking redress against what they thought was an unlawful interference by the State of the individual's freedom of trade.

One of the questions which was canvassed in these petitions, which were heard by a Full Bench of five Judges and the decision of which case is to be found in — 'Moti Lal v. Govt. of the State of Uttar Pradesh', AIR 1951 All 257 (A), was, whether or not it was possible for the State to have, in effect, a monopoly of motor transport under the provisions of the Motor Vehicles Act of 1939? The view expressed in that case was that it was not possible under the provisions of the Motor Vehicles Act of 1939, having in view the provisions of Articles 14 and 19 of the Constitution of India, to create a monopoly in favour of the State.

The State Government had at that time stopped issuing "permits" to private operators and had, by virtue of the provisions of section 42(3) (a) of the Motor Vehicles Act, put on the road transport vehicles of its own without securing permits for them. The Full Bench did not upheld the power of the State in the manner it had been exercised and expressed the view that it could not discriminate for the purpose of its own benefit and in its own favour and, therefore, the private operators were able to retain their interests in respect of the routes and the permits to which they were entitled under the Motor Vehicles Act.

(6) It appears that the State Government was anxious to secure a monopoly in respect of motor vehicle transport and with this object it sought legislative authority from the Uttar Pradesh Legislature. The Uttar Pradesh State Road Transport Act, 1950, (the impugned Act), appears to embody the culmination of that desire of the State Government. From the objects and reasons of the impugned enactment it is clear that the said enactment was brought into being because the Uttar Pradesh Government wished to run motor transport vehicles exclusively and that it could not do so under the Motor Vehicles Act of 1939 in view of the decision of the Full Bench already referred to. It was stated that it was essential for "public good" that the State transport should continue and the legal difficulties arising from the High Court's decision should be remedied. It was, therefore, in order to remedy the legal difficulties which arose in the way of the State in running transport services that the Uttar Pradesh State Road Act was passed.

(7) The petitioners in all these petitions have challenged the validity of the Uttar Pradesh State Road Transport Act, 1950. The challenge to the Act is founded 'inter alia' on the following main grounds :

(a) That the Act is discriminatory.

(b) That the Act is in conflict with the guarantee contained in Article 19(1)(g) of the Constitution.

(c) That by the Act the State has in effect acquired, in any event, an interest of the petitioners in an undertaking without making any provision for compensation as required by Article 31(2) of the Constitution.

(d) That the Act conflicts against the guarantee of freedom of inter-State and intra-State trade contained in Article 301 of the Constitution.

(8) It is necessary at this stage to have a picture, in outline, of the impugned Act. Section 1 of the Act lays down the extent and the date on which it is to come into effect — it may be stated that the Act came into effect from February 10, 1951. Section 2 contains definitions.

Section 3 confers power on the State Government to run transport services. This was the section which bore the brunt of the attack from the petitioners. The section is in these words:

> "Where the State Government is satisfied that it is necessary in the interest of general public and for subserving the common good so to direct, it may, by notification in the official Gazette, declare that the road transport services in general, or any particular class of such service on any route or portion thereof, as may be specified, shall be run and operated by the State Government exclusively, or by the State Government in conjunction with Railway, or partly by the State Government and partly by others in accordance with the provisions of this Act."

(9) Section 4 provides for a scheme of transport services and by sub-section (2) (g) power is conferred to cancel or modify "the existing permits granted under Chapter IV of the Motor Vehicles Act, 1939". Further, by sub-clause (i), power is given to curtail routes covered by existing permits or to transfer permits to other route or routes. By sub-clause (k) power has been given to do "other consequential or incidental matters as may appear necessary or expedient for the purposes of the scheme" — this was in the nature of an omnibus, residuary power.

(10) Section 5 of the Act gives opportunity to persons whose interests were affected by the scheme promulgated under section 4 to object within thirty days from the publication of the scheme. The State Government or if the State Government so directs, a prescribed authority, was to consider the objections and either confirm, modify or alter the scheme in such terms, of course, as it thought proper.

(11) Section 6 provides for alteration or modification in any scheme. A scheme published under sub-section (3) of section 5 could, under this section, be cancelled, altered or modified by the State Government or by the Transport Commissioner with the sanction of the State Government at any time. By a proviso to this section it was provided that mere increase or decrease in the number of transport services or the change of types of vehicles or seating capacity etc. were not to be deemed to be modifications or alterations in a scheme. Sub-section (2) of section 6 provided that the procedure laid down in sections 4 and 5 were to be followed, so far as can be made applicable, in alterations and modifications of a scheme under this section.

(12) Section 7 provided for consequences which ensued the publication of a scheme under section 5. It says that upon the publication of the scheme under section 5 and so long as that scheme remained in force, the consequences mentioned in that section were to be in effect.

Section 7(1)(a) to (d) provides as follows :

> (a) "The State Government may, in the case of transport vehicles to be used by the State Government or by the State Government in conjunction with Railway provide for dispensation from observance of the provisions of Chapter IV of the Motor Vehicles Act, 1939, as respects—
>
> (i) the necessity of taking out or granting or countersigning permits,
>
> (ii) the duration and renewal of permits,
>
> (iii) the conditions attached to permits,
>
> (iv) the cancellation and suspension of permits,
>
> (v) the restrictions on the number of permits, as it may notify in that behalf in the official Gazette;
>
> (b) No person (other than the State Government either singly or in conjunction with Railway) shall except as may be provided under clause (c) be entitled to a permit under Chapter IV of the Motor Vehicles Act, 1939;

(c) The State Government may specify the number of transport vehicles, if any, for which the permits may be granted or countersigned in favour of persons other than the State Government or the State Government and the Railway conjointly;

(d) The State Government or any officer or authority empowered by it in this behalf may, in the manner prescribed, cancel any permit or direct that any permit or class of permits shall not be renewed or shall not be effective beyond such date as may be specified or reduce and curtail the number of vehicles or routes covered by any permit or alter the conditions attached to any permit or attach any new condition to any permit granted under Chapter IV of the Motor Vehicles Act, 1939";

(13) The provisions of clause (e) are not very material, but the provisions of clause (f), which are in these words, are material:

"(f) The State Government may for purposes of this Act issue directions, as it considers necessary, to the State Transport Authority, Regional Transport Authority or any other authority or officer and such officer or authority shall forthwith give effect to all such orders and directions."

(14) Sub-clause (2) of Section 7 is in these words:

"(2) Nothing in sub-section (2) of section 44 of the Motor Vehicles Act, 1939, shall apply to any officer or authority specified in the notification under clause (e) of sub-section (1)".

(15) It will be clear from the provisions of section 7, particularly from the provisions quoted above, that very large powers were conferred on the State Government in regard to motor transport services. It would also appear that the provisions of the Motor Vehicles Act, 1939, particularly the provisions of Chapter IV of that Act, were made ineffective in respect of certain matters. It was argued on behalf of the petitioners that this section gives power to the State Government to discriminate.

(16) By section 10 provision was made for delegation of powers. The section is in these words:

"The State Government may, by notification in the Gazette, delegate to an officer or authority subordinate to it, any of the powers conferred on it by this Act except those specified in section 3 and sub-section (2) of section 5 to be exercised subject to any restrictions and conditions as may be specified in the notification."

(17) Section 11 provides for repeals. Sub-section (1) of that section says:

"Where there is any conflict or inconsistency between the provisions of this Act and the provisions of any other law, then the provisions of this Act shall prevail."

Sub-section (2) is in these words:

"Any order made or deemed to be made under this Act shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or any instrument having effect by virtue of such enactment."

It was contended that sub-section (2) of section 11 was 'ultra vires' in view of the pronouncement of the Full Bench in the case of — 'Bhushan Lall v. State', AIR 1952 All 866 (B), inasmuch as the words and the effect of sub-section (2) of section 11 were the same as those of section 6 of the Essential Supplies (Temporary Powers) Act, (Act XIV of 1946).

(18) The other important provision of the impugned Act is the provision contained in section 13 of the Act which in effect validates certain things. It is necessary to quote this section in extenso. It runs as follows:

"13. Validation.—(1)(a) Every—

(1) State Road Transport Service commenced before the appointed date and operating on any route at such date, and

(ii) order cancelling or curtailing any permit for transport vehicle, or attaching any new condition or altering the conditions already attached to any permit for such vehicle, and every order reducing or otherwise fixing the number of transport vehicles to be used on any route or changing the route relating to the permit, and every order refusing to renew any permit previously granted, made on or before the appointed date on account of the State Road Transport Service running and operating or commencing to run and operate on the route to which the permit related, shall be and is hereby made and declared to be valid in law, any provision in the Motor Vehicles Act, 1939, or any other law notwithstanding, and

(b) Every route on which the State Road Transport Service was operating on the appointed date and every such service shall for purposes of this Act, be deemed as the case may be to be a route specified in a notification under section 3, and the service operating under a scheme duly prepared and published under and in accordance with sections 4 and 5, provided that the State Government publishes in the official Gazette within fifteen days of the commencement of this Act a scheme as to the aforesaid road transport service providing as far as may be, for all or any of the matters specified in sub-section (2) of section 4 and the scheme so published shall be and be deemed to be the scheme duly confirmed and published under sub-section (3) of section 5 and the route to which it relates shall be called a notified route and the provisions of sections 6 and 7 shall be applicable thereto.

(2) Any application for granting a permit for a transport vehicle made whether before or after the commencement of this Act in respect of a route, which is or is deemed to be a notified route, shall notwithstanding anything in the Motor Vehicles Act, 1939, or any judgment, decree or order of a Court, be decided in accordance with the provisions of this Act as if the Act had been in force at all material dates."

Clause (b) of section 13(1) contains provision of great consequence for it provides for giving a "legal status" to certain routes — a status which routes were to enjoy under the impugned Act after a notification under section 3 had been issued and after a scheme had been duly prepared and published under sections 4 and 5 of the Act. By this clause the existing routes, that is to say, the routes on which the State transport services were operating on the appointed date, were to become

routes in accordance with a scheme prepared under the impugned Act and in respect of these the State Government was obviated the necessity of making the necessary declaration under section 3 and following the procedure laid down in sections 4 and 5.

A kind of 'fait accompli' was legalized by this provision and further it was made open to the appropriate authority to make alterations and modifications in these routes as provided for by section 6. Practically all the cases before us were covered by a notification which was issued by the State Government in pursuance of section 13(1)(b) of the Act.

(19) Section 14 of the impugned Act states:

"Without prejudice to the provisions of Section 7, but notwithstanding anything contained in the Motor Vehicles Act, 1939, it shall be lawful for the Transport Commissioner or an officer appointed in that behalf by the Transport Commissioner to authorize a public carrier or contract carriage owned by the State Government to be used on any or all routes in Uttar Pradesh and the public service vehicle aforesaid may then be so used as if the authorization had been a permit granted under and in accordance with the provisions of the Motor Vehicles Act, 1939."

This section in effect gives power to the Transport Commissioner or an officer appointed in that behalf by the Transport Commissioner, to authorize the running of any State vehicle on any route notwithstanding anything contained in the Motor Vehicles Act.

(20) By section 15 power was conferred on the State Government to make rules for the purpose of carrying into effect the provisions of the impugned Act. The State Government, consequent upon the power conferred upon it by section 15, had made certain rules which were duly published in the Uttar Pradesh Gazette on February 3, 1951. By these rules certain terms were defined and among other things provision was made for publication of the scheme, for filing, receiving and hearing of objections and other incidental matters.

(21) All the petitions were classified by counsel appearing for the petitioners into two groups, one, which consisted of those petitioners whose route or operational area was curtailed because of action taken under the impugned Act, and the other which consisted of those who were totally stopped from carrying on any operation on any route. There was also another distinction which was pointed out, namely, the distinction that obtained between those operators who plied "stage carriages" and those who plied "contract carriages". A "contract carriage" has been defined in the Motor Vehicles Act in section 2(3) as follows:

"'contract carriage' means a motor vehicle which carries a passenger or passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum and from one point to another without stopping to pick up or set down along the line of route passengers not included in the contract; and includes a motor cab notwithstanding that the passengers may pay separate fares;

Explanation.— 'Contract carriage' does not include a motor vehicle, possession of which has been temporarily transferred in accordance with an express agreement of hire for use as a private vehicle and which is used in accordance with the terms of such agreement";

"Stage carriage" has been defined by section 2(29) of the Act as follows:

"'Stage carriage' means a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey";

(22) From the aforesaid definitions it would appear that a "stage carriage" is what is popularly known as a "motor bus carrying passengers who wish to be carried along a public highway" while a "contract carriage" is one which carries passengers under a specific contract and over a specific and agreed route and is not a carriage that runs on any particular route catering for passengers wishing to travel along that route. Most of the petitions that come from the territorial region of Agra relate to cases where the operation of "contract carriages" has been affected by an order of the State Government.

(23) The main arguments in these cases on behalf of the petitioners were addressed to us by Sri Gopal Swarup Pathak although several counsel represented the various petitioners. Those counsel who followed Sri Pathak adopted the main arguments addressed to us by Sri Pathak and they only made submissions in regard to those points which required special attention in their respective cases. On behalf of the opposite parties arguments were addressed to us in main by the learned Advocate General although the learned Standing Counsel also addressed us on certain questions.

(24) The arguments of Sri Pathak covered a very large field and his arguments bore the impress of a good deal of research and originality. As an introduction to his main arguments Sri Pathak raised the question as to whether or not monopoly as an economic theory was a sound theory. Sri Pathak's contention was that State monopoly was economically unsound, and, as such, could not be conducive to public good.

It was pointed out by Sri Pathak that the experience of some countries which had resorted to State monopolies in regard to certain trades and ventures had been a sad experience and that some of those countries were going back to the old order of things. In my view it is not strictly within our province to pronounce judgment on whether or not monopoly is a sound economic theory. There is no gainsaying the fact that economic theories have undergone vital changes during the last 25 years; at any rate, new concepts and new ideas of social well-being have occupied the minds of thinkers and ideas which a century back would have been rejected at stating have now come to stay.

With the passage of time courts have started recognizing such economic theories as are conducive to social interests. Many of the social interests which would have gone unrecognized sometime back have received recognition recently. It is reasonable to think that as new wants develop in the social order States and the courts will have to recognize

new social interests. The impugned legislation has been brought into being, as has already been noticed earlier, to subserve the common good of the people of the State of Uttar Pradesh. With the growing idea of having welfare States, controls by the States of activities which formerly remained uncontrolled and remained within the exclusive ambit of individual operation are becoming more and more common. The Directive Principles of our Constitution clearly indicate that the State has to try

> "to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

Our Constitution has also guaranteed certain freedoms to the individual citizens of India. It has conferred what are called "fundamental rights" on the citizens and an invasion against these fundamental rights can be protected or guarded by having recourse to courts of law. Even, with all these circumstances to guide us in deciding the larger question that was argued by Sri Pathak, namely, whether State monopoly could ever be in the interests of the people, the question could not appropriately be decided in these petitions.

The narrower question was whether under the circumstances of these cases the State Legislature was competent, in the public interest, to confer the power which it did by the impugned Act on the State Government to create, in effect, a monopoly in respect of motor transport on certain routes. This question, to my mind, calls for a decision from us, inasmuch as, what was attempted to be done by the impugned Act was, in effect, affecting the right of freedom guaranteed by Article 19(g) of the Constitution.

(25) It was argued that the right to run a motor vehicle on the national highway was a trade or a business and a right to do that trade or business could only be affected by reasonable restrictions as were provided for by subclause (6) of that Article. It was next argued that what has been done under the impugned Act is not to place a reasonable restriction on the exercise of the right guaranteed by Article 19(1)(g), but to completely destroy the right of trading by the running of motor vehicles on public highways. It was further argued that restriction could never amount to total abolition of the trade unless, of course, it was an obnoxious or an immoral trade.

(26) In the Full Bench case in AIR 1951 All 257 (A), an opinion was expressed by a majority of the Judges that the restrictions contemplated by clause (6) of Article 19 of the Constitution could amount to a total annihilation of the right or a complete restriction thereof. It was also pointed out in that case that nationalization of any industry did not appear to be possible without direct legislation and if there was a legislation to that effect then the legislation had "probably" to be justified under Article 19(6) of the Constitution.

The right to use the public highway for purposes of trade or business was also recognized by this Full Bench though it was pointed out that the right was exercisable subject to such reasonable restrictions and regulations, which at times might even amount to prohibition, as might be necessary to be imposed in the public interest. The question which clearly arises for determination is, what is the right which the petitioners possessed and which has, according to them, been destroyed by the impugned legislation? Was it an unqualified right to run motor vehicles on the public highways unregulated and unrestricted or was it a right to run public vehicles on the national highways under a "permit" granted by the State — a permit that contained restrictions under which the vehicles could be run?

To me it appears that the right which has been affected is not any unrestricted right to use the national highways because there was, after the passing of the Motor Vehicles Act, no such right. Indeed, the Motor Vehicles Act of 1939 had placed restrictions on the exercise of the right of every person who wished to run a motor vehicle on the public highway. The restrictions placed on the right of the individual to run motor vehicles on the public highways were not affected by the provisions of Article 19(1)(g) of the Constitution inasmuch as clause (6) of that Article provides that nothing in sub-clause (g) of the said clause shall affect the operation of any 'existing law' in so far as it imposes, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the sub-clause. That the Motor Vehicles Act was an "existing law" within the meaning of this clause is clear from the definition of that phrase in Article 366(10) of the Constitution.

That the restrictions which the Motor Vehicles Act placed on the individual's right to trade or to do business with the aid or with the instrumentality of motor vehicles could not be, in my view, called unreasonable restrictions. The Full Bench decision referred to earlier also took the same view of the restrictions contained in the Motor Vehicles Act. That being so, what we have to see is, what is the right that remained in the petitioners after the restrictions which had been placed on that right under the Motor Vehicles Act? Was it a right which could be called a right to trade or to do business by plying motor vehicles that remained with the petitioners in a restricted form or was it something that was conceded to them under a permit granted under the Motor Vehicles Act. Was it again a right to trade or to do business or was it only a right to use a motor vehicle on the public highways apart from any element of trade or business attaching to it?

"Permit" has been defined by section 2(20) of the Motor Vehicles Act in these words:

> "'permit' means the document issued by a Provincial or Regional Transport Authority authorizing the use of a transport vehicle as a contract carriage or stage carriage, or authorizing the owner as a private carrier or public carrier to use such vehicle."

From the aforesaid definition it will be clear that the permit relates to the 'use' of the vehicle of a particular type and not to the carrying on of a particular trade or business. It may be that by using a particular vehicle in a particular manner a kind of trade or business was furthered or done, but that, to my mind, does not mean that the permit was for carrying on that business or that trade. By section 42 of the Motor Vehicles Act it was made obligatory on all owners of transport vehicles to obtain a permit before they could

use a vehicle on the public highway. The use of the vehicle was to be in accordance with the permit granted.

By section 47 of the Motor Vehicles Act power was conferred on a Regional Transport Authority to decide whether or not to grant a permit for the running of a "state carriage". By section 50 of the Motor Vehicles Act power was conferred on a Regional Transport Authority to grant or refuse to grant a "contract carriage" permit and by section 55 of the Act authority was vested to decide whether or not to grant a permit for a "public carrier."

(27) From what has been stated above, it would appear that what was restricted or controlled was the use of instruments or things which could further be used in connection with a trade or business; no trade or business, as such, was controlled by the Motor Vehicles Act. The question that may arise is whether, when restriction is placed on the use of instruments or things that may be used for purposes of business by certain persons or class of persons, can it be said that the business itself has been controlled?

The answer to this question is not easy, but on a certain view of the matter it may be possible to say that the controlling of instruments or things or implements of trade does not necessarily mean the control of a trade or even of that particular trade in which or to further which such instruments or implements or things are used or may be found necessary for use. Be the position what it may, even if there has been a restriction placed on an individual's right of trade even then if the restriction is a reasonable restriction and in the public interest then the restriction has to be upheld. It has to be borne in mind that in the operational field of a welfare State there are quite a large number of services which the welfare State is expected to render to the citizens of the State. No element of "trading" enters into consideration while the State renders these services. The element of trading comes into the picture only when such services are offered by individuals or a collection of individuals for purposes of their individual or collective gain. The fact that certain services essential to the community may, if left to individual enterprise, yield profits or gains to the enterprising individual, does not necessarily make such services business undertakings in their essence.

It was argued that anything that was likely to yield monetary gain to any person must be considered as potential fields for business: that may be so, but that by itself does not enable the individual to claim the right to do anything that may yield him profits for, if such a general proposition were true, then mankind would be open to the most ingenious and calous exploitation by scheming men. It is on this principle, I think, that it is not open to anyone to carry on obnoxious or immoral trades, though such trades may yield phenomenal profits. It is necessary to realize the true import of the guarantee contained in Article 19 of the Constitution. The guarantee, as I see it, is not that there is an un-restricted right to do the things enumerated in that Article, but the right is to do the things enumerated subject to reasonable restrictions or such restrictions as are permissible. Where restrictions have been put, restrictions which are not beyond the scope of the restrictions mentioned in the Article, then, in my view, the guarantee operates only in regard to the restricted right and not the general right. As I have stated earlier, the right of the individual to utilize motor vehicles for purposes of trade was restricted to such an extent under the Motor Vehicles Act as to be almost non-existent, the right was only available when a permit for the exercise of that right was available to the person from the appropriate authority under the Motor Vehicles Act. The impugned Act when it takes away that right of the individual, if it does so, then, in my view, it is not taking away any right of the individual to carry on any occupation, trade or business.

(28) On behalf of the State it was argued that Article 19(6) of the Constitution indicated, as in its amended state, that the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business or industry or service, whether to the exclusion, complete or partial, of the citizens or otherwise, was a permissible restriction on an individual's right of trading. Clause (6) of Article 19 was amended sometimes in 1951 and it came into force on June 18, 1951, while the impugned Act came into force on February 10, 1951. It was, therefore, argued on behalf of the petitioners that this amendment to Article 19 (6) could not affect the present case.

In order to be able to decide whether or not the amended clause could be made applicable in judging the validity of the impugned Act or not one has to decide first whether or not the references to matters contained in sub-clauses (i) and (ii) of clause (6) are in the nature of illustrations or did the amendment add substantially to the power which was originally contemplated to be conferred on legislatures in regard to placing restrictions on individual liberties enumerated in Article 19. That there was a substantial amendment to clause (6) of Article 19 admits, in my view, of no doubt for originally the words in clause (6) only provided "in particular" for such matters as related to prescribing professional and technical qualifications in respect of persons practising a profession or carrying on any occupation, trade or business, while in the amended form it provides "in particular" for permissible restrictions relating to not only professional or technical qualifications but also in regard to the individual's rights being curtailed so that the carrying on by the State or by a corporation controlled by the State of any trade, business in the State, or service whether to the exclusion, complete or partial, of citizens or otherwise may be possible.

The nature of the amendment is such that it cannot be said that the matter contained in clause (6) (ii) was put in by way of an illustration only which could appropriately have been an illustration to clause (6) in its unamended form. In this view of the matter, it appears to me that it was not possible for the State to rely on the power conferred on it by clause (6) of Article 19 in its amended form for saying that the impugned legislation was beyond challenge because of what was contained in clause (6) (ii) of Article 19, since this amendment came after the impugned Act had been placed on the statute book.

(29) It is necessary, therefore, to see whether the impugned Act can be justified on the ground that if it affects the right of the individual to carry on an occupation, trade or busi-

ness then it affects those rights only in so far as it places "reasonable restrictions" on the exercise of those rights.

It was contended for the petitioners that the creation of a monopoly in favour of the State could never be called a reasonable restriction on the individual's right of trade. On behalf of the State it was contended, however, that reasonable restrictions may amount to total stoppage of the trade or the business. Reliance was placed on the observations of the learned Chief Justice in — 'Moti Lal v. Govt. of the State of Uttar Pradesh (A)'. The learned Chief Justice said as follows in that case:

"The first is the argument that 'reasonable restriction' cannot mean a total stoppage. I do not think this argument is sound. The words in Article 19 are not 'regulation' but are 'reasonable restriction' and I do not see why, if by reason of the nature of the trade carried on, which might be against public morality or if, for any other reason, it is deemed necessary in the general interest, to stop totally any trade or business, it cannot be included in the word 'restriction' ".

(30) The learned Chief Justice relied on the decision of the Judicial Committee in the case of the — 'Commonwealth of Australia v. Bank of New South Wales', 1949-2 All ER 755, at p. 772 (C). Mootham and Wanchoo JJ. in the same case observed as follows:

"We are not prepared to assent to the proposition that the expression 'reasonable restrictions' can never in any circumstances exclude complete prohibition."

(31) Their Lordships of the Judicial Committee pointed out at page 772 in the case of the — 'Commonwealth of Australia v. Bank of New South Wales (C)', as follows:

".....their Lordships do not intend to lay down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency, or in some other body, be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State 'trade, commerce and intercourse' thus prohibited and thus monopolized remained absolutely free. Nor can one further aspect of prohibition be ignored. It was urged by the appellants that prohibitory measures must be permissible, for otherwise lunatics, infants and bankrupts could without restraint embark on inter-State trade and deceased cattle, or noxious drugs could freely be taken across State frontiers. Their Lordships must, therefore, and what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Here, again a question of fact and degree is involved....."

(32) On behalf of the petitioners, it was contended that the view expressed in the Full Bench case in regard to the ambit of the restrictions that could be placed, was no longer good law in view of the decision of the Supreme Court in the case of — 'Rashid Ahmad v. Municipal Board, Kairana', reported in AIR 1950 SC 163 (D). Reliance was placed on the following passage appearing at page 165 of the decision:

"The nett result is that the prohibition of this bye-law, in the absence of any provision for issuing license, becomes absolute. Further, bye-law 4 contemplate the grant of a monopoly to a contractor to deal in wholesale transactions at the place fixed as a market. Acting upon that provision, the respondent Board has granted monopoly to Habib Ahmad and has put it out of its power to grant a license to the petitioner to carry on wholesale business in vegetables either at the fixed market place or at any other place within the municipal limits of Kairana. This certainly is much more than reasonable restrictions on the petitioner as are contemplated by clause (6) of Article 19."

(33) It was argued that since in the opinion of their Lordships of the Supreme Court creation of a monopoly, which was really restricting a right to negation, was more than reasonable restriction, therefore, reasonable restriction could never, in the view expressed by their Lordships of the Supreme Court, amount to total deprivation of the right.

As I read the decision of their Lordships of the Supreme Court, I do not think that their Lordships laid down as a rule of law or even intended to lay it down as a rule of law, that reasonable restrictions could never amount to total prohibition. Their Lordships were dealing with a particular case and under the circumstances of that particular case they were of the opinion that a total prohibition which created a monopoly in favour of an individual could not be called a reasonable restriction. As was pointed out by their Lordships of the Judicial Committee of the Privy Council in the case of the — 'Commonwealth of Australia v. Bank of New South Wales (C)', each case has to be judged on its own facts and what may be reasonable restrictions in one case may not be so under the circumstances of another case.

Whether a restriction is reasonable or not, has to be judged in the setting of time and circumstances. It has also to be viewed in the light of the economic and social needs of the community obtaining at any particular time. It may further have to be judged in certain cases having regard to geographical conditions. According to the statement of objects of the impugned Act suitable and efficient transport services had to be organized for 'subserving the common good of the people of the State' and that common good could only be achieved, in the view of the legislature, by taking resort to the methods adumbrated in the impugned Act. The legislature must be deemed to be a good judge of the things that can subserve the common good of the people and the view of the legislature should, therefore, be entitled to great weight by courts when they have to determine whether or not certain restrictions which have been placed on the rights of the individuals are in the interests of the general public.

There is no gainsaying the fact that transport services are essential to the life of a community and that it is conducive to the interests of the general public to have an efficient

system of transport services. It was argued on behalf of the petitioners that the State was in no better position to man and maintain these services than were the petitioners inasmuch as the petitioners had been doing this work for some time. A good deal of criticism was offered by learned counsel appearing for the petitioners against the transport services which were being run by the State for some time, but most of these criticisms, in my view, were more imaginary than real. It may further be stated here that there was no sufficient material before the Court in these petitions, for it to be able to say that the monopoly which was contemplated in favour of the State in regard to motor transport services under the impugned Act was not conducive to the common good. The running of motor transport services requires a good deal of capital and technical knowledge. The resources of a State are always greater than the resources of individual operators and if for nothing else, on this alone it is 'prima facie' more desirable that a service vital to the needs of the community should be operated by the State rather than by individuals. The question of co-ordination and other similar questions also play a vital role in making such services efficient and for these purposes again, if for nothing else, the State stands in a better position than does an individual.

I may here quote the following passage from the decision of the Supreme Court in — 'State of Madras v. V. G. Row', A. I. R. 1952 SC 196 at page 200 (E):

"The nature of the right alleged to have been impugned, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances, of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable."

Consequently, a monopoly in favour of the State in respect of such services cannot be said to be an unreasonable restriction on the rights of the individuals if the legislature has thought it fit to create one.

(34) I would, in view of what I have said above, hold that the impugned Act could not be challenged on the ground that it infringed Article 19 (g) of the Constitution.

(35) It was next contended on behalf of the petitioners that the impugned legislation was discriminatory and it infringed the provisions of Article 14 of the Constitution.

Article 14 of the Constitution is in these words:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

(36) It was argued that there was under the impugned Act no equality before the law or the equal protection of the laws to people who wished to carry on the business of transporting passengers by motor vehicles. It was stated that a monopoly was created in favour of the State in respect of motor transport services. It was further contended that under section 3 the State Government was armed with the power to discriminate between one service and another and between one group of persons and another because it was left to the State Government to say whether or not it was going to take over the transport services in general or to take over any particular class of such service or to take over any route or a portion thereof. It was further pointed out that no principle has been enunciated in the impugned Act on which the State Government was to act while choosing between one set of persons and another.

(37) Article 14 of the Constitution is in two parts. The first part reiterates, as has been said, the "basic principles of republicanism" while the second part guarantees "equal protection" to all citizens in the enjoyment of their rights and liberties without favouritism or discrimination.

There have been a good many decisions of the Supreme Court as to the scope of Article 14 of the Constitution. Reliance was placed by the petitioners in particular, on the case of — 'Charanjit Lal Chowdhuri v. The Union of India', A. I. R. 1951 S C 41 (F). In that case Fazl Ali, J. at page 44 quoted the following words of Professor Willis with approval:

"The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate." It merely requires "that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privilleges conferred and in the liabilities imposed" ..... 'The inhibition of the amendment ..... was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation'. It does not take from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permit to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis".

Mukherjea, J. said this at page 58:

"The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be arbitrary. It must always rest upon

some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid".

It may further be pointed out what else Fazl Ali, J. observed:

"Article 14 of the Constitution lays down as important fundamental right, which should be closely and vigilantly guarded but, in construing it, we should not adopt a doctrinaire approach which might choke all beneficial legislation".

(38) Fazl Ali, J. also approved the following passage from Professor Willis' book on Constitional Law:

"There is no rule for determining when classification for the police power is reasonable. It is a matter for judicial determination, but in determining the question of reasonableness the Courts must find some economic, political or other social interest to be secured, and some relation of the classification to the objects sought to be accomplished. In doing this the Courts may consider matters of common knowledge, matters of common report, the history of the times, and to sustain it they will assume every state of facts which can be conceived of as existing at the time of legislation. The fact that only one person or one object or one business or one locality is affected is not proof of denial of the equal protection of the laws. For such proof it must be shown that there is no reasonable basis for the classification" (Willis Constitutional Law, 1st Edition page 580).

In the same case Mukherjea, J. pointed out as follows:

It must be conceded that the Legislature has a wide discretion in determining the subject matter of its laws. It is an accepted doctrine of the American Courts and which seems to me to be well founded on principle, that the presumption is in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a transgression of constitutional principles."

(39) He then relied on the following passage from the decision of the Supreme Court of America in — Middleton v. Texas Power and Light Co.', (1919) 249 US 152 at page 157 (G):

"It must be presumed that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds."

(40) I consider it appropriate at this stage to draw attention to another passage in the decision of Fazl Ali J. in the case of — 'State of West Bengal v. Anwar Ali Sarkar', AIR 1952 SC 75 (H), at page 84, where his Lordship said as follows:

"The first criticism which is by no means an unsubstantial one, may possibly be met by relying on the decision of this Court in — 'In re Delhi Laws Act, 1912, etc', AIR 1951 SC 332 (I), but the second criticism cannot be so easily met, since an Act which gives uncontrolled authority to discriminate cannot but be hit by Article 14 and it will be no answer simply to say that the legislature having more or less the unlimited power to delegate has merely exercised that power. Curiously enough, what I regard as the weakest point of the Act (viz., its being drafted in such general terms) is said to be its main strength and merit, but I really cannot see how the generality of language which gives unlimited authority to discriminate can save the Act."

Fazl Ali J. further pointed out as follows:

"It should be noted that there is no reference to intention in Article 14 and the gravemen of that Article is equality of treatment. In my opinion, it will be dangerous to introduce a subjective test when the Article itself lays down a clear and objective test."

In the same case Mahajan J. observed as follows:

"By the process of classification the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons."

Mahajan J. further observed:

"Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily."

(41) It was further pointed out by that learned Judge as follows:

"The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of Article 14. To get out of its reach it must appear that not only a classification has been made but also that it is one based upon a reasonable ground on some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

(42) In the case of — 'Kathi Raning Rawat v. The State of Saurashtra', AIR 1952 SC 123 (J), Chief Justice Patanjali Sastri pointed out that:

"All legislative differentiation is not necessarily discriminatory. Discrimination involves an element of unfavourable bias, and it is in that sense that the expression has to be understood in the context. Equal protection claims under Article 14 are examined with the presumption that the State action is reasonable and justified. Though differing procedures might involve disparity in treatment of persons tried under them, such disparity is not in itself sufficient to outweigh this presumption and establish discrimination unless the degree of disparity goes beyond what the reason for its existence demands, e.g., when it amounts to a denial of a fair and impartial trial."

In that case Fazl Ali J. made the following observation:

"..... a distinction should be drawn between 'discrimination without reason' and 'discrimination with reason'. The whole doctrine of classification is based on this distinction and on the well-known fact that the circum-

stances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really arise as between persons governed by different conditions and different sets of circumstances."

(43) The learned Judge further pointed out that

"the clear recital of a definite objective in the earlier Ordinance and in the impugned Ordinance as amended furnishes a tangible and rational basis of classification and the Ordinance and the notification did not, therefore, violate Article 14."

(44) Mukherjea J. pointed out in that case that where

"the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups, of persons, the statute itself cannot be condemned as a piece of discriminatory legislation."

(45) I wish now to refer to the latest case of the Supreme Court of — 'Kedar Nath v. State of West Bengal', reported in AIR 1953 SC 404 (K). In this case it was pointed out that:

"Equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation."

It was also pointed out in this case that it was for a court to find out whether, having regard to the underlying purposes of the Act, as disclosed by its title, preamble and provisions, the classification resorted to was or was not unreasonable.

(46) I have quoted extensively from the decisions of the Supreme Court in order to glean out the important principles which have to be borne in mind in applying the provisions of Article 14 of the Constitution to the facts and circumstances of any particular case. It will be clear from the observations quoted earlier by me that wherever there is a proper classification, viz., a classification which bears a reasonable and just resemblance to the subject-matter of the legislation then it cannot be contended that the legislation was in the teeth of the guarantee contained in Article 14. In determining whether the classification bears a proper resemblance to the subject-matter of the legislation, courts have got to look to the objects which were sought to be achieved by the legislation. It is permissible for a court to take into account the title, the preamble, as also the framework of the legislation to determine the true scope and nature of it. In determining the purpose of the legislation and further in determining whether the provisions contained in the legislation are likely to achieve the objects with which the legislation was forged courts must lean in favour of the view that the objects are likely to be achieved since the legislature was of that view as was pointed out by the Supreme Court of America in — 'Middleton v. Texas Power and Light Co. (G)':

"It must be presumed that the legislature understands and correctly appreciates the needs of its own people and its laws are directed to problems made manifest by experience and that its discrimination are based upon adequate grounds."

The above opinion of the Supreme Court of America was, as I have already pointed out, approved by Mukherjea J. in the case of — 'Charanjit Lal Chowdhuri (F)'. To me, therefore, it appears that we must accept that the impugned legislation was for the good of the people of the State. Indeed, the preamble of the impugned Act is in these words :

"Whereas it is expedient in the interests of the general public and for the promotion of suitable and efficient road transport to provide for State road transport services in Uttar Pradesh."

Transport services have always been recognized as public utility services and it cannot be contended, in my view, that any effort to better such services or to make such services more efficient would not be in interests of the general public or would not be conducive to public good. I may here point out that even the Parliament of India was of the opinion that control of road transport was necessary for the common good. When I say this I have in mind the Road Transport Corporation Act (Act LXIV of 1950). By this Act the Union Legislature gave power to monopolize motor road transport by constituting a Road Transport Corporation. The Union Legislature has recently also nationalized "air" transport services of the country. The railway transport system of the country had for some time been operated largely by the State on a basis which was certainly in the nature of a monopoly. From all this it appears to me that the creation of monopolies in respect of those matters which appropriately fall under the head of "public utility services" cannot be assailed on the ground of either placing unreasonable restrictions on the individual's right of trade or on the ground that such legislation is discriminatory legislation. The amendment that has been made in clause (6) of Article 19 also is indicative of the view which our Constitution took of such monopolies.

(47) It was strenuously contended by Sri Pathak that there would be an apparent conflict between the principle underlying clause (6) (ii) of Article 19 and the principle enunciated in Article 14 of the Constitution if we were to give clause (6) (ii) the meaning which the words of that sub-clause bear on their face. I have not been able to see any force in this contention of Sri Pathak. I believe I would be right when I say that no court can presume or lightly accept the contention that there are apparent or any real conflicts and inconsistencies between different parts of the same Constitution. Courts have always leaned against seeing contradictions or inconsistencies even in respect of legislative measures of much lesser sanctity than the Constitution of a country. I have myself tried hard to see any inconsistency where inconsistency was visible to Sri Pathak, but I must confess that I have been unable to see any such inconsistency.

Sri Pathak, at one stage of his arguments, however, conceded that there may be certain special trades or businesses in respect of which if the principle underlying clause (6) (ii) of

Article 19 was applied there may be no violation of the principle enunciated in Article 14 of the Constitution; to my mind once this concession was made by Sri Pathak then the whole basis of his argument in regard to there being an inconsistency between those two provisions was gone.

(48) All reasonable classifications which have a proper and just resemblance to the subject-matter of the legislation cannot be hit by the guarantee contained in Article 14 has to be conceded on the statement of the law already indicated by me earlier. Therefore, the only question that arises for determination in this connection is whether the classification visualised or indicated in clause (6) (ii) of Article 19 is a reasonable classification. Having in mind the scope of the legislation which necessarily would fall within the scope of sub-clause (ii) of clause (6) it appears to me that the classification indicated must be held, at least after the amendment became effective, to be a reasonable classification in relation to the field of legislation which is indicated in that sub-clause. The idea of the State coming into the field of trade and commerce was not for the first time visualised by the Constitution makers when they put in clause (6) (ii) in Article 19 of the Constitution but it was visualised by them when the Constitution was for the first time framed: we find this to be so because of the provisions contained in Article 289(2) of the Constitution which says this:

> "(2). Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such an extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith."

Clause (3) of Article 289 also enacts that certain trades or businesses may lawfully be found to be incidental to the ordinary functions of Government.

(49) We must now see whether in the impugned Act there is or is not a reasonable classification having a proper relation to the subject-matter of the legislation. Classification to my mind is almost inherent in the concept of a monopoly. Therefore, the only question that arises for determination is whether this classification is reasonable or not. That the classification in the impugned Act bears a reasonable resemblance to the subject-matter of the legislation can, in my view, not be seriously disputed for the whole object with which the impugned legislation had been passed is to provide a State road transport service which would be a suitable and an efficient road transport service and which would subserve the common good of the people of the State. Under the provisions of section 3 of the impugned Act three possible classifications have been indicated:

(i) The State:

(ii) The State in conjunction with the railway:

(iii) The State in conjunction with others: It cannot be said that these are not classes into which the subject-matter of the legislation, viz., legislation for organising road transport services could appropriately fall.

Transport services, as I have already pointed out, are public utility services and the considerations which can and would normally guide the State in running these services cannot be expected normally to guide private operators or a combination of them, for in their case the "profit motive" must always be the overriding consideration, while in the case of a State operating these services the "profit motive" can seldom be the primary objective. Therefore, by classifying the State in a separate class from the others it cannot be said that there has been an unreasonable classification. In order to determine whether a particular classification is proper or improper one has also to bear in mind the prevailing national sentiments and the prevailing economic theories so that a classification which may not have been judged proper in the 18th century may be judged as eminently just, proper and reasonable in the 20th century. I believe that the question whether a classification is reasonable and proper or not must be judged more on common sense than on legal subtleties. In my opinion, therefore, there was a reasonable classification bearing a proper and just resemblance to the subject-matter of the legislation under the impugned Act.

(50) It was further contended on behalf of the petitioners that under section 3 of the impugned Act unrestricted power was conferred on the State Government to discriminate between one set of operators and another. It was said that it was left to the objective discretion of the State Government to determine which operators were to be joined with the State and which were to be left out; it was also said that it was left to the objective determination of the State Government to take over or not to take over any particular route or class of service.

Mahajan J. as I have already pointed out earlier, had observed in the case of the — 'State of West Bengal v. Anwar Ali Sarkar (H)', that by the process of classification the State has the power of determining who should be regarded as a class in relation to a law enacted on a particular subject. That learned Judge further pointed out that this power in some degree was likely to produce some inequality but if the law dealt with the liberties of a number of well defined classes then the law was not open to the charge of denial of equal protection on the ground that it had no application to other persons.

"Equal protection claims under Article 14 always are examined with the presumption that the State action is reasonable and just" this was so stated by Chief Justice Patanjali Sastri in the case of Kathi Raning Ravat (J), a case to which I have already made reference. Unless it can be shown that the discrimination that has been resorted to or the power to discriminate has been given without reason it cannot be said that there is unequal treatment. As was pointed out by Fazl Ali J. in the aforementioned case:

> "The whole doctrine of classification is based on this distinction and on the well known fact that the circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really

arise as between persons governed by different conditions and different sets of circumstances."

(51) It cannot be contended reasonably that the State Government would "without reason" discriminate or that there is in section 3 of the impugned Act a power to discriminate 'without reason' given to the State Government. The State Government cannot arbitrarily associate individuals with itself in running the transport services or arbitrarily exclude individuals from association with itself; it can only associate or leave out persons in the interests of the general public or for subserving the common good. The legislative policy in regard to the matter is clear and definite and in the words of Mukherjea J. it is only "the effective method of carrying out that policy that a discretion has been vested by the statute on the State Government to make selective application of the law to certain classes or groups of persons." I do not, therefore, consider that section 3 of the impugned Act confers on the State Government a power which could be utilized by them arbitrarily for making discrimination. I, therefore, hold that section 3 of the impugned Act is not ultra vires.

(52) I may here point out that reliance was placed by the petitioners on the Full Bench decision of — 'Moti Lal v. Uttar Pradesh Govt. (A)' to contend that where an Act conferred power on the State whereby it could discriminate against persons in its own favour then such a power was hit by the guarantee contained in Article 14. The argument before the Full Bench was that section 42(3)(a) of the Motor Vehicles Act was 'ultra vires' inasmuch as it conferred power on the State to discriminate between individuals and itself. The provisions of section 42(3)(a) are in these words :

"Sub-section (1) shall not apply (a) to any transport vehicle owned by or on behalf of the Central Government or a Provincial Government other than a vehicle used in connection with the business of an Indian State Railway."

The learned Chief Justice refrained from expressing any opinion whether or not section 42(3)(a) was void by reason of the provisions of Article 14 of the Constitution. Mootham and Wanchoo JJ. held that this provision, so far as it purported to exempt from the application of sub-section (1) of that section transport vehicles owned by or on behalf of the State Government was in conflict with Article 14 of the Constitution. They went further to say that it appeared to them that when the State engaged in business or commerce such as was carried on by private individuals or corporations then the State must subject itself to the same obligations as are imposed on others and must place itself in the same position as private individuals or corporations except in the matter of taxation. They expressed the view that the State could not engage in business or commerce denying equality before the law or equal protection of the laws to other persons as against itself.

The reason behind this view appears to me to have been that under section 42(3)(a) there was a clear discrimination between the State and the individuals in the same field of activity and there was no classification of the State in one group and the individuals in the other group. The differentiation was made between persons falling in the same group, between persons who equally constituted a group qua that trade. The position under the impugned Act is different. The State and the individuals have not been discriminated upon while being in the same group nor any power for discrimination has been given while the State and the individuals remain and act under one group or in the same group. Sapru J. also took a similar view of section 42(3)(a) and so did Agarwala J.

But, as I have pointed out above, there was a clear distinction between the power conferred on the State under section 42(3)(a) of the Motor Vehicles Act and the power conferred by section 3 of the impugned Act. I may here point out what was stated by Agarwala J. in paragraph 96 of the Full Bench decision in order to show the real import of the decision in regard to section 42(3)(a). Agarwala J. said this :

"It is true that the vehicles of the State used for a purpose other than that of carrying passengers or goods on hire fell under a distinct category and can by law be treated separately and if section 42(3)(a) had been confined to such vehicles of the State, there could have been no objection to its validity. But since the impugned clause is not restricted in its operation to such vehicles of the State and is applicable to vehicles which are used by the State for the purposes of carrying on motor transport business for profit in competition with private individuals, the clause must be held to be bad."

If I may say with respect, Agarwala J. has clearly brought out the distinction that obtains when there is a classification and differentiation between different classes and when there is no classification but there is differentiation without classification. The argument which was available to the petitioners against the validity of section 42(3)(a) of the Motor Vehicles Act is not, to my mind, available to them in respect of section 3 of the impugned Act.

(53) From what I have stated above, I am of the opinion that the impugned legislation is not hit by the provisions of Article 14 of the Constitution.

(54) Before I take up the other major points argued on behalf of the petitioners I should like to dispose of another argument which was raised on behalf of the petitioners and which related to the validity or otherwise of section 11(2) of the impugned Act. That provision is in the following words:

"(2). Any order made or deemed to be made under this Act shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or any instrument having effect by virtue of such enactment."

It was contended that this provision was 'ultra vires' in view of the Full Bench decision in AIR 1952 All 866 (B), where it was held that section 6 of the Essential Supplies (Temporary Powers) Act, XXIV of 1946 was 'ultra vires' the Indian Legislature.

Section 6 of the aforementioned Act was in these words :

"Any order made under section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having

effect by virtue of any enactment other than this Act."

It will, therefore, be observed that the wordings of section 6 of the Essential Supplies (Temporary Powers) Act and the words of section 11(2) of the impugned Act are practically the same, at any rate the effect of those words is exactly the same. The Full Bench held that section 6 must be held to be invalid in view of the majority decision of the Supreme Court in the Delhi Laws Act case (I). This is what the Full Bench said in respect of this matter :

"The Advocate General contended that the terms of the proviso to section 2 of Part C States (Laws) Act, 1950 are distinguishable from the provisions of Section 6. We do not think that there is any essential difference between the two. Whereas the proviso to Section 2, Part C States (Laws) Act, 1950 authorised the Central Government to make express provision for the repeal of an existing law, Section 6 of the Essential Supplies Act authorises the Central Government to achieve the same object impliedly by passing an order or making a rule or regulation in conflict with an existing law. There is no difference in principle between an "express repeal" and an "implied repeal"."

I must, therefore, hold that the provisions of section 11(2) of the impugned Act are "ultra vires" the State Legislature on the same reasons which impelled the Full Bench in — 'Bhushan Lal's case (B), to come to the conclusion that section 6 of the Essential Supplies (Temporary Powers) Act was 'ultra vires' the Indian Legislature.

(55-56) The next contention raised on behalf of the petitioners was that by the impugned Act the petitioners had not only been deprived of their property, but further that property in the shape of an interest in a 'commercial undertaking' had been taken possession of or acquired, ostensibly, for public purposes by the State without making any provision for compensation for the property taken possession of or acquired and, therefore, such a legislation was bad in view of the provisions of Article 31(2) of the Constitution.

(57) I must at the outset state that the decision of this question has caused us considerable anxiety. The entire field of the controversy in respect of this matter was covered by counsel on both sides with great ability and thoroughness.

(58) The first question that one has to determine in this connection is whether the right which the petitioners claimed was property or "interest in a commercial undertaking" within the meaning of Article 31(2) of the Constitution. The other question that arises is whether there was any acquisition of such an interest by the State under the impugned Act.

(59) It was contended by Sri Pathak that the right to ply motor vehicles for gain was in any effect an interest in a commercial undertaking — Sri Pathak's contention also was that it was "property" within the meaning of Article 31(1) and (2) of the Constitution as well. If it was property then there is no doubt that under the impugned Act the petitioners have been deprived of that property although such deprivation has been by the authority of the law. The right to compensation under our Constitution does not arise on mere deprivation. The right to compensation arises only when after deprivation there has been a vesting in the State of that property or there has been deprivation by acquisition. The argument on behalf of the State made by the learned Advocate General was that the right, which has been affected, of the petitioners under the impugned Act, was not strictly speaking either "property" or an interest in a business undertaking. He further contended that even if it was so then there had been no 'acquisition' by the State of such a right of the petitioners under the impugned Act.

(60) I shall first concern myself with finding the real nature of the right which the impugned legislation affects or, according to the submissions of the learned counsel for the petitioners, "takes away."

In the case of 'G. Veerappa Pillai v. Raman and Raman Ltd.', AIR 1952 SC 192 (L) their Lordships of the Supreme Court held that under the Motor Vehicles Act new rights and liabilities were created and an elaborate procedure was prescribed for their regulation. It was pointed out that no one was entitled to a permit as of right even if he satisfied all the prescribed conditions. The grant of a permit was entirely within the discretion of the transport authorities which were administrative bodies exercising quasi-judicial functions in the matter of the grant of permits. The contention on behalf of the petitioners was that the permits which the petitioners had were "properties", for the petitioners were able to earn money as a consequence of having those permits. It was alternatively contended that even if the possession of the permits was not property even then it was certainly an interest in an undertaking.

Reliance was placed on certain decisions, namely, on the decisions in — 'Tan Bug Taim v. Collector of Bombay', AIR 1946 Bom 216 (M), and — 'H. C. Gupta v. Mackertich John', AIR 1946 Cal 140 (N), but in my view, none of these two decisions was of assistance to the petitioners in supporting their contention. Reliance was placed on the well known case of the — 'Minister of State for the Army v. Dalziel', 68 Comm-W LR 261 (O), particularly, on the following observation of Rich J. at page 286 :

"In such circumstances, he may well say: 'You take my house, when you do take the prop that doth sustain my house; you take my life, When you do take the means whereby I live' ".

It was contended on the above quoted observation of Rich J. that the permit which enabled the petitioners to earn their livelihood must be deemed to be their property and that when that permit was taken away from them their property was taken away. I do not think that there is any substance in this contention. Reliance was next placed on the following passage from Willis' Constitutional Law at page 821 :

"Ownership relates to rights, powers, privileges, and immunities concerning either land or chattels. Property is not the thing, but it is these rights, powers, privileges and immunities which a person has as against all others with reference to these objects of ownership."

(61) It must be noticed that a privilege or an immunity or a right in order to be property

must be available against all others. The right under the permit which the petitioners had was not a right available against all others.

(62) On behalf of the State a passage from Nicol's Eminent Domain, Volume II, page 109, was quoted to support the contention that even an established business or a goodwill had never been held, by itself, to be property in the constitutional sense. It was also pointed out that a mere loss of prospective profits by itself never gave a right to compensation. In my view this must be so, for a right to compensation in respect of a business could only arise when the business was directly taken over, i.e. when its plants etc. were taken over.

The learned Advocate-General contended that the business of running buses for carrying goods or passengers may be an interest in an undertaking, but it was pointed out by the learned Advocate-General that interest had not been acquired by the State, that interest had only been restricted by the impugned Act. It was pointed out that the common law right of the individual to use the public highway had already been restricted under the Motor Vehicles Act when such highway was to be used by plying motor vehicles. Therefore the impugned Act only further restricted that right—may be to the extent of making it nugatory. There may have been under the impugned Act a deprivation but there has been, as has been pointed out, no acquisition by the State. It would be instructive to notice the meaning of the word "acquire" — "acquire" means to gain a thing: a person is said to acquire a thing when that thing gets vested in the acquirer. In the case before us there is nothing which gets vested in the alleged acquirer although there is restriction of a similar thing in another.

(62a) It is necessary at this stage to refer to Article 31 of the Constitution which guarantees certain rights in respect of property. The material part of Article 31 is in these words :

"31(1). No person shall be deprived of his property save by authority of law.

(2). No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixed the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

It is not material for our purposes to quote the other provisions of this Article. From the above it will be clear that mere "deprivation" does not confer any right to compensation on the person so deprived. The right to compensation only arises when there is an acquisition by the State of the thing of which an individual is deprived. In order to judge whether there is a right to compensation or not the property acquired must be traceable to the earlier owner who has been deprived of it before any question of compensation can, under our Constitution, arise. The right to get compensation under American Constitution is on a slightly different footing, for the words in the American Constitution are these:

"Nor shall any person be deprived of ..... property, without due process of law".

In America there is no separate provision for acquisition after deprivation as there is in our Constitution. Consequently when American courts went on to hold that deprivation was acquisition or some such thing, the principle of those cases, to my mind, could not be available for application to the constitutional position arising in India under our Constitution.

(63) The petitioners were running buses on certain routes under a permit granted to them by an appropriate authority: the running of these buses has now been stopped by the State under the powers conferred by the impugned Act. The State has itself started running services on those routes. It is on this state of facts that it was contended on behalf of the petitioners that the State has first deprived the petitioners of their property and has thereafter acquired that property itself. It must be borne in mind in this connection that under the Motor Vehicles Act everyone who could obtain the necessary permit was entitled to run buses or motor vehicles on such routes as were permitted. The State could, and as a matter of fact did, run motor bus services on many of the routes on which private operators operated their services.

The question is whether by depriving the private operators of their right to run buses on certain routes and by deciding to run those routes itself the State acquired the right which was of the petitioners. To me it appears that it could not be said that there was by the State any acquisition of the right which was formerly of the petitioners, whether such right was "property" or an interest in a commercial or industrial undertaking. The vehicles which were being operated by the private operators have not been acquired by the State, nor has any other tangible property which was used by the petitioners for their business been acquired. What has been done is that the petitioners have been prohibited from operating their buses on certain routes. This right of the petitioners has in no way been vested in the State inasmuch as, the State always had an equal right with the petitioners to run their buses on those routes. It was argued that the moment a monopoly in this matter was created in favour of the State the same moment, notionally at any rate, certain rights of the individual operators vested in, or was acquired by the State. I do not consider this to be so, for if this were so, then every individual who had a potential right to apply for a permit and get it, could say that his right also has been acquired by the State and as such he was entitled to compensation. The right to claim compensation is not founded on any such notional or far-fetched conceptions. The right to compensation is available when there has been in substance and in reality an acquisition.

(64) Reliance was placed on a passage in Cooley's Constitutional Limitations, 8th Edition, Volume II, page 1158, for contending that "any injury" to the property of an individual which deprives the owner of the ordinary use of it is equivalent to taking and entitled him to compensation. As I have already stated the principle on which compensation was adjudged or awardable under the American law would

not be the principle on which compensation was awardable in India, because of the fundamental difference that obtained between the guarantee conferred on the American citizen and the guarantee conferred on the Indian citizen. Many other cases and authorities were cited to us to the same effect and I do not consider it necessary either to refer to those decisions or to discuss them for the principle of those decisions has no application in India.

(65) In order to see the substance of the matter, a few illustrations may be instructive. Under the Motor Vehicles Act, it was open to the appropriate authority to grant as many permits as the issuing authority considered proper in respect of any particular route so that when more people were put as competitors on a route then there was in a sense a "taking" of some of that man's right who was earlier on that route. But then such "taking" could never give rise to any claim for compensation. If that was so, then I do not see how there could be a right to compensation when the same right to earn profits has been affected in a larger measure.

(66) Destructions of businesses often entail greater hardships than the taking of tangible property, but for such destruction the Constitution makes no provision for any compensation. The petitioners' right was the common law right to use the 'public highways' in a particular manner under a permit — that right could not be any right in property or an interest in an undertaking within the meaning of Article 31 of the Constitution. I have already pointed out that mere 'deprivation' is not enough justification for claiming compensation under our Constitution and in these cases there was no 'acquisition' of that of which the petitioners were deprived, by the State.

(67) I would further like to point out that I have already held that what was done by the impugned Act was to place reasonable restriction on the rights of the petitioners and there was no "taking" of any property of the petitioners. When once it is found that the restriction imposed is reasonable and there is no actual "taking" then no question of compensation can arise.

(68) I must, therefore, hold that the impugned Act is not 'ultra vires' inasmuch as it makes no provision for compensation, for, in my view, there was no occasion to make any provision for any compensation payable to the petitioners.

(69) Learned counsel for the petitioners next raised another argument based on what may be called the guarantee contained in Article 301 of the Constitution. It was contended that by the impugned legislation the State Government has placed restrictions on the freedom of inter-State and intra-State trade, commerce and intercourse. The argument was that by prohibiting the petitioners from plying their trade, which consisted in carrying passengers from one part of the State to another as also carrying passengers from one State to the other, the freedom of trade guaranteed by Article 301 had been vitally affected.

(70) Article 301 of the Constitution is in these words :

> "Subject to other provisions of this Part trade, commerce and intercourse throughout the territory of India shall be free."

(71) It is appropriate to point out that by Article 304 it is competent for the Legislature of a State to impose such reasonable restrictions on the freedom of trade, commerce or intercourse as may be required in the public interest. There, however, is a proviso which has to be borne in mind in connection with the exercise of the power conferred on the State Legislature to which reference is just being made. The proviso says that no Bill or amendment for the purposes mentioned above shall be introduced or moved in the Legislature of a State without the previous sanction of the President. The guarantee contained in Article 301, therefore, is not an unqualified guarantee.

Article 19 (1) (g) of the Constitution gives protection to an individual to the extent that he can practice any profession, or carry on any occupation, trade or business. Article 301 more or less is complementary to this general provision contained in Article 19 (1) (g) inasmuch as Article 301 gives a kind of territorial protection to trade, commerce and intercourse, a protection which incidentally enures to the benefit of those who engage in trade, business and commerce or carry on intercourse of the type visualised under this Article. The protection which Article 301 contemplates is what may be termed, in the words of Agarwala J. in the Full Bench case of Moti Lal (A), "trade in motion" so that the restriction has to be, when it is being judged, restriction on the flow of goods as such, and not in the flow of goods through the agency or medium of any particular individual or group of individuals. I should like to quote here the following observations of the learned Chief Justice in Moti Lal's case (A) :

> "The correct interpretation seems to be that Article 19 lays down the rights of the citizen, while Article 301 deals with how the trade, commerce and intercourse is to be carried on between one place and another, whether the two places are situated in two States or are inside the same State."

(72) Considerable reliance was placed by Sri Pathak on the decision in 1949-2 All ER 755 (C). On the strength of this decision of the Privy Council it was contended by Sri Pathak that if their Lordships were of the opinion that the business of banking, which consisted of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred transactions, could be included in the activities described as trade, commerce and intercourse and if by monopolizing such trade, commerce and intercourse Article 92 of the Australian Constitution was violated then obviously Article 301 of our Constitution had been violated by the impugned legislation.

The argument looks attractive on the face of it, but, in my judgment, it is not sound. Arguments based on analogy have always an element of deception present in them and it is necessary, therefore, to pierce the veneer of such an argument and test it in the light of the facts and circumstances of the two allegedly analogous matters. The Privy Council itself pointed out that "Every case must be judged on its own facts and in its own setting of time and circumstance ....." The conception of freedom of trade, commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual, and

their Lordships observed that two general propositions arose out of this conception :

"(1) that regulation of trade, commerce and intercourse among the States was compatible with its absolute freedom, and (2) that S. 92 of the Constitution (the Australian Constitution which was more or less similar to Article 301 of our Constitution) was violated only when a legislative or executive act operated to restrict such trade, commerce or intercourse directly and immediately as distinct from creating some indirect or consequential impediment which might fairly be regarded as remote."

Their Lordships further pointed out that whether the impugned legislation directly and immediately affected trade, commerce and intercourse or it affected these matters in some indirect or consequential way remotely, could only be decided by the Court. In the words of their Lordships of the Privy Council

"the test is clear; does the Act, not remotely or incidentally but directly, restrict the inter-State business of banking?"

Their Lordships further pointed out that some difficulty may arise in applying the test of whether a restriction is direct or one that is too remote, yet it was stated by their Lordships that the distinction was a real one.

From the observations of their Lordships of the Privy Council it is clear to me that in order to determine whether there has been an infringement of Article 301 of the Constitution or not, the "pith and substance" of the enactment must be seen. As was pointed out by their Lordships, these words raise in convenient form an appropriate question in cases where the real issue is whether an enactment works some interference on the trade, commerce and intercourse directly or indirectly. Attempt was made in this case to advance the argument on behalf of the petitioners by giving the matter a higher degree of definition than it admitted.

(73) Sri Pathak relied on the observations of Dixon J. in the case of — 'O. Gilpin Ltd. v. Commr. for Road Transport and Tramways (New South Wales)', 52 Comm-W LR 189 (P) — the observations on which reliance was placed are to be found at page 211 of the decision. The words of Dixon J. on which reliance was placed were these :

"Nor can I share the view that the protection is against none but direct interference with inter-State trade, commerce and intercourse."

Dixon J., however, himself said this also :

"I do agree that it prevents only burdens or restrictions which apply to conduct or action as trade, commerce or intercourse, or because of its inter-State character."

But whatever may have been the view of Dixon J. the view that must prevail with us is the view expressed by their Lordships of the Privy Council — a view to which I have already made reference.

I may at this stage refer to an Australian case, namely, that of — 'Duncan v. Vizzard', reported in 53 Comm-W LR 493 (Q). In this case one of the points that arose for decision was whether the New South Wales State Transport (Co-ordination) Act, 1931, was valid in view of the provisions of section 92 of the Australian Constitution? It was held by the majority of Judges forming that Bench that the New South Wales State Transport (Co-ordination) Act, 1931, did not directly or even indirectly affect the freedom of inter-State trade. I do not see why if the New South Wales State Transport (Co-ordination) Act was not 'ultra vires' in view of the provisions of section 92 of the Australian Constitution, the impugned Act could be held invalid in view of Article 301 of our Constitution

(74) In view of what I have stated above, I am of the opinion that the impugned legislation is not hit by the provisions of Article 301 of the Constitution.

(75) It was next contended that section 7 of the impugned Act was 'ultra vires' because it authorised executive officers of the State to set aside or supersede the provisions of the Motor Vehicles Act. As I read section 7 of the impugned Act, I do not see any such power being conferred on executive officers of the State. The section gives a right to the executive authority to make certain orders in respect of specified matters; by this section the executive authority has not been vested with the power to either cancel or modify any previous legislation. I do not, therefore, think section 7 of the impugned Act to be 'ultra vires.'

(76) A good deal of argument was made by counsel for the petitioners in respect of the validity of certain notifications issued under the impugned Act as also, in regard, to the effect of the alleged non-compliance with certain provisions of the Act in regard to the framing of the "schemes" under the impugned Act. In order to appreciate the argument advanced on behalf of the petitioners, it is necessary to reiterate some of the facts. The State buses were running on most of the routes on which the petitioners' buses were also running and consequently after the passing of the impugned Act the State Government made a notification as provided for by section 13(1)(b) of that Act. I have already quoted this part of the section in an earlier portion of this judgment and I do not think it necessary to quote it again except saying that a notification was published by the State Government in the State Gazette dated February 12, 1951. This notification indicated the position as it obtained in respect of transport services. After the notification the routes on which the services were running became, what may be called in the words of the impugned Act, "notified routes". Under the impugned Act these routes were to be deemed to have been routes notified under section 3 of the Act. Under the provisions of section 13(1)(b) of the impugned Act it was not necessary in respect of these routes to make any notification under section 3, but it appears that a notification was published purporting to be under section 3 in respect of "stage carriages" in the State Gazette on June 23, 1951, in English, and on July 4, 1951, in Hindi. This subsequent notification was, to my mind, absolutely redundant, but be that as it may, objections were invited to the scheme thus notified and it was mentioned that the Governor of the State was to consider the objections.

It appears that all the petitioners, except D. N. Agarwala, whose petition is numbered 597 of 1952, preferred objections. These objections were heard by a Deputy Secretary of the Transport Department and a final scheme was published under sub-section (3) of section 5 on September 27, 1952, in the State Gazette. The

scheme which applied to "contract carriages" was, however, published in the Gazette dated December 20, 1952. There appears to be a conflict between the Hindi notification and the English notification inasmuch as the Hindi notification refers to "stage carriages" while the English notification mentions "state carriages." Actually the aforementioned notification published a scheme for the running of "contract carriages". It may be mentioned that all routes of Agra region in respect of which objections were filed were concerned with "contract carriages."

(77) Another notification appears to have been published in the U. P. Gazette dated December 20, 1952, Notification No. 3736-TP/XXX-50T(3)-50, which refers to a Notification dated February 12, 1951, in pursuance of the provisions of sections 4 and 5 read with sub-section (2) of section 6 of the impugned Act. The Notification said :

> " ..... the Governor is pleased to publish the Scheme hereto annexed in respect of the State carriage services to be operated by the State Government on routes mentioned therein for the information of all persons likely to be affected thereby ....."

It further said that notice was given thereby that the proposed scheme was likely to become final on or after February 20, 1953. Objections or suggestions were invited from persons likely to be affected by the scheme for consideration of "the Governor."

It appears that objections were filed by most of the petitioners before us. Under sub-section (2) of section 5 of the impugned Act objections had to be invited and the State Government, or if the State Government so directed, a "prescribed authority", was to consider those objections and thereafter either confirm, modify or alter the scheme. These objections, as already mentioned, were heard by a Deputy Secretary in the Transport Department.

It was contended on behalf of the petitioners that the Notification having stated that it was the Governor who was to consider the objections, the consideration of the objections by a Deputy Secretary of Government was illegal and without jurisdiction. Rule 6 of the rules framed under the impugned Act says this :

> "HEARING OF OBJECTIONS: the Transport Commissioner in consultation with the State Government shall then fix a date and the place for hearing of the objections and inform the objector of the date and the place so fixed by registered post."

Section 5(2), as has been noticed already, makes it incumbent for the State Government or a "prescribed authority" to consider the objections. It is important to note that under section 10 of the impugned Act it was not possible for the State Government to delegate the powers conferred on it by section 5(2) of that Act.

Section 10 is in these words :

> "The State Government may, by notification in the Gazette, delegate to an officer or authority subordinate to it, any of the powers conferred on it by this Act except those specified in section 3 and sub-section (2) of section 5 to be exercised subject to any restrictions and conditions as may be specified in the notification."

"Prescribed authority" has not been defined by the impugned Act. The rules framed under the impugned Act have also not indicated who is to be deemed to be a "prescribed authority" within the meaning of that Act. No notification was placed before us to show that the State Government had directed that any person or officer was to be deemed to be the "prescribed authority" within the meaning of the impugned Act.

It was, therefore, clear that objections had to be considered by the State Government only. The notification which said that the Governor was to consider the objections also indicates that there was no "prescribed authority" which was to consider these objections. The question which was raised was whether under these circumstances a consideration of the matter by a Deputy Secretary of Government was proper consideration.

On behalf of the State it was argued that under Article 154(1) of the Constitution the executive power of the State is vested in the Governor and was to be exercised by him either directly or through officers subordinate to him. Therefore the notification stating that the Governor was to consider the objections meant that the State Government was to consider them.

A further question was raised, namely, whether the consideration of objections could properly fall under the exercise of "executive power of the State." To me it appears that the power that the State Government could exercise under the provisions of section 5(2) of the impugned Act could properly be called the exercise of executive power — it certainly was not the exercise of a judicial power of the State even though the nature of the power was 'quasi' judicial. The brunt of the attack of counsel for the petitioners fell on the right of the Deputy Secretary to consider such matters. It was contended that permitting consideration of these objections by the Deputy Secretary was in effect a delegation of the power to the Deputy Secretary and there being no power of delegation possible under the provisions of section 10 of the impugned Act the consideration of the objections by the Deputy Secretary was 'ultra vires' and if that was so then there was no consideration of the objections and no finality, therefore, could attach to the schemes which have been given effect to.

The question that has to be considered, therefore, first, is whether there was a "consideration" of the objections by the Deputy Secretary — this question arises because it was contended on behalf of the State that the Deputy Secretary merely "heard" the objections and after hearing them advised the Governor who must be deemed to have really considered them. We have noticed that under rule 6 of the rules framed under the impugned Act the Transport Commissioner has been given the power to fix a date and place for the hearing of the objections in consultation with the State Government. The impugned Act, however, does not in so many words make provision for the hearing of objections. It only provides for a "consideration" of the objections. It must be admitted that it is one of the principles of natural justice that if a man has a right to prefer objections to something then he ought to have also a right to be heard in support of his objections unless, of course, it is made clear by law that there is to be no right of hearing but the right

to object is confined to a right to make written objections. Under rule 5 of the rules framed under the impugned Act any person wishing to file objections under section 5 was to do so in the form of a memorandum in duplicate setting forth concisely the grounds of objections to the scheme. Sub-rule (2) of rule 5 states:

> "The objection shall be addressed to the Transport Commissioner, Uttar Pradesh, and shall be accompanied by a court-fee stamp of Re. 1/-".

(78) We have also noticed that under the rules, provision is made for giving the objector an opportunity to be heard in support of his objections. The argument of counsel for the petitioners was that in view of the provisions referred to above, it was for the State Government or the Governor to invite objections to the schemes, to hear them and to decide them. It was contended that on the language of rule 6 the objections should have been heard, if not by the Governor, by the Transport Commissioner and that a Deputy Secretary in the Transport Department could have absolutely no authority to hear them.

It was pointed out that under the Constitution provision had been made for the conduct of business of the Government of a State and that the Governor could by rules make provision for the more convenient transaction of the business of the State. It was further pointed out that no rules had been placed before the Court by which the Governor had made any provision for the conduct of this particular business of the State. The rules which had been framed, though not under the Constitution, for the conduct of this business of the State were the rules framed under the impugned Act and under those rules, it was contended, the objections should have been heard by the Transport Commissioner.

"Transport Commissioner" has been defined by section 2(g) of the impugned Act as follows:

> "'Transport Commissioner' means the Transport Commissioner of Uttar Pradesh appointed by the State Government and includes any other officer who may be authorized by the State Government to perform the functions of the Transport Commissioner under this Act."

It was admitted on behalf of the petitioners that the State Government had appointed a "Transport Commissioner" for the State as contemplated by section 8 of the impugned Act. What, however, was disputed was that the State Government had authorized any other officer to perform the functions of the Transport Commissioner under this Act. On behalf of the State nothing was shown to controvert this assertion made on behalf of the petitioners.

That being so, I must accept that the State Government had not appointed any other officer to perform the functions of the Transport Commissioner save the Transport Commissioner himself. If, therefore, under the rules framed under the impugned Act there was power only in the Transport Commissioner to consider the objections then the consideration of the objections by the Deputy Secretary was unjustified. To me it appears that under section 5(2) objections had to be considered either by the State Government or if the State Government so directed, by the "prescribed authority." We have also noticed that there could be no delegation of this power, that is to say, the State Government could not, nor could the "prescribed authority" if there was any, under section 5(2) delegate power to anybody else to consider the objection — this is so because of the provisions of section 10 of the impugned Act. In my opinion the State Government had by the rules framed by it under the impugned Act constituted the Transport Commissioner "the prescribed authority" under the provisions of section 5(2) and, therefore, it was either for the State Government itself or for the Transport Commissioner to hear those objections.

(79) On behalf of the State it was contended that the notification which was issued in this connection stated that the Governor was to consider the objections. The consideration by the Governor of the objections meant the consideration of the objections by the State Government inasmuch as all actions which had to be taken on behalf of the State Government had to be in the name of the Governor. It was further contended that under the provisions of the impugned Act there was no question of giving anyone a hearing in regard to the objections, but since the rules, by implication, provided for a hearing of the objections the hearing was before a Deputy Secretary of Government who must be deemed to have acted as a subordinate officer of the Governor acting which was possible constitutionally.

As I see the position I see it to be either that under section 5(2) of the impugned Act the State Government itself was to consider the objections or the State Government was to direct their consideration by a "prescribed authority". The notification stating that the Governor was to consider the objections indicated that it was the State Government which was to consider them. The hearing of the objections by the Deputy Secretary must, therefore, be deemed to have been a hearing by the Governor through an officer subordinate to him. The ultimate notification that was published after the objections had been entertained and heard stated that "the Governor is pleased to order the publication of the scheme hereto annexed which has been confirmed under sub-section (2) of section 5 of the said Act." This indicates that a consideration was given by the Governor to the objections as provided for by section 5(2) — the notification having been published in accordance with section 5(3) of the impugned Act. There was no allegation on behalf of the petitioners that the matters which were submitted orally by them before the Deputy Secretary were not brought to the notice of the Governor before he made the final orders in respect of these matters. I must assume that the Deputy Secretary, in the normal course of his official business, apprised the Governor of what was submitted on behalf of the petitioners before him and further I must assume that the Governor gave due consideration to those matters before he came to his decision. Accordingly I do not think that there was any real substance in the contention raised on behalf of the petitioners in regard to this matter.

(80) I, therefore, hold that the schemes finally published were not open to challenge on the ground that the petitioners had either no opportunity of raising objections or that the objections had been decided by an improper authority or that the procedure followed in

deciding those matters was an illegal procedure.

(81) It was contended by Sri Bhargava on behalf of some of the petitioners that some of them did not know the date on which their objections were to be heard. It was, however, conceded that notice of the first hearing was given to these petitioners and all that happened was that the hearing could not take place on that date for want of time or some such reason and, therefore, it was adjourned to some other date and that the petitioners could not know the adjourned date of hearing. On the materials before me, I am not satisfied that the petitioners could not have known the adjourned date of hearing if they had taken proper care and proper steps to know of it. That being so, I do not think that any legitimate grievance can be made by the petitioners on that score.

(82) The next contention was that a notice of the schemes framed had, under rule 3 of the rules made under the impugned Act, to be published in the Gazette as also in a local newspaper, but such a notice, it was said, was not published in a local newspaper and, therefore, the schemes could not be given effect to. I do not consider that there is much substance in this contention, first, because the publication of the notice was not of the essence of the matter, and secondly because everyone admittedly had knowledge of the schemes and the absence of the publication of such notice did not in any manner prejudice anybody.

(83) As I have already noticed there were certain contradictions or inconsistencies between the notification which issued in English and the notification that issued in Hindi, but these contradictions or inconsistencies do not affect the substance of the matter. By Article 348(1)(b)(iii) of the Constitution it has been provided that "all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State shall be in the English language."

In view of this provision of the Constitution the notification appearing in English must prevail over the notification appearing in Hindi. I cannot, however, help saying that people concerned with making these notifications should have taken greater care in having them published in Hindi. To me it appears that it is of importance that in the matter of issuing and publishing notifications which are now issued in Hindi, and it may be noted that it is only that Hindi version of the Gazette that is available to the general public, great care should be taken.

(84) The last point that was argued on behalf of the petitioners was that even if the impugned Act authorized the cancellation of permits which had been granted by the officers of this State in respect of motor vehicles which were being operated under those permits, that Act could not have extra-territorial application, and no permits which had been granted to some of the petitioners by authorities outside this State could be cancelled under the said Act. This argument was based on the fact that there were certain petitioners who operated their buses within the State on permits which had been granted to them by the Regional Transport Authority of Delhi. Whether or not there could be power to cancel such permits, the impugned Act could certainly give power to the State Government not to let anyone operate his bus within the territory of the State irrespective of the fact whether he was operating his bus on a permit obtained from an authority within the State or because of a permit granted to him by an authority outside the State. Under the impugned Act no power has been conferred on the State Government to operate extra-territorially and no such action has been taken, as I see it, by the State Government under that Act. That being so, I do not consider this argument of the petitioners to be right.

(85) In the result I am of the opinion that all these writ petitions must fail and should be dismissed. The costs incurred by the parties should be borne by them because, even though, I have held that the impugned Act is not 'ultra vires' except in respect of section 11(2). I am of the opinion that the petitioners have suffered great loss and that their loss is not merely temporary but is permanent.

CHATURVEDI, J.:

(86) These are 106 writ petitions filed on behalf of certain persons who have been carrying on the business of transport of persons and goods for hire, on various routes situate in the State of Uttar Pradesh. The opposite parties arrayed in these writ petitions are the State of Uttar Pradesh, the Transport Commissioner, the Regional Transport Authorities and the Hon'ble Minister for Transport, Lucknow.

(87) As is well known, transport business has been carried on in this State through motor vehicles by private persons. Subsequently it appears that the Government also thought of running its own motor vehicles for hire. It is not necessary to go into the history of the matter earlier than 1939, in which year the Central Government passed the Motor Vehicles Act, (Act No. IV of 1939). Section 42 (3) of this Act exempts transport vehicles owned by or on behalf of the Central or the Provincial Government from the necessity of obtaining a permit, unless the vehicles were used in connection with the business of an Indian State Railway.

As far as the private vehicles were concerned, the owners were under an obligation to obtain permits before they could run their vehicles on a public thoroughfare. Sometime in 1947 after the coming into force of the popular Government, the Government thought of running its own buses for the carriage of passengers and goods. Notices were issued under the Motor Vehicles Act mentioned above, which had the effect of excluding from certain routes all private transport vehicles which were used for hire, and the business of motor transport was to remain exclusively in the hands of the State Government of U. P. With that object in view, a number of permits issued to the private operators were cancelled, and certain other operators were refused the permits which they would otherwise have been entitled to. This was about the time when the Constitution of India came into force, and a number of writ petitions were filed in this Court in the year 1950 challenging this action of the State Government.

These petitions were referred for decision to a Full Bench of five Judges and the petitions were disposed of by the Full Bench 'A. I. R. 1951 All 257 (A)'. Four judgments were delivered by the learned Judges constituting the Full Bench, and one of the decisions of the Full

Bench was that the Government could not nationalise any trade or business by executive orders. That could, if at all, be done only by an Act of the Legislature. The Full Bench decided certain other matters also, but reference will be made to them later in the course of this judgment as and when the occasion arises. As a result of this decision, the transport authority was directed by this Court to consider the applications for permits filed by the private operators according to the provisions of the Motor Vehicles Act, and without in any way being influenced by the fact that the State Government wanted to run its own motor transport on certain routes in the State.

(88) The State Government appears to have accepted the correctness of the legal position as laid down in the above case; but being of the opinion that the motor transport service in the State should be nationalised gradually, they moved a Bill in the State Legislature for the purpose. The Bill was ultimately passed in 1950 and is known as U. P. State Road Transport Act, 1950, (Act No. II of 1951), and it will be hereafter referred to as the impugned Act.

In accordance with the provisions of this Act, certain schemes were framed by the State Government, notices of which were published in the State Gazette and objections were invited. The objections were heard and some of the schemes have been finalised, but one or two of them have not yet reached that stage. The private operators of motor buses have filed the above petitions, and the main prayers contained in the petitions are that writs in the nature of mandamus or other directions or orders be issued against the opposite parties directing them to refrain from enforcing the different schemes, and from interfering with the petitioners' business of transport; and also to issue writs of certiorari quashing certain notification issued by the State Government and the Regional Transport authorities.

(89) These petitions may be conveniently divided into two groups — (1) petitions dealing with stage carriages, and (2) petitions dealing with contract carriages. Stage carriages are those which are adapted to carry more than six persons excluding the driver, and which carry passengers for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey; whereas contract carriages are those which carry passengers for hire under a contract for the use of the vehicle as a whole from one point to another without stopping to pick up or sit down along the line of route passengers not included in the contract.

They include motor cabs notwithstanding that the passengers may pay separate fares. It is not necessary to specify separately the petitions which fall under one group or the other, because the decision of the petitions does not turn on any position peculiar to the carriages falling under one or the other group. The points that have been raised are common to both the types of carriages, excepting in one smaller matter of detail which will be considered in due course.

(90) Before proceeding to specify the points argued on behalf of the parties, I propose to summarise the relevant provisions of the impugned Act.

The preamble to the Act is also important and it is in the following words :

> "whereas it is expedient in the interest of the general public and for the promotion of suitable and efficient road transport to provide for State Road Transport Services in Uttar Pradesh;"

Section 2 of the Act defines certain words used in the Act, and the most important section is section 3. It provides that where the State Government is satisfied that it is necessary in the interest of general public and for subserving the common good so to direct, it may declare that the road transport services in general, or any particular class of such service on any route or portion thereof, shall be run and operated by the State Government exclusively, or by the State Government in conjunction with Railway, or partly by the State Government and partly by others.

This section authorises the State Government to declare that road transport services on any route shall be operated exclusively by the State Government or in conjunction with others. The State Govt. has been given a right to nationalise the motor transport services on any particular route or routes, if satisfied that it is necessary to do so in the interest of general public and the common good of the people.

(91) Section 4 provides for the publication of the scheme framed in pursuance of the above declaration and also for the matters that may be provided in the scheme. Section 5 authorises any person, whose interests may be affected, to file objections before the Transport Commissioner within 30 days of the publication of the scheme, and the State Government or the prescribed authority, after considering the objections, may either confirm, modify or alter the scheme. This final scheme so confirmed, modified or altered shall then be published in the Gazette.

(92) Section 6 deals with the alteration or modification of the scheme made final under S. 5, and the procedure provided by sections 4 and 5 is to be followed in altering or modifying the scheme finalised under S. 5. Section 7 narrates the consequences that are to follow the publication of the scheme made final under S. 5.

The consequences are far reaching, and the State Government is authorised to renew or cancel any permits or to restrict their number, and no person other than the State Government would be entitled to a permit under Chapter IV of the Motor Vehicles Act of 1939. It is at the option of the State Government to permit certain other vehicles also to ply on the roads at its own discretion.

(93) Section 8 provides for the appointment of a Transport Commissioner, and section 9 for the appointment of Advisory Committees. Section 10 authorises the State Government to delegate to an officer or authority, subordinate to it, any of the powers conferred on it by this Act, except those specified in S. 3 and sub-section (2) of S. 5.

(94) Section 11 provides that, in case of any conflict or any inconsistency between the provisions of the impugned Act and the provisions of any other law, the provisions of the impugned Act are to prevail; and any order made or deemed to be made under the impugned Act shall have effect notwithstanding anything inconsistent therewith contained in any other

enactment. Section 12 provides for the punishment of persons plying public service vehicles in contravention of the provisions of clause (c) of S. 7.

(95) Section 13(1)(a) validates State Road Transport Service commenced before the appointed date and also every order cancelling or curtailing any permit or attaching any condition or reducing the number of transport vehicles to be used on any route notwithstanding the fact that it may not have been in accordance with the provisions of the Motor Vehicles Act of 1939.

Section 13(1)(b) is again important and it provides that every route on which the State Road Transport Service is operating on the appointed date shall be deemed to be a route specified in a notification under S. 3, and the service operating on the route is to be deemed to be operating under a scheme duly prepared in accordance with the provisions of sections 4 and 5 on condition that the State Government publishes in the official Gazette within 15 days of the commencement of the Act a scheme as to the Road Transport Service.

The scheme so published was to be taken to be duly confirmed and published under sub-section (3) of S. 5, and the route to which it related was to be called a notified route, and the provisions of sections 6 and 7 were to be applicable to it. Sub-section (2) of this section provides that all applications for the grant of permits shall be dealt with in accordance with the provisions of the impugned Act notwithstanding anything in the Motor Vehicles Act or any judgment, decree or order of the Court.

(96) Section 14 authorises the Transport Commissioner or any officer appointed by him to permit a carriage owned by the State Government to be used on any or all the routes in Uttar Pradesh, that is, any such carriage to be used as a contract carriage. Section 15 authorises the State Government to make rules for the purposes of carrying into effect the provisions of the Act, and the State Government in accordance with the provisions of the section has made certain rules which have been duly published in the Gazette.

(97) The main arguments in the case have been advanced on behalf of the petitioners by Mr. Gopal Swarup Pathak and Mr. V. D. Bhargava, who appear in the majority of these petitions. The other counsel have mainly adopted the arguments of Messrs. Pathak and Bhargava. Mr. Chhail Behari Lal, however, brought to our notice one important point which we shall consider while dealing with the objection under Article 19 (1) (g) of the Constitution. The case on behalf of the opposite parties was argued by the learned Advocate-General and the Standing Counsel for the State of Uttar Pradesh.

(98) The main arguments advanced by the learned counsel for the petitioners may be classified under the following heads :

(1) that the impugned Act is bad as it contravenes the provisions of Article 14 of the Constitution inasmuch as it discriminates between the State on the one hand and the citizen on the other; and also, inasmuch as it permits discrimination by the State Government or its officers between one motor transport operator and another;

(2) that the impugned Act is bad as it purports to interfere with the fundamental rights granted to the petitioners by Article 19(1)(g) of the Constitution to carry on their business of motor transport;

(3) that the impugned Act contravenes the provisions of Article 31(2) of the Constitution inasmuch as it provides for acquisition by the State of the business of transporting goods and passengers carried on by the petitioners without the payment of any compensation, and without there being any public purpose behind this acquisition; and

(4) that the impugned Act is bad as it contravenes the provisions of Article 301 of the Constitution which directs that all inter-State trade and also intra-State trade shall be free.

(99) These are the four main grounds on which the validity of the impugned Act itself has been challenged. But apart from the challenge to the constitutionality of the Act, certain other objections have been taken to the legality of the wordings and the publication of certain notifications under sections 3, 4, 5 and 6 of the impugned Act. Objections have also been taken to the effect that the objections preferred by the petitioners under section 5 of the Act were not considered by proper authorities and no decision was actually given on those objections. I shall consider these objections in detail after dealing with the main objections concerning the constitutionality or otherwise of the impugned Act.

(100) The first objection based on Article 14 of the Constitution in effect is that the State has denied to the petitioners equality before the law. It is argued that the State is as much a person when it enters into a trade or business as any private citizen, and the impugned Act purports to provide for a monopoly being created in favour of the State in the matter of motor road transport to the exclusion of the petitioners, who have been carrying on the transport trade from before.

The objections under this head are two-fold— (1) that the State and the citizen stand on the same footing, and if a monopoly cannot be created in favour of an individual, it cannot be created in favour of the State either; and (2) that the Act makes it possible for the State Government and its officers to discriminate between one citizen and another, inasmuch as the permits granted to the petitioners can be cancelled at the sweetwill of the officers concerned, who may cancel the permit of one operator and maintain that of another.

(101) The contention of the learned counsel for the petitioners under head (1) is that it has been laid down in the Full Bench case of Moti Lal (A), already referred to, that the State, when it carries on business is asmuch a person as a private individual, and Article 14 of the Constitution prohibits preferential treatment being accorded to the State in the matter of trade.

(102) In my opinion, this contention is only partially correct. What was challenged before the Full Bench was the validity of S. 42(3) of the Motor Vehicles Act, which provides for certain exceptions in the matter of obtaining permits as laid down in sub-section (1). Sub-section (1) of that section prohibited every owner of a transport vehicle from using or permitting the use of the vehicle in any place, except in accordance with the conditions of a permit granted or countersigned by a Regional or Provincial Transport authority.

Sub-section (3), clause (a), however, made an exception in favour of transport vehicles owned by or on behalf of the Central or the Provincial Government other than a vehicle used in connection with the business of an Indian State Railway. It is this provision the validity of which was challenged on the ground of improper discrimination in favour of vehicles owned by the Government. The Hon'ble the Chief Justice did not consider it necessary to decide the question whether the provisions of S. 42(3)(a) of the Motor Vehicles Act became void by reason of the provisions of Article 14 of the Constitution; but the other four learned Judges held that, when the State engaged itself in business or commerce, such as was carried on by private individuals, it must subject itself to the same obligations as were imposed upon the private individuals, and that the State must place itself in the same position as an individual when it is carrying on a trade along with them on a competitive basis.

(103) Section 42 of the Motor Vehicles Act made it compulsory for private operators to obtain permits; but an exception was made in favour of the State, and the Full Bench held that as the State was competing with private individuals in the matter of trade, an exception in favour of the State vehicles from the operation of S. 42(1) was a discriminatory piece of legislation, and it therefore became void after coming into force of the Constitution.

(104) As regards the monopoly in trade, the Full Bench held that it was not legal to effect monopoly in any trade in favour of the State by executive orders, in the absence of any legislation permitting the State to monopolise or nationalise the trade. It further held that there was no provision in the Motor Vehicles Act, which could authorise any State Government to nationalise the trade, nor was there any legislation elsewhere to authorise such nationalisation.

It was, therefore, held that an attempt by the State Government to nationalise transport trade by executive orders was illegal; but at the same time, they made it quite clear that they were not deciding the question that, if a legislation was passed authorising the nationalisation of any trade, such a legislation would be valid or not.

(105) In the present case, we have to decide the question left open by the Full Bench, namely, whether such a legislation is a valid piece of legislation. This brings me to the question whether the U. P. State Road Transport Act contains any classification, and whether that classification can be said to be a reasonable one. Section 3 of the impugned Act leaves it to the discretion of the State Government to run its own services exclusively on a particular route or a portion thereof, or to run them in conjunction with the Railway, or in conjunction with other persons.

In either of these three cases it is left to the discretion of the State Government to decide in the manner it considers to be in the interest of the general public and for subserving the common good. The decision to run the services exclusively or in conjunction with the others is to be a decision of the State Government and of nobody else. The State or the State Government has thus been put in a separate class by itself, and the private operators in the other class.

This classification, in my opinion, is quite a reasonable and valid classification based, as it is, on a reasonable and just relation to the subject of transport trade. Transport service is a public utility service, and the considerations, which are expected to guide a State in running such a service, are widely different from the considerations which are expected to guide a private citizen in the matter of such a trade. Private operators would be more interested in their own profits from the business, rather than in providing the comforts and amenities to the travelling public or in maintaining a proper and well paid staff.

A State, on the other hand, is not likely to subordinate the considerations of the amenities and comforts of the travelling public to the consideration of profit earning. In the present state of the development of the society, the nationalisation of public utility services has been resorted to by many countries. In England in the years 1946 to 1948 the Bank of England was nationalised and so also the coal industry, transport services, supply of electricity and supply of gas. Recently the conservative Government has denationalised the coal industry, but the transport services are running still as nationalised services.

(106) In the Union of India itself the Parliament passed the Road Transport Corporation Act, Act 64 of 1950, permitting nationalisation of motor road transports, and it provided for the constitution of a Road Transport Corporation. The Air Companies Act, Act 27 of 1953, has nationalised air services. Monopoly of the State, therefore, in the matter of transport services appears to be generally recognised as a desirable object to be achieved. It cannot, therefore, be said that putting the State in a separate class in the matter of transport trade is not a reasonable classification. I further find that Article 19 (1) (g), (6) was amended by the Constitution First Amendment Act of 1951, and the effect of the amendment is that an exclusive right to trade by a State or by a Corporation owned or controlled by a State, even to the total exclusion of others, is considered as a reasonable restriction to the fundamental right of a citizen to carry on trade granted by Article 19(1)(g).

I do not mean to say that every Act of nationalisation of a trade has been considered to be a reasonable restriction. But what I do think is that the Constitution itself has considered it legal, under certain circumstances for a State to nationalise a trade or business. The Union Government already enjoys monopoly in the matter of Railway, post, telegraph and telephone services, and it would be going too far to say that, in the circumstances prevailing these days, these monopolies are rendered invalid by the provisions of Article 14 of the Constitution.

Section 18 of the Indian Railways Act, section 4 of the Indian Post Offices Act, and section 4 of the Indian Telegraph Act virtually confer a monopoly on the Union or the State Governments in the matter of these services. These facts clearly prove that, in the matter at least of public utility services, the State Government or the Union Government has been put in a different class, and, in our opinion, such a classification is clearly valid and permissible. The impugned Act has put the State itself in a class different from that of a private operator, and the classification is perfectly

justified. The objection of the learned counsel, therefore, on this point does not appear to have any force and we find ourselves unable to accept it.

(107) The second objection under Article 14, as stated above, was that the provisions of the impugned Act make it possible for the State Government or its officers to discriminate between one operator and another. They may cancel the permits of some and maintain those of the others. They may decide to notify any route that they like and not notify another. It is contended that the Legislature itself should have laid down the principles on which a selection of the routes or of the individual operators was to be made, and the whole thing should not have been left to the subjective determination of the officers of the State Government.

I find myself unable to agree with this contention either. The only principle that could be made applicable to the selection of the routes or the number of the operators would be the rule of administrative convenience. It would depend on the number of buses and other carriages that the State is able to put into service and also the employment of the necessary staff for running the services, as also the suitability of a particular route to be taken first and the others afterwards. These matters are all matters of detail, which have to be left to the officers responsible for working the scheme under the supervision of the State Government, and no hard and fast rule could possibly have been laid down by the Legislature itself which could govern the cases of all the different routes and the individual operators.

(108) Great reliance was placed by the learned counsel for the petitioners on the case in AIR 1952 SC 75 (H). In this case the West Bengal Special Courts Act (X of 1950) provided a procedure for the trial by the Special Courts, which was substantially different from that laid down for the trial of offences generally under the Code of Criminal Procedure.

It was left to the discretion of the State Government to have one case of the same kind tried by the Special Court and another by the regular court. It was held by their Lordships that a rule of procedure comes as much within the purview of Article 14 of the Constitution as any rule of substantive law, and that it was not necessary for the applicant to prove that the Legislature had the intention to discriminate against him, if the discrimination was a necessary consequence of the Act. Section 5(1) of the said Act was held to have vested the State Government with unrestricted discretion to direct any cases or class of cases to be tried by the Special Court.

This was a case where it was possible to lay down the guiding principles providing for a particular type of case to be tried by the Special Courts and another class by the ordinary criminal courts. But no such guiding principles could be laid down in the present Act where the decision was to be with respect to the particular routes or the particular private carriages which were to be permitted to run.

(109) In my opinion, the case is actually governed by the decision of their Lordships of the Supreme Court in recent case in AIR 1953 SC 404 (K). In this case the validity of the West Bengal Criminal Law Amendment (Special Courts) Act, (XXI of 1949), was challenged. Section 4 of that Act authorised the Provincial Government to allot cases for trial to a Special Judge from time to time and to withdraw any case already referred to the Special Judge.

After considering — 'Anwar Ali Sarkar's case (H)', and the case in AIR 1952 SC 123 (J), their Lordships came to the conclusion that the case of Kedar Nath (K), was governed by the Saurashtra case where certain provisions of the State Public Safety (Third Amendment) Ordinance, (LXVI of 1949), were held to be valid. After considering these and other cases in detail, their Lordships were pleased to observe as follows :

"There may be endless variations from case to case in the facts and circumstances attending the commission of the same type of offence, and in many of those cases there may be nothing that justifies or calls for the application of the provisions of the Special Act. For example, sections 414 and 417, Penal Code are among the offences included in the Schedule to the Act, but they are triable in a summary way under S. 260, Criminal Procedure Code, where the value of the property concerned does not exceed fifty rupees. It would indeed be odd if the Government were to be compelled to allot such trivial cases to a Special Court to be tried as a warrant case with an appeal to the High Court in case of conviction. The gravity of the particular crime, the advantage to be derived by the State by recoupment of its loss, and other like considerations may have to be weighed before allotting a case to the Special Court which is required to impose a compensatory sentence of fine on every offender tried and convicted by it. It seems reasonable, if misuse of the special machinery provided for the more effective punishment of certain classes of offenders is to be avoided, that some competent authority should be invested with the power to make a selection of the cases which should be dealt with under the special Act."

(110) These observations, in my opinion, cover the present case, as there may be endless variations in the circumstances, which should determine as to which route was to be taken over first and which permits of individual operators were to be cancelled first and which allowed to stand for the time being. I have no reason to doubt that officers of the State Government would fairly and properly look into the matter and after taking everything into consideration, make their selections with respect to the routes as well as the individual operators.

It has not been shown to us that, in the schemes that have been framed so far, the officers are in any way acting improperly in selecting the routes or the individual operators. These questions have to be decided on a consideration of numerous facts and circumstances, and it is obviously right and proper that the decision be left to the officers concerned. This objection of the learned counsel also therefore, fails.

(111) The objection under Article 19 of the Constitution is that the impugned Act infringes the rights of the petitioners conferred upon them by Articles 19(1)(f) and (g). It is, however, conceded that if sub-clause (g) applies, then sub-clause (f) would have no application,

and the main contention on behalf of the petitioners has been that it is the right to practise and carry on the transport trade, which has been improperly taken away Sub-clause (f) really does not apply to the case, as no restriction has been placed on the petitioners acquiring, holding or disposing of any property. The motor vehicles belonging to the petitioners have not been acquired, nor the stations constructed on some of the routes by the petitioners for the convenience of the passengers.

No part of their undertaking or property has been acquired, and the only right they have been deprived of is the right to carry on their trade of transporting goods and passengers. Sub-clause (f) has, therefore, no application to the case, and sub-clause (g) is the only clause which requires consideration Sub-clause (g) confers a right on all the citizens to practise any profession, or to carry on any occupation, trade or business. This right is, however, subject to the provisions of Art. 19 (6). Clause (6) lays down that nothing contained in sub-clause (g) shall prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the sub-clause. This is the general restriction on the right, and it has been mentioned that, in particular, nothing in the said sub-clauses shall prevent the State from making any law prescribing or empowering any authority to prescribe the professional or technical qualifications for practising any profession or carrying on occupation, trade or business.

Clause (6) stood as above till the 18th of June, 1951, when the latter portion of the clause was substituted by the following words

"nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

(112) If this amendment were applicable to the present case, the point that the impugned Act contravenes the provisions of Art. 19(1)(g) would not have been even arguable. But it appears that the amendment is not really applicable to this case, as pointed out by Mr. Chhail Behari Lal, advocate for some of the petitioners. The amendment has been made applicable to all "existing law" and also to all law made in future after the amendment of the Constitution. The impugned Act, however, came into force on the 10th of February, 1951, before the Constitution First Amendment Act of 1951 came into force. The question therefore, is whether it can be said to be an "existing law".

"Existing law" has been defined in Art. 366 (1) of the Constitution as any law passed or made before the commencement of this Constitution. "Existing law", therefore, has to be confined to legislation which was passed or made before the 26th of January 1950, and it cannot be said to include an enactment passed by the State Legislature after that date. The impugned Act, therefore, was neither "existing law" nor law made after the amendment of the Constitution. Its validity, therefore, has to be determined on the law, as it stood before the Constitution First Amendment Act of 1951. I have, therefore, to see whether the impugned Act contravenes the provisions of Art. 19(1)(g) read with (6) as it originally stood.

(113) It was argued that Art. 19 of the Constitution does not confer on the citizen any new rights, but only guarantees the already existing rights under the general law. But this question is really of no importance, because whether the Article preserves the old existing rights or confers new ones, there can be no doubt that every citizen, after the Constitution, in any case, has the right to practise any profession or to carry on any occupation, trade or business, subject to the right of the State of making any law imposing reasonable restrictions on the citizens' rights in the interests of the general public. Attention has, therefore, to be confined to these provisions of the Constitution, as it would serve no useful purpose to embark upon an enquiry as to what the rights of the citizens were before the Constitution, and whether the same rights have been preserved or new ones have been conferred.

(114) I have, therefore, to see whether a State Legislature is authorised to pass a law nationalising a trade under clause (6), as it originally stood. According to this clause, State could impose reasonable restrictions in the interest of the general public, and it has been held that reasonable restrictions may even amount to the complete stoppage of any particular trade under certain circumstances.

This was the decision of all the five Judges in the Full Bench case in AIR 1951 All 257 (A). It cannot be doubted that in the case of obnoxious trade the State can properly and validly put a complete prohibition against it in the interest of the general public, for example, nobody can doubt that the State has a right to stop the trade of selling publicly obscene literature or libellous matter. Transport trade cannot be said to be an obnoxious trade. But certainly it is a trade in which the public using the thoroughfares is particularly interested; and, in the interest of the general public itself, many more restrictions can be imposed on trades of this kind than on other trades. It was conceded that the Provisions about transport business on public thoroughfares being under a permit and according to the conditions of it, was a reasonable restriction.

The State can also admittedly restrict the number of transport vehicles intended to be run for hire on the public thoroughfares. In this case the State has gone even beyond that, and has purported to nationalise the entire transport trade carried on by means of motor vehicles resulting in the total stoppage of the trade by private operators. In my opinion, even this total stoppage of trade on public places and thoroughfares cannot always be said to be an unreasonable restriction.

(115) In 1949-2 All ER 755 at p. 772 (C), their Lordships of the Judicial Committee observed as follows :

"..... their Lordships do not intend to lay down that in no circumstances could the exclusion of competition so as to create a monopoly either in State or Commonwealth agency or in some other body, be justified. Every case must be judged on its own facts and in

its own setting of time and circumstances, and it may be that in regard to some economic ..... activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that inter-State "trade, commerce and intercourse" thus prohibited and thus monopolised remained absolutely free".

In the Full Bench case of this Court, referred to above, Mootham and Wanchoo, JJ. observed as follows:

"We may point out that in India certain public utility services are already the subject of State monopoly, for example, Railways, Posts, Telegraphs, and Telephones. It would, in our opinion, probably be going too far to say that in the circumstances of today, section 18 of the Indian Railways Act, Section 4 of the Indian Post Offices Act, and section 4 of the Indian Telegraphs Act are invalid because they prohibit, or tend to prohibit the carrying on certain occupations, trades or businesses by citizens. We consider that reasonable restrictions in the interest of the general public may in certain circumstances, as pointed out by their Lordships of the Judicial Committee, mean complete prohibition, and it will be for the Courts to Judge whether in a particular case complete prohibition amounts to more than a reasonable restriction in the interest of the general public".

(116) As stated by the learned Judges mentioned above, the State is already enjoying monopoly in the matter of running the Railway, Post Offices and Telegraph Offices, and he transport trade by motor vehicles is of a similar kind. It is common knowledge that transport vehicles by private operators, before the State also started running its vehicles, were run in a very unsatisfactory manner, and used to cause a lot of inconvenience to the travelling public. After the State also entered into competition, the services have been substantially improved on certain routes in the western and the hill districts, and if taking an over all view of the entire position, the Legislature has come to the conclusion that all the motor transport trade should be nationalised, there is no reason to hold that this action of the State is in any way unreasonable. The members of the Legislature are the best persons who are in a position to know what is actually in the interest of the general public, and great value has to be attached to their opinion in a matter of this kind. Nationalisation of any trade effected before the Constitution came into force, and similar nationalisation effected after the amendment of clause (6) of Art. 19 will generally be upheld as a reasonable restriction, in view of the amendment of the Constitution, and I see no reason to hold that the same could not be the result if the legislation was passed after the 26th January, 1950 and before the 18th January, 1951.

The intention of the Constitution makers is quite clear, though there has been an oversight in using the exact words. Still if nationalisation were prohibited by the Constitution, as it stood before the amendment, I would have been compelled to hold that the impugned Act is void. But in view of what I have stated above, I am of the opinion that nationalisation in the matter of public utility services was permissible even according to the constitution as it stood before the amendment.

(117) The learned counsel for the petitioners referred to a decision of their Lordships of the Supreme Court reported in — 'A. I. R. 1950 SC 163 (D)'. In this case Rashid Ahmad used to carry on the wholesale business in vegitables and fruits at Kairana in a rented shop in a part of the town. On the 19th April, 1949 the Municipal Board of Kairana passed certain bye-laws providing that wholesale business in vegetables shall be carried on only in the Municipal Market, & the person authorised by the Municipal Board shall be the only person who could carry on such business.

The result of the bye-laws was that Abdul Rashid could not carry on the business in his own shop, and the contract for the business was given by the Municipal Board to a third person. Abdul Rashid applied for permission to carry on the trade, but his application was rejected, and subsequently a notice was issued to him to stop the business in his shop. The result of the bye-laws was that the prohibition against Rashid Ahmad from carrying on his trade was an absolute prohibition, and the bye-laws further contemplated the granting of a monopoly to any contractor they liked. Monopoly was actually granted to a person by the name of Habib Ahmad and Abdul Rashid could not carry on his trade. On these facts their Lordships held,

"This certainly is much more than reasonable restrictions on the petitioner as are contemplated by clause (6) of Art. 19. This being the position the bye-laws would be void under Art. 31 (1) of the Constitution."

The argument of the learned counsel is that this observation of their Lordships means that all monopolies in the matter of trade are prohibited by the Constitution as they amount to more than reasonable restrictions on the right to carry on the trade. I do not think that such a far-reaching conclusion is deducible from this case. There are two clear distinctions between this case and the present case. In the first place, the monopoly in Rashid Ahmad's case was not effected in favour of the State, & secondly, the monopoly was not in the matter of any public utility service. The trade of selling vegetables can be carried on at a private place and the restrictions that can be put on a trade, which can be carried on only in public places, are bound to be much more strict than those imposed on trades carried on in private places.

Further, the considerations which apply to a monopoly in favour of a State are quite different from considerations which apply to a monopoly in favour of an individual. The amendment in the Constitution may have been effected in order to make the position clear, and, in my opinion, the decision in 'Rashid Ahmad's case (D)', does not govern the present case.

(118) The next case cited was the case of — 'Chintaman Rao v. State of Madhya Pradesh', A. I. R. 1951 SC 118 (R). In this case it was laid down by their Lordships that section 4 of C. P. and Berar Regulation of Manufacture of Biris (Agricultural Purposes) Act, (Act 64 of 1948), was ultra vires inasmuch as it imposed total prohibition of carrying on the business of the manufacture of Biris during the agricultural season arbitrarily, and it interfered with private business. It consequently could not be said to impose reasonable restrictions on the

fundamental rights conferred by Art. 19 (1) (g) of the Constitution. Their Lordships held that the phrase "reasonable restrictions" contemplates that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public.

The word "reasonable" implies intelligent care and deliberation, and the legislation was held to fall outside the ambit of the expression, inasmuch as it arbitrarily and excessively invaded the right of the citizen to trade. According to their Lordships a proper balance between freedom guaranteed in Art. 19 (1) (g) and the social control permitted by clause (6) of Art. 19 should be struck. While discussing the point later on, their Lordships observed as follows:

> "The effect of the provisions of the Act, however, has no relation to the object in view, but it is so drastic in scope that it goes much in excess of that object. Not only are the provisions of the Statute in excess of the requirements of the case but the language employed prohibits a manufacturer of Biris from employing any person in his business no matter wherever that person may be residing."

Such prohibitions were on their very face held to be of an arbitrary nature bearing no relation whatsoever to the object which the legislation sought to achieve. On these facts the legislation was held to be void, but the remarks do not apply to the present case.

It cannot be said in the case under consideration that the provisions of the Act have no reasonable relation to the object in view, or that they go in excess of that object. The preamble to the impugned Act is in the following words:

> "Whereas it is expedient in the interest of the general public and for the promotion of suitable and efficient road transport to provide for State Road Transport Services in Uttar Pradesh."

Section 3 of the Act authorises the State Government to notify the scheme if satisfied that it is necessary in the interest of the general public and for subserving the common good. The principles, therefore, laid down by their Lordships of the Supreme Court in that case have no application to this case.

(119) The next case cited by the learned counsel is also a Supreme Court case reported in — 'Raghubir Singh v. Court of Wards', AIR 1953 SC 373 (S). The State of Ajmer passed Act No. 42 of 1950, and S. 112 of that Act provided that if a landlord habitually infringed the rights of a tenant under the Act, he was deemed to be landlord disqualified to manage his own property, and the property should be liable to be taken under the superintendence of the Court of Wards. The determination of the question as to whether a landlord had habitually infringed the rights of his tenant or tenants was left to the subjective determination of the Court of Wards.

It was argued that the provisions of S. 112 amounted to reasonable restrictions on the exercise of the right conferred by Art. 19(1)(f) of the Constitution and these restrictions were in the interest of the general public. Their Lordships repelled the argument on the ground that the provisions of the section were penal in nature and were intended by way of punishment by a landlord, and an enactment, which prescribed a punishment or penalty for bad behaviour, could not possibly be regarded as a restriction on fundamental rights, as punishment could not be a restriction. It was further observed that when a law deprived a person of possession of his property for an indefinite period based merely on the subjective determination of an executive officer, such a law could on no construction be called reasonable.

This was not a case under Art. 19(1)(g), but was a case under sub-clause (f), and it was held to be not a reasonable restriction to deprive a person of the possession of his property for an indefinite period of time as the subjective determination of an executive officer. That case has no bearing on the question under consideration.

(120) Reference was also made by the learned counsel to the case of the Madras High Court reported in — 'C. S. S. Motor Service v. State of Madras', AIR 1953 Mad 279 (T). That was a case where the provisions of S. 47 of the Motor Vehicles Act were challenged and clause (e) of S. 47 was held to be invalid on the ground that the provision was not in the interest of the general public but of the permit holder.

Their Lordships further held that, where a legislation which interfered with fundamental rights was sought to be sustained as falling within the scope of Art. 19(6), the question whether it was reasonable and made in the interest of the public was one open to judicial review. I respectfully agree with this observation of the learned Judges, but, after a consideration of all the facts and circumstances of the case as well as the cases cited at the Bar, I have come to the conclusion that the creation of a State monopoly in the matter of a motor transport trade or the nationalisation of such a trade in the interest of the general public is a reasonable restriction on the rights of the citizen guaranteed under Art. 19(1)(g) of the Constitution.

(121) The next point argued by the learned counsel was that the effect of this legislation was the acquisition or taking possession of the property of the petitioners and as no compensation was provided for that, and as there was no public purpose behind it, the legislation is rendered void, as it contravened the provisions of Art. 31(2) of the Constitution. In my opinion, the Article has no application to this case, because this is not a case of acquisition at all, but a case of restricting the right to trade under clause (6) of Art. 19. To a case actually falling under Art. 31(2) of the Constitution, the provisions of Art. 19 can have no application; and similarly to a case falling within the ambit of Art. 19, the provisions of Art. 31 (2) have no application.

Article 19(6) permits the imposition of reasonable restrictions on the rights conferred by Art. 19(1)(g), and I have already held that the present Act came within the scope of clause (6) of Art. 19, and the restrictions imposed by the Act were reasonable. This being a case of restrictions only, it cannot fall under Art. 31(2) which is concerned with acquisitions of property. I shall consider in some detail later on the question whether the impugned Act purports to acquire any property. For the present I only mean to say that the argument, that Art. 19(f) and Art. 31(2) are both inconsistent with the Act, is to some extent itself inconsistent.

(122) On this part of the case, the learned counsel has argued that his right to ply motor vehicles on the route or routes in question was his property, and the same is being acquired or is being taken possession of by the State without providing for any compensation and without there being any public purpose behind the acquisition. It is clear from the Act itself that there is no provision for payment of any compensation, and if the case is really covered by Art. 31(2), then the impugned Act must be held to be void, because it does not provide for the payment of any compensation. The further question, as to whether the acquisition was for public purpose or not, need not, therefore, be considered at all.

(123) For application of Art. 31(2) it must be shown that the petitioners owned some property, moveable or immoveable, which has been taken possession of or acquired by the State. I have, therefore, to see whether the petitioners have been deprived of any property and whether the same property has been acquired or taken possession of by the State of Uttar Pradesh. It was argued by the learned counsel for the petitioners that they had a right to carry on the business or trade of transporting passengers and goods by means of motor vehicles on the routes in question, and that right of theirs was property. The State may not have taken over the transport vehicles or other property belonging to the operators, but the operators have been deprived of this right to carry on the transport trade, and the first question for consideration is whether this right to trade can be said to be property. Property may be moveable or immoveable and the Article applies to both, but the right must come within the definition of "property", whether it be corporeal or incorporeal, moveable or immoveable.

The right to use public thoroughfares always existed in the citizen, and the Full Bench of this Court in Moti Lal's case (A), has further held that this right extended to using the thoroughfares for carrying on passengers and goods for gain. Restrictions on this right have been placed from time to time and the Act now in force, which deals with this subject, is the Motor Vehicles Act of 1939. Section 42 of this Act says that no person shall have a right to ply his motor vehicle for hire on a public thoroughfare except under and in accordance with the terms of the permit granted to him under the succeeding provisions of the Act.

The Act, therefore, substantially curtails the right of the citizen to carry on motor transport business on the public thoroughfares. Still it cannot be said that that right has been completely wiped out by the Act. Permits are granted on certain conditions, and on a consideration of certain matters enumerated in the Act. But if those conditions are fulfilled and other considerations do not stand in the way, a citizen would have a right to run his motor vehicle on the thoroughfare for earning profits. The right, therefore, of the citizen to carry on transport business by motor vehicles on the public thoroughfare still subsists, though to a very limited extent. There are some observations made by the learned Judges in Moti Lal's case (A) pointing to this conclusion, and with great respect, I agree with the law laid down there. I am, therefore, prepared to hold that the right of the petitioners to carry on transport trade through their motor vehicles under the terms and conditions of the permit was there when the impugned Act was passed.

(124) The next question is whether this right can be said to be property. The learned counsel for the petitioners cited some cases in support of his contention that this right was property. In AIR 1946 Bom 216 (M), it was held that the word "property" would 'prima facie' cover a business and its goodwill. There is no question of any goodwill in the present case, and the case cited above does not appear to be very helpful.

(125) The next case cited is that of AIR 1946 Cal 140 (N). In this case it was held that the word "undertaking" used in Rule 81 of the Defence of India Rules, and S. 299(2), Government of India Act, was synonymous with the word 'business' and that the business of carrying on the hotel came within the meaning of the word "undertaking" in the above provisions. I quite agree that the word "undertaking" would include a business and the business by itself would be included in the word "property". But what is being taken away in the present case is a right to run on a thoroughfare which cannot be called an undertaking. This case, therefore, is also not of any help.

(126) The case of 68 Comm-W LR 261 (O), was a case where under Regulation 54 of the National Security (General) Regulations, the Commonwealth took for an indefinite period exclusive possession of certain property, and it was held that this taking possession of amounted to an acquisition of property. Dalziel had taken land from the Bank upon a weekly tenancy and carried upon that land the business of parking motor cars. The Minister for the Army took possession of this land for defence purposes. It was held that this taking over amounted to an acquisition, as the word was not restricted to any particular type of interest or to any particular type of property, but it extended to the acquisition of any interest in any property.

The land remained the property of the Bank and Dalziel continued to be its tenant, but the possession of the land was taken over by the Minister, and this taking over was for an indefinite period of time. The right to possession of the land was held to be property which had been acquired and Dalziel was held to be entitled to just compensation. In this case also the acquisition was of possession of land and it was clearly, therefore, property. But in the present case there is no right in any property that has been taken away, but it is only the general right of every citizen to use a thoroughfare that has been affected.

(127) In 1949-2 All ER 755 (C), it was held that the business of banking which consisted of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other similar transactions, was included among those activities described as "trade, commerce, and intercourse". There can be no doubt that the business of banking is trade, but that question is not the question that I have to determine in this case. What I have to determine is whether the common law right of the citizen to ply his buses for hire on a public road is property or not, and this case also does not help in the determination of that question.

(128) Willis in his Constitutional Law at page 821 says,

"Ownership relates to rights, powers, privileges, and immunities concerning either land or chattels. Property is not the thing, but it is these rights, powers, privileges, and immunities which a person has as against all others with reference to these objects of ownership."

This definition suggests that a right, power, privilege or immunity may be property if a person enjoys them against all others. But it does not mean that the common law right of a citizen to a public thoroughfare is his property.

(129) Nichols on Eminent Domain, Vol. II, page 109, under the heading "Goodwill and business" says :

"An established business or what is called "goodwill" has never been held to be by itself property in the constitutional sense. When a piece of real estate upon which an established business is carried on is taken for the public use, it often happens that the proprietor of the business is unable to secure an equally available site in the neighbourhood, and by the interruption of his business and the removal of his store to a considerable distance away he may lose the greater part of his customers and never be able to regain his standing in the business community. If he is the owner of the land taken the jury may partly compensate him by giving him a liberal award for the land, but if he is a mere tenant, especially if there is an eminent domain clause in his lease, he may not receive a dollar."

He then goes on to say that a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the constitution undertakes absolutely to protect. The destruction of a business may entail much greater hardship than the taking over of the property for which the constitution makes compensation necessary, but the diminution of the value of the business is considered a vaguer injury than the taking or appropriation with which the constitution deals.

The position would be the same when the business is destroyed by taking the land on which it was carried on. The impugned Act only destroys the right to carry passengers and goods for hire on the notified routes and it cannot be said that the petitioners had any right or title in the land, nor have they by the impugned Act been prohibited from carrying on their business elsewhere. As far as the impugned Act goes, in my opinion, therefore, it cannot be said that the petitioners have been deprived of any property in the constitutional sense by being prohibited from plying their buses on the particular route or routes.

(130) The right of the petitioners was the same right which every citizen has for using the highway, but it cannot be said that every citizen has property in the highway because he has a right to carry on the business of transport on the highway. The petitioner's right was different from that of the general public only in so much that they possessed permits for using the highways but the right to use the routes cannot, in my opinion, be said to be the property of the petitioners. These permits were liable to be cancelled for specified reasons, but the discretion given to the transport authorities is so wide that it is difficult to say that the right acquired by the permit can be classified as property.

I am further of the opinion that it would not be correct to say that the right granted by the permit to use the highway was an interest in any property or undertaking. The undertaking consisted of the buses, the passenger stations and other property belonging to the petitioners, but it cannot be said to include the common law right of the petitioners to use the highways. What has been taken away is the right to use these highways and that right could not be said to be any interest in that undertaking. I am consequently of the opinion that, though the petitioners have been deprived of a limited right evidenced by the permit, they have not been deprived of any property in the sense that the word is used in Art. 31(2) of the Constitution.

(131) Whatever doubt there might be on the point, there can, however, be no doubt, in my opinion, on the next question as to whether the State has acquired or taken possession of this very right of the petitioners. The State, according to the Full Bench decision in Moti Lal's case (A), is a person entitled to carry on any trade it likes as much as any private citizen of India. It also has a right to run its own motor vehicles on the public thoroughfares, and when it confines the right to itself, it does not acquire the right of the citizen to use the highway for profits, but exercises its own right exclusively with the result that the citizen is deprived of his right. But it cannot be said that the State has acquired his right to run the buses because, as stated above, the State has an undoubted right in itself to run its own motor transports on public thoroughfares.

Article 289(2) contemplates the Government of a State carrying on a trade or business, and if a State carries on such an activity on a public thoroughfare, it is carrying it on in the exercise of its own right and not because it has acquired or taken possession of somebody else's right. The right of the petitioners comes only to this that they could run a particular vehicle on a particular route for a limited period of time, and the right to run that vehicle has not been acquired by the State, though the petitioners have been deprived of it. It is a case of deprivation and not of acquisition of any right.

(132) For the reasons given above, I have come to the conclusion that the case is not covered by Article 31(2) of the Constitution at all, and the objection on this ground also fails. I may also mention that in the Full Bench case of Moti Lal (A) also the State had tried to monopolise the trade, but no argument was made that the action amounted to acquisition and, therefore, compensation should be paid by the State for attempting to nationalise the motor transport trade. It is not necessary to discuss the American cases on this point because in America compensation has to be paid even for taking away rights, though the State may not have acquired or itself taken possession of them.

(133) I now come to the question whether the impugned Act purports to contravene the provisions of Art. 301 of the Constitution and is, therefore, void. Article 301 runs as follows :

"Subject to the other provisions of this Part, trade commerce and intercourse throughout the territory of India shall be free."

It has been argued that this Article not only safeguards the right of the citizen to inter-State trade, but it safeguards the rights also to intra-State trade, but the impugned Act prohibits the petitioners from carrying on both inter-State and intra-State trade.

I am unable to accept this argument because, in my opinion, what the Article safeguards is the carrying on of the trade as distinguished from the right of any individual to carry it on. Article 19 (1) (g) and Article 301 have been framed in order to secure two different objects. Article 19 (1) (g) refers to the individual rights and Art. 301 refers to trade as a whole and not to the right of any individual. What Art. 301 prohibits is interference with trade as such, though it sometimes happens that the number of individuals restricted may indicate that what was meant to prohibit was the trade itself, though prohibition was purported to be imposed against individuals only. But where ample provision is made for carrying on the trade and the trade would continue to flow as before, the fact that certain individuals have been prohibited from taking part in it would not, in any way, go to contravene the provisions of Article 301.

Article 301 safeguards the right of a community to see that the trade between the different parts of India is not hampered in any manner. I do not think that the provisions of Arts. 19 (1) (g) and 301 overlap and are both meant to safeguard the rights of the individual trader, as has been contended for by the learned counsel for the petitioners.

(134) Great reliance was placed by the learned counsel on the case in 1949-2 All ER 755 (C), which is a decision by their Lordships of the Privy Council in an appeal from Australia. Their Lordships were interested in interpreting the provisions of Art. 92 of the Australian Constitution which provides,

> "On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of an internal carriage or ocean navigation, shall be absolutely free."

The Commonwealth of Australia had passed a law nationalising the banking trade and the validity of this Act was challenged on the ground that it contravened the provisions of Art. 92 of the Constitution. Their Lordships held that the business of banking was included among the activities described as "trade, commerce and intercourse", and as these were to be absolutely free, an Act which prohibited the business from being carried on between one State and another was a bad piece of legislation.

Their Lordships relied on previous case decided by them, namely. — 'James v. The Commonwealth of Australia', 1936 AC 578 (U). In this case James was prohibited from taking his dried fruit to another State and their Lordships had held that such a restriction interfered with the freedom of trade and commerce. They emphasised the fact that the word "intercourse" was joint with trade and commerce, and if intercourse between the States is protected, the freedom of one individual citizen from one State to cross over the frontier into another State must also be protected. In case, the Australian Constitution had also separately dealt with the rights of the individual citizen to trade and also the right to inter-State trade itself, the case would have been applicable to our Constitution as well. But the distinction is that in our Constitution the rights of the individual have been separately provided for, and this Article has been placed in a different part of the Constitution altogether.

If the individual citizen had no other right, it could have been said that Article 301 protects the individual's right as well as the flow of the trade itself. But that is not the position. Having exhaustively dealt with the individual's right earlier, it cannot be said that the same rights were again purported to be safeguarded by this Article. This Privy Council case, therefore, is distinguishable on the ground mentioned above.

(135) The same question was previously raised before the Full Bench in Moti Lal's case (A), and while dealing with this part of the case, the Hon'ble Chief Justice observed,

> "The correct interpretation seems to be that Art. 19 lays down the rights of the citizen while Art. 301 deals with how the trade commerce and intercourse is to be carried on between one place and another, whether the two places are situated in two States or are inside the same State."

(136) Besides, the interpretation put on Art. 301 by the learned Counsel for the petitioners would make the Article clearly inconsistent with Art. 19(6) of the Constitution as it stands after the amendment made in 1951. Such an interpretation is to be avoided if it is possible to do so. Article 304(b) does not apply to this case because the previous consent of the President was not obtained before the Bill was introduced in the Legislature. Subsequent consent was admittedly obtained, but that would not affect the matter, as under the proviso to Art. 304(b), previous consent of the President is essential.

(137) For the reasons given above, I find myself unable to accept the contention of the learned counsel for the petitioners on this point either.

(138) It was next argued that sections 7 and 11(2) of the impugned Act are bad pieces of legislation, because they authorise the executive officers of the State to set aside or supersede the provisions of the Motor Vehicles Act.

As far as S. 7 of the impugned Act is concerned, the objection has no force because the Legislature itself has modified certain provisions of the Indian Motor Vehicles Act, and has also specified the matters concerning which the State Government is authorised to pass certain orders. The State Government or its officers have, in no way, been authorised to cancel or modify the previous legislation on the subject and the required modifications have been effected by the Legislature itself in S. 7 of the Act. The position, however, with respect to S. 11(2) is somewhat different. Section 11 (2) is in the following words :

> "Any order made or deemed to be made under this Act shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or any instrument having effect by virtue of such enactment."

Numerous kind of orders can be passed by the State Government and its officers under different provisions of the impugned Act and this sub-section provides that those orders shall have effect notwithstanding any provisions of

any other enactment. This virtually amounts to giving a power to the State Government and its officers to repeal other enactments on the subject and such a power should not have been conferred on the Government or its officers.

The question is really concluded by a decision of a Full Bench of this Court in AIR 1952 All 866 (B). In this case the validity of sections 3, 4 and 6 of the Essential Supplies (Temporary Powers) Act of 1946 was challenged. The Full Bench held that sections 3 and 4 were valid, but declared section 6 as ultra vires the Legislature. The relevant portion of S. 6 of the Essential Supplies Act is word for word the same as the provisions of S. 11(2) of the impugned Act, and the Full Bench held that section to be ultra vires the Legislature because it amounted to an abdication of legislative function in favour of the Government and its officers. This Full Bench case fully covers the question, and I am bound to hold that the provisions of S. 11(2) are ultra vires the Legislature of Uttar Pradesh. But this finding does not affect the result of these writ petitions in any manner.

(139) The next point that was urged was with respect to the invalidity of certain notifications issued under the impugned Act, and the alleged non-compliance with certain provisions of the Act in the actual framing of the schemes under the impugned Act. A number of objections were raised, and I will now proceed to consider those objections after giving the necessary facts.

It is admitted by the parties that on all the routes concerning which schemes have been framed under the impugned Act, State Transport Services as well as private buses were running when the Act was passed, and no new route has been notified on which State buses also had not been running. All the cases, therefore, are governed by the provisions of S. 13 (1) (b) of the impugned Act. This sub-section says:

> "Every route on which the State Road Transport Service was operating on the appointed date and every such service shall for purposes of this Act, be deemed, as the case may be, to be a route specified in a notification under section 3, and the service operating under a scheme duly prepared and published under and in accordance with sections 4 and 5, provided that the State Government publishes in the Official Gazette within fifteen days of the commencement of this Act a scheme as to the aforesaid road transport service providing as far as may be, for all or any of the matters specified in sub-section (2) of section 4 and the scheme so published shall be and be deemed to be the scheme duly confirmed and published under sub-section (3) of section 5 and the route to which it relates shall be called a notified route and the provisions of sections 6 and 7 shall be applicable thereto."

A notification was published by the State Government under S. 13(1)(b) in the U. P. Gazette dated the 12th February, 1951 giving the routes and the State Transport Services operating on those routes on the date immediately preceding the commencement of the impugned Act. This notification only mentioned the situation as it existed on that date, and that situation, as it then prevailed, was the scheme which was notified under section 13 (1) (b). All these routes therefore, have to be deemed to be the routes specified in a notification under Section 3 and the services have to be taken to be operating under a scheme duly prepared and published under and in accordance with provisions of sections 4 and 5 of the impugned Act.

The position, as disclosed in this notification, should be deemed to be the scheme duly confirmed and published under sub-section (3) of section 5, and all these routes shall be taken to be notified routes, and the provisions of sections 6 and 7 of the Act are to apply to this scheme. Section 6 of the Act provides for the alteration or modification of a scheme, and lays down that the procedure mentioned in sections 4 and 5 of the Act shall, so far as can be made applicable, be followed in altering or modifying a scheme as if the alteration or modification were a separate scheme. Another notification however, purporting to be under S. 3, was published with respect to stage carriages in the U. P. Gazette on the 23rd June, 1951 in English and on the 4th July, 1951 in Hindi.

The Hindi notification, according to a previous notification, was to be published on the 20th June, 1951, but it was actually published on the 4th of July, and the English notification of the scheme dated the 20th June, 1951 was published on the 23rd June, 1951. Objections were invited to the scheme thus notified, and it was mentioned that the Governor of U. P. would consider the objections. All the present petitioners filed their objections excepting one D. N. Agarwala, who is the petitioner in Writ Case No. 597 of 1952. The objections were heard by a Deputy Secretary, and the final scheme was published under sub-section (3) of section 5 on the 27th of September 1952 in the U. P. Gazette. The scheme with respect to the contract carriages was dated the 16th of December, 1952 and was published in the U. P. Gazette dated the 20th December, 1952.

The Hindi notification says that it is with respect to the stage carriages, though the English notification says that it is with respect to State carriages. But the scheme actually is and purports to be a scheme for the running of contract carriages. This scheme was made final and published under sub-section (3) of section 5 in the Government Gazette dated the 21st March, 1953.

(140) There was another scheme with respect to a different route concerning which Writ Cases Nos. 397, 504 and 505 of 1953 have been filed, and it was published on the 11th of April, 1953. Objections to this scheme were invited, but the final scheme under sub-section (3) of section 5 has not yet been published, because meanwhile these writ petitions had been filed and the State Government appears to have stayed its hands.

(141) It has been argued that the notification published on the 16th June, 1951 under Section 3 of the Act was not a proper notification as required by the provisions of that section. The relevant portion of the notification is as follows:

> "The Governor of Uttar Pradesh is pleased to declare that the stage carriages services on the routes mentioned below should be run and operated exclusively by the State Government."

The scheme itself was published in the U. P. Gazette dated the 23rd June, 1951. Section 3 of the Act provides that a notification has to be

issued where the State Government is satisfied that it is necessary in the interest of general public and for subserving the common good and then it may declare that the Road Transport services shall be run exclusively by the State Government or in conjunction with others. The objection is that this notification does not say that the State Government is satisfied that it is necessary in the interest of general public and for subserving the common good to run these services exclusively.

But this objection cannot be upheld for two reasons— (1) that it was not only unnecessary to issue the notification under S. 3 at all, but the notification under S. 13(b) having been issued, this notification under section 3 could not legally be issued. Section 3 covers cases of the routes newly proposed to be taken over, and S. 13(b) refers to those routes on which State carriages were already operating when the Act came into force. A notification under S. 13(b) having been issued, the notification under S. 3 should be deemed to have already been issued, and any modification of the scheme could be undertaken under S. 6 of the Act.

A notification actually issued under S. 3 with respect to these routes was not only unnecessary but also illegal. As such, it does not matter what the language of the notification was. Secondly, the notification expressly purports to be under S. 3 of the Act, and it can be presumed that when the Governor agreed to issue the notification, he must have been satisfied that the requirements of S. 3 of the Act have been fulfilled so far as the notification was concerned. The Act does not say that the satisfaction of the State Government should also appear in the notification itself and in view of the specific mention of the section it can be presumed that the State Government was satisfied that it was necessary in the interest of the general public and for subserving the common good to notify the routes.

For both the above reasons, I think that this objection has no force. The subsequent scheme should be taken to be the modification of the previous scheme published under S. 13(b), and this modification could be made under S. 6 of the Act without in any way resorting to the provisions of S. 3. As a matter of fact, there is no provision in the Act for the cancellation of the scheme published under S. 13(b) and the only provision is for modification of that scheme and it is contained in S. 6.

(142) The next objection was that in the scheme, as originally published, objections were invited and it was given out that the Governor will hear the objections on the appointed date, but instead of the Governor hearing the objections, the objections were actually heard by a Deputy Secretary to Government. This objection too appears to have no force, because under S. 5(2) it is the State Government or the prescribed authority which has to consider the objections and either confirm, modify or alter the scheme. A Deputy Secretary of the Department actually heard the objections. Under Art. 154(1), the executive power of the State vests in the Governor and is exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 166(1) of the Constitution provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

The reason why the Governor was mentioned in the notification as the person who would hear the objections appear to be that the officer concerned thought that, as an executive action was to be expressed to be taken in the name of the Governor, it should be mentioned that it is the Governor who would hear the objections. Nobody could have been under any misapprehension that it would be the Governor himself who would hear the objections. The Governor in such matters always acts through the officers subordinate to him, and, in the present case, there was nothing wrong in a Deputy Secretary of the Department hearing the objections, even though it was expressed in the notification that this executive action of the Government would be taken by the Governor.

(143) It was next argued that the final scheme published under sub-section (3) of S. 5 does not say that the objections have been considered by the State Government, and it is, therefore, not known whether any such consideration was actually given, nor have any reasons been given for the decision arrived at on the objections. It is admitted in this case that a Deputy Secretary to Government actually heard the objections in support of their objections and it was after this that the final scheme, as ultimately passed, was notified in the Gazette under sub-section (3) of S. 5. It thus becomes obvious that decisions were taken and the objections must have been considered because the final decision as notified is the decision of the State Government.

As a matter of fact, it appears that the proposed scheme, as originally published, has actually been modified and this fact unmistakably shows that the objections had been considered. The State Government was not bound to supply the reasons to the petitioners for the decisions arrived at after hearing the objections. The decisions actually arrived at are embodied in the final scheme and the facts given above clearly show that the objections of the petitioners were considered by the State Government which finally published the scheme. The State Government is also authorised to act through its Secretaries, and even if it be assumed that the Deputy Secretaries' recommendations were accepted by the State Government, it cannot be said that there was any illegality in this procedure.

It was also argued in this connection that there is some inconsistency between the provisions of S. 5(2) and S. 10 of the Act. Section 5(2) says that the State Government or if the State Government so directs, the prescribed authority shall after having considered the objections either confirm, modify or alter the scheme. Section 10 says that the State Government cannot delegate to an officer or authority subordinate to it the powers conferred upon the Government by the provisions of subsection (2) of S. 5. It was urged that under the provisions of S. 10, the State Government could not delegate its powers to any officer to consider the objections and then either confirm or modify the scheme, whereas the provisions of S. 5(2) confer those powers on the prescribed authority also.

The prescribed authority means the authority appointed by the rules made under this Act, and that authority has been given an independent power in S. 5(2) to consider the objections. If there were such an authority, it

would not be a delegation of powers by the State Government under S. 10 at all. But the right of the prescribed authority to consider the objections is an independent right granted by S. 5(2). Thus there appears to be no real inconsistency between the provisions of sections 5(2) and 10 of the Act. An officer of the State Government can be authorised by the rules framed by the State Government to consider the objections, but the State Government cannot by a notification in the Gazette delegate its powers under this sub-section to any officer.

(144) It was also argued in connection with notification under S. 3 that the same should have been published according to rule 3 in a local newspaper, but the notification was not actually published in any such paper. I have already held that the notification under S. 3 was not only an unnecessary but also an illegal notification. Therefore it can make no difference whether the said notification was published in a local newspaper or not.

(145) In respect to contract carriages, the objection was that the notification itself purported to be concerning stage carriages, and, therefore, we must take it that there was no notification under S. 3 of the Act with respect to contract carriages at all. I have already held that a notice under S. 3 was not required, nor could it legally be issued; but the objection, even as it stands, has no force because the English notification said that it was with respect to the State carriages, and it was only the Hindi notification which said that it was with respect to stage carriages. Article 348(1)(b)(iii) of the Constitution provides that all orders, rules, regulations and bye-laws issued under any law made by the Legislature of a State shall be in the English language.

Preference, therefore, has to be given to the English version of the notification, and the English version was quite correct. There appears to have been a clerical mistake as far as the Hindi version was concerned. But even this mistake in the Hindi version could not have misled anybody because the entire scheme published, which accompanied the notification, was with respect of contract carriages, and the scheme itself said that it was with respect to contract carriages. The notification and the scheme were published together and a reference to the scheme must have shown to everybody that it was with respect to contract carriages. This objection is also without any force.

(146) A reference was made to some cases which laid down that the notifications issued by the State Governments should be read, as they stand, and that they must be strictly construed. I respectfully accept the principle laid down in these cases, but they do not apply to the present case, and I do not consider it necessary to discuss those cases.

(147) The last point argued was that this Act authorises the cancellation of permits granted by the officers of other States, namely, the State of Delhi, and to this extent the Act is ultra vires the U. P. Legislature. This objection also is without substance, because the Act authorises the cancellation of those permits in so far as they authorise the operators to run their buses in the State of Uttar Pradesh, and the State Legislature could very well say that so far the permits granted by the officers of the other States are concerned, they will have no validity as far as the territory included in the State of U. P. is concerned, and the outside permits would to that extent become ineffective.

(148) In the result I am of the opinion that all these writ petitions should be dismissed, but the parties should be ordered to bear their own costs because the petitioners are likely to suffer serious losses after the coming into force of the schemes prepared under the Act.

BY THE COURT:

(149) For the reasons given by us in our separate judgment we dismiss these petitions, but direct that the parties do bear their own costs of these petitions.

(150) We further certify that these cases involve substantial questions of law as to the interpretation of the Constitution within the meaning of Article 132(1).

A/R.G.D. Petitions dismissed.

AIR 1954 ALL. 291 (Vol. 41, C. N. 140)

MALIK C. J. AND V. BHARGAVA J.

Commr. of Income-tax, U. P., Lucknow, Applicant v. Radhaswami Satsang Sabha, Respondent.

Misc. Case No. 186 of 1949, D/- 28-9-1953.

(a) Income-tax Act (1922), S. 66 — Point not arising out of appellate order cannot be allowed to be argued. (Para 16)

Anno: Income-tax Act, S. 66 N. 21.

(b) Income-tax Act (1922), S. 4(3), last part — Satsangis — General public utility.

People belonging to religious sects or communities have been treated as a cross section of the public. The Radhaswami Satsangis are a cross section of the public, being followers of one religion, and a charitable trust for the benefit of Satsangis as such must be deemed to be a trust for an object of a general public utility. Case law Ref. (Paras 16, 30)

Anno: Income-tax Act, S. 4 N. 16, 19.

(c) Evidence Act (1872), S. 57 — Judicial notice — Colonies of Satsangis.

Courts can take judicial notice of the fact that there is a flourishing colony of Satsangis at Agra and there are centres in most of the big cities in U. P., including Allahabad. (Para 19)

Anno: Evid. Act, S. 57 N. 9.

(d) Income-tax Act (1922), S. 4(3), Last para — "General public utility". (Observation of Beaumont C. J. in AIR 1939 Bom 45, Dissented from).

By the words "general public utility" the legislature could not have meant that the trust must be for the benefit of the general public and not a section of the public. Observation of Beaumont C. J. in AIR 1939 Bom 45, Dissented from. (Para 26)

Anno: Income-tax Act, S. 4 N. 19.

(e) Income-tax Act (1922), S. 4(3)(i) and (ia) — Scope and applicability.

Clause (i) of sub-s. (3) of S. 4 applies to cases where the business itself is held under trust for religious or charitable purposes, while clause (ia) applies only to such business as is carried on on behalf of a religious or charitable institution which was not held under trust. (Para 62)

Anno: Income-tax Act, S. 4 N. 20, 21.

(f) Income-tax Act (1922), S. 4(3)(i) — Property.

The word 'property' used in S. 4(3)(i) is used in its widest sense and there is no reason to give it the interpretation that it includes only corporeal property and does not include business which includes not only the assets held by it but also the good will. (Para 61)

Anno: Income-tax Act, S. 4 N. 20.

(g) Income-tax Act (1922), S. 4(3)(ia) — Institution.

Radhaswami Satsang Sabha is clearly an institution having been brought about to effect the purpose and to carry out the objects for which the trust was founded. It is a religious and charitable institution within the meaning of S. 4(3)(ia). 1896 AC 500, Relied on. (Para 63)

Anno: Income-tax Act, S. 4 N. 21.

(h) Income-tax Act (1922), S. 4(3)(i) and (ii) — Dayalbagh Satsang Sabha — Offering to deity Radhaswami Dayal by followers of Radhaswami Sect vest in Sabha — Nature of offerings — Income from industrial and commercial concerns started out of funds, nature of.

The 'bhents' (offerings) made by the followers of the Radhaswami sect of the Dayalbagh school to the deity Radhaswami Dayal in pursuance of the dictates of the faith and in accordance with the constitution of the Dayalbagh Satsang Sabha vest in the Sabha under a legal obligation wholly for religious or charitable purposes of the Sabha but the 'bhents' cannot be said to be income derived from property under S. 4(3)(i) of the Income-tax Act. They will properly come under clause (ii) of that sub-section meaning thereby that they are income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes. (Para 64)

The income derived from industrial and commercial concerns of the Institution is the income from property held under trust wholly for religious or charitable purposes and is exempt from income-tax under S. 4(3)(i) and it is, therefore, not necessary to apply to such income S. 4(3)(ia) of the Act. (Paras 65 and 67)

The starting of industrial and commercial concerns by the Radhaswami Satsang Sabha of Dayalbagh, Agra, out of the funds can in view of its constitution and bye-laws and their origin and character and the conduct and creed of the followers of the Radhaswami faith be held to be in furtherance of its objects of a religious and charitable nature as contemplated by the definition given in explanation to S. 4(3) of the Income-tax Act. (Paras 7 and 66)

Anno: Income-tax Act, S. 4 N. 14, 15, 19, 20.

G. S. Pathak, for Applicant; Kripa Naraian; K. L. Misra, Maheshwari Dayal, B. N. Katju and G. Kumar, for Respondent.

CASES REFERRED:

(A) ('35) AIR 1935 PC 97: 62 Ind App 146 (Prs 3, 9, 16, 32)
(B) (1951) 1951 AC 297: 1951-1 All ER 31 (Prs 18, 38)
(C) (1949) 1949 AC 426: 1949-1 All ER 848 (Prs 20, 38)
(D) (1871) 12 Eq 574: 40 LJ Ch 640 (Pr 21)
(E) (1938) 1938-6 ITR 701 (Pr 22)
(F) ('42) 1942-10 ITR 512 (Cal) (Pr 23)
(G) (1936) 20 Tax Cas 1 (Pr 24)
(H) ('39) AIR 1939 Bom 45: 1938-6 ITR 427 (Pr 26)
(I) ('39) AIR 1939 PC 208: 66 Ind Cas 241 (PC) (Prs 26, 59, 61, 62)
(J) ('44) AIR 1944 PC 88: 71 Ind App 159 (PC) (Prs 26, 27, 41, 49, 61, 62)
(K) ('12) 34 All 468: 14 Ind Cas 698 (Pr 28)
(L) ('50) AIR 1950 All 62: 1949 All LJ 453 (Pr 29)
(M) (1804) 9 Ves Jun 399: 32 ER 656 (Pr 33)
(N) (1891) 1891 AC 531: 61 LJ QB 265 (Prs 34, 40, 41, 50)
(O) (1917) 1917 AC 406: 86 LJ Ch 565 (Pr 39)
(P) (1951) 1951 Ch D 132 (Pr 40)
(Q) ('32) AIR 1932 PC 138: 59 Ind App 206 (PC) (Pr 41)
(R) ('33) AIR 1933 PC 145: 1953-1 ITR 135 (PC) (Pr 42)
(S) (1901) 1901 AC 26: 70 LJ KB 77 (Pr 42)
(T) ('42) AIR 1942 Bom 61: 1942-10 ITR 26 (Pr 45)
(U) ('47) AIR 1947 Bom 382: 49 Bom LR 189 (Pr 46)
(V) (1921) 1921 AC 1: 89 LJ PC 162 (Prs 52, 62)
(W) (1926) 1926 AC 192: 95 LJ KB 356 (Prs 54, 56)
(X) ('44) AIR 1944 Lah 465: 1944-12 ITR 385 (Pr 60)
(Y) ('36) AIR 1936 PC 1: 1935-3 ITR 395 (PC) (Pr 61)
(Z) ('25) AIR 1925 All 115: 47 All 68 (Pr 62)
(Z1) ('26) AIR 1926 Mad 949: 49 Mad 833 (SB) (Pr 62)
(Z2) (1940) 1940 AC 138: 109 LJ PC 22 (Pr 63)
(Z3) (1896) 1896 AC 500: 65 LJ QB 672 (Pr 63)

MALIK C. J.:

This is a reference under S. 66(1), Income-tax Act, made on behalf of the Commissioner of Income-tax against an order made by the Tribunal that the assessee was entitled to exemption under certain provisions of S. 4(3), Income-tax Act.

(2) The assessee is the Dayalbagh Satsang Sabha (hereafter called the Sabha in this judgment). This Sabha is a body registered under the Charitable Societies Registration Act (Act No. 21 of 1860).

(3) It may be necessary here to mention that in the year 1861 a new faith or religion was founded by Swami Shiv Dayal Singh, the followers of which were known as Satsangis to which Hindus, Mohamedans, Parsis or Christians could be initiated provided they were found to be fit and suitable by the spiritual head. The object of the religion, as described by their Lordships of the Judicial Committee in — 'Chhotabhai v. Janan Chandra', AIR 1935 PC 97 at p. 99 (A) was to attain true and perfect salvation by the liberation of the spirit from the bondage of mind and matter which can only be achieved by following the practices prescribed by the religion.

The history of the growth of this new religion is described in the judgment of their Lordships of the Judicial Committee in Chhotabhai's case (A)', but that judgment is mostly concerned with the sect now known as Swamibagh sect. There was, however, a schism in the

year 1907 when the sect with which we are concerned, i.e., Dayalbagh Sect, was founded with Babu Kamta Prasad Sinha as its Guru. The main difference between the Swamibagh and the Dayalbagh sects was in their conception of the position of the Guru. The followers of Swamibagh sect believed that the Sant Satguru was the personification of their deity Radhaswami Dayal (which is the name given to the Supreme Creator) and, consequently all offerings made were held by the Sant Satguru himself. The Dayalbagh sect did not identify the Sant Satguru as Radhaswami Dayal but revered him as a representative of the Supreme Creator on earth who received inspiration from the Creator so that the offerings, made even through the Sant Satguru, did not vest in him personally but were held by him on behalf of the Supreme Creator. The Dayalbagh sect flourished as its Gurus were very capable men who commanded great respect and increased in many ways the activities of the Dayalbagh Satsang with the result that the property now in the possession of the Dayalbagh sect is said to be of considerable value.

After the decision of the Judicial Committee in 'Chhotabhai's case (A)', mentioned above, the Income-tax Department wanted to assess to income-tax the then Sant Satguru Sir Anand Sarup for the entire income of the properties whether vested in the Sabha or held by any other society or institution connected with Dayalbagh.

(4) The Radhaswami Satsang Sabha, as plaintiff filed a suit in the court of the Additional Civil Judge of Agra against the Secretary of State for India in Council and the Commissioner of Income-tax for a declaration that the properties held by the Sabha were held as religious and charitable trust and were not the properties belonging to the Sant Satguru, and the Commissioner could not, therefore, assess him to Income-tax. The Sant Satguru, Sir Anand Sarup, was impleaded as a defendant to the suit and after his death his widow Lady Sohan Bai and his sons were impleaded as his legal representatives. This suit was decreed on 12-8-1938. A First Appeal was filed in this Court by the Secretary of State and the Commissioner of Income-tax which was dismissed and the decree of the lower court was affirmed.

(5) After the decision of the suit by the lower court, the Income-tax Officer of Agra started proceedings against the Sabha for assessment for the year 1936-37 which was followed by assessment for the years 1937-38, 1938-39, 1939-40, 1940-41 and 1941-42. The assessee filed appeals against the assessments before the Appellate Assistant Commissioner who held that the assessee was not entitled to the exemption claimed under S. 4(3), Income-tax Act, though he made certain modifications in the amount assessed. There were appeals filed before the Income-tax Appellate Tribunal, which were dealt with by a common order dated 28-2-1948. The Tribunal held that the Sabha was not assessable to Income-tax and was entitled to claim exemption under Section 4 (3) (1), 4(3) (ia) and 4 (3) (ii) with the result that the orders of assessment passed in all the six years mentioned above were set aside.

(6) The Commissioner thereupon asked for a reference under Section 66 (1), Income-tax Act, and the Tribunal decided to make a reference and has referred to this Court six questions for decision.

(7) The questions referred for decision are set out in para. 20 of the 'Statement of the Case' and are as follows:

"1. Whether the bhents (offerings) made by the followers of the Radhasoami faith of the Dayalbagh school to the deity (Radha Swami Dayal) in pursuance of the dictates of their faith and in accordance with the constitution of the Sabha vest in the Sabha under a legal obligation wholly for religious and charitable purposes within the meaning of Section 4 (3) (i), Income-tax Act?

2. Whether in the circumstances of the case set forth in the statement of case, the income derived by the respondent Sabha from bhents and received by the Sabha under the circumstances mentioned in question No. 1 is also exempt from taxation under Section 4 (3) (ii) as being solely applicable to charitable and religious purposes?

3. Whether in the circumstances stated in the statement of case, the starting of industrial and commercial concerns by the Radha Swami Satsang Sabha of Dayalbagh, Agra, out of the funds can in view of its constitution and bye-laws and their origin and character and the conduct and creed of the followers of the Radhaswami faith be held to be in furtherance of its objects of a religious and charitable nature as contemplated by definition given in Explanation to Section 4 (3), Income-tax Act?

4. Whether the income derived from concerns mentioned in (3) above is income derived from property held under a legal obligation for religious and charitable purposes and as such exempt from taxation under Section 4 (3) (i) of the Act?

5. Whether the income derived from concerns mentioned in (3) above is income derived from business carried on by the Sabha as a charitable and religious body in the course of carrying out its primary purposes of a religious or charitable nature to be applied solely to those purposes and hence also exempt under S. 4 (3) (ia), Income-tax Act?

6. Whether as held by the Tribunal the income which was the subject matter of the assessments relating to the years 1939-40, 1940-41, 1941-42 was already exempt under Section 4 (3) (i) and the addition of S. 4(3) (ia) was only made by the Legislature by way of an amplification of the scope of the exemption under S. 4 (3) (i) and as such S. 4 (3) (ia) could retrospectively apply to the assessments relating to the aforesaid years?"

(8) It would appear from these questions, and the fact has been admitted by Mr. Pathak, learned counsel for the Commissioner, & learned counsel for the assessee, that the questions relate only to the bhent income and the income from certain industrial and commercial concerns and do not relate to income from any other properties that the Sabha might possess. The first two questions relate to 'bhent' income. We shall deal with the question as to what this income is later in this judgment. Questions 3 to 5 relate to income from industrial and commercial concerns. The sixth question is the general question as to the effect of the amendment made in the year 1939 and the addition of the provision (ia)(a) and (b) by the Amending Act of 1939 to sub-section (3) of Sec. 4.

The question has been badly framed and it does not clearly bring out the meaning.

(9) We have already said that the earlier history of the Radha Swami Satsang, before it broke into two sects known as the Swamibagh sect and the Dayalbagh sect, is given in the judgment of their Lordships of the Judicial Committee in — 'Chhotabhai's case (A)'. The later history and the way in which the Dayalbagh sect has grown up and developed and the ideas and tenets of the faith are given in the judgment of the High Court in the suit brought by the Sabha against the Secretary of State and the Commissioner of Income-tax, the judgment being printed in our paper-book at page 202.

(10) It is not necessary for us to go into the history of the growth of this sect in any detail, nor is it necessary to consider how far that judgment can be treated as having a binding effect in these proceedings, as both the Appellate Tribunal as well as learned counsel for the parties have relied on this judgment and have said that even though the judgment may not have a binding effect, it is entitled to great respect and they were prepared to accept the facts as found by this Court.

(11) The Tribunal relied on this judgment for the purpose of finding that the properties vested in the Sabha. The finding recorded by them is in these words

> "We therefore in respectful agreement with the High Court hold that all the properties held by the Sabha vested in the Sabha and not in the Guru for the time being."

This finding is accepted now and is not challenged by any party though it might have been challenged before the Tribunal. The Tribunal also found that the Sabha is a religious and charitable body. This finding, though the matter has not been referred to us in any of the questions mentioned above, has been strenuously challenged by learned counsel for the Commissioner.

(12) Learned counsel has urged that many of the objects of the Sabha do not come under the meaning of the word "charity", and the Satsangis are not a sect or community so that any charitable object for the benefit of the Satsangis cannot be deemed to be an object of general public utility. As a matter of fact greater part of the argument of learned counsel has centred round these two points.

(13) It would probably be convenient to deal with these two points before we pass to the other points that arise in the case, but it may be useful at this stage to say that the Tribunal has summarised its findings in para 19 of the 'Statement of the Case', on the basis of which it wants our decision on the questions referred to us in para 20.

The first finding mentioned in para 19 is—

> "That the respondent Sabha is a religious and charitable society"

and the sixth finding is—

> "That the activities were intended to ultimately ameliorate the condition and the welfare of the Satsangis a section of the public and to improve their mental, educational and economic conditions and as such were charitable purposes within the meaning of that term as defined at the end of S. 4, Income-tax Act."

(14) Taking up the first question, whether a trust created for the benefit of the Satsangis can be deemed to be a trust for charitable objects in the sense that it is for the public benefit, the whole argument of learned counsel, though addressed at great length, centres round only one submission that no one can be a Satsangi who is not initiated by the Sant Satguru and he is, therefore, the nexus connecting the Satsangis with one another and the Satsangis must, therefore, be deemed to be a group of individuals selected by the Sant Satguru and not a cross section of the public. An attempt has been made to reinforce this argument by reference to various cases relating to charities created for the benefit of clubs, or employees of particular firms or companies or members of connected families, and the cases relating to religious sects and communities have been attempted to be distinguished on the ground that the conception of the Guru or the leader vitally differs between other sects and followers of the Radhaswami faith.

(15) Before, however, we deal with this question we may mention that in the assessment proceedings for the year 1936-37, which was the only year in which this aspect was discussed, as in the other following years after the first assessment the liability of the Sabha to assessment was assumed, the following matters were conceded at the outset:

> "(i) that the word 'Property' in S. 4(3)(i) as it then stood does not bear the restricted meaning that it bears in S. 9 of the Act but includes securities, a business or share in business and
>
> (ii) that an object may be of 'general public utility' within the meaning of the said definition even though the benefit goes to a particular sect or community, viz., Satsangis only as against the general public."

When faced with these admissions and the fact that the point was not raised before the Tribunal, learned counsel for the Commissioner fell back on the argument that it was a pure question of law, and the burden of proving that the Satsangis were a sect or community and thus a part of the general public was still on the assessee, in spite of the concession made before the Income-tax Officer which made it unnecessary for the assessee to prove any facts to establish that it was a body which could be called a cross section of the public.

(16) It would be enough to reject this contention on the ground that the point does not arise out of the Appellate Order but we may briefly indicate that in our view the point has no substance. The whole basis of the argument is the remark in 'Chhotabhai's case (A)', mentioned above at page 99 that—

> "All persons, whether Hindus, Mahomedans, Parsis or Christians, can be initiated into this religion provided they are found to be fit and suitable by the spiritual head or 'Guru', and when initiated, they are called 'Satsangis'".

Learned counsel failed to see that these observations were made by their Lordships of the Judicial Committee only as regards fresh converts to the Satsangi faith. This faith or religion has now existed since 1861 and since its foundation there are many Satsangis who are not converts to this faith but they are Satsangis by birth. Their Lordships of the Judicial Committee did not say that that was the only way in which one could become a Sat-

sangi and the passage occurs in the paragraph dealing with the foundation or the starting of the society in the year 1861. Had there been no concession it might have been possible for the assessee to give evidence on the point, and we are not in a position, therefore, to say that it is a pure question of law and give a decision in favour of the Commissioner.

The fact that people belonging to religious sects or communities have been treated as a cross section of the public is not disputed. Cases of this kind are given in Halsbury's Laws of England, Second Edition, Vol. 4, page 113, para 148.

(17) In England the question whether a trust created for the benefit of a group of people can be treated as beneficial to the community has occupied the attention of the Courts for a large number of years and all the cases on the point are not easily reconcilable. The Courts have, however, for their guidance evolved certain tests. The tests deducible from Volume 4 of Halsbury's Laws of England are as follows:

In para 146 dealing with the question that the purpose must be of public nature, it is said:

> "In ascertaining whether a purpose is public or private, the salient point to be considered is whether the class to be benefited, or from which the beneficiaries are to be selected, constitutes a substantial body of the public."

In para 170 negative test is also given that gifts for the benefit of particular individuals or a fluctuating body of particular individuals, whether named by the testator or to be selected by the trustees or by any other person, are not gifts beneficial to the community.

The law is summarised in the Footnote (i) at page 128, when after giving reference to various cases it is said that—

> "Both classes of cases deal with gifts to sections of the public, the former being held not charitable and the latter charitable. It is submitted that a gift to a section of the public is not charitable if the section is so small that the gift amounts to a gift to specified individuals, even though the motive of the donor may be to accomplish a purpose which would be legally charitable if the objects of his bounty had not been so restricted."

(18) In 'Oppenheim v. Tobacco Securities Trust Co. Ltd.', 1951 AC 297 (B), Lord Simonds has laid down the test as follows:

> "Then the question is whether that class of persons can be regarded as such a "section of the community" as to satisfy the test of public benefit. These words "section of the community" have not special sanctity, but they conveniently indicate first, that the possible (I emphasise the word "possible) beneficiaries must not be numerically negligible, and secondly that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual ..... A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositus they are neither the community nor a section of the community for charitable purposes."

In the same judgment Lord MacDermott has laid down the test as follows:

> "The test thus propounded focuses upon the common quality which unites those within the class concerned and asks whether that quality is essentially impersonal or essentially personal. If the former, the class will rank as a section of the public and the trust will have the element common to and necessary for all legal charities; but, if the latter, the trust will be private and not charitable."

In the same case Lord Normand pointed out at page 309 the difficulty of defining the attribute or qualification which differentiates a section of the public from an aggregate of persons which is not a section of the public and has observed that by reason of the difficulty—

> "all attempts to define the public element in charitable trusts have foundered."

He has pointed out that the definition depends entirely on the attribute by which the selection of the class is determined.

(19) It is not necessary to multiply authorities on the point. On the observations made in this judgment the argument is based that all members of the Radhaswami faith must be deemed to be connected with the Sant Satguru and it must, therefore, be held that he is the nexus and the Satsangis are a group of individuals who have been selected by him and are inter-connected through him. To some extent this would be true of every religious community or faith and the smaller or more recent the group the closer, probably, would be the connection. As we have already said, the argument of learned counsel is based on the method of initiation of fresh converts to the faith and does not take into account those who have already been converted since 1861 when the faith was found or of the descendants of such converts. We think, we can take judicial notice of the fact that there is a flourishing colony of Satsangis at Agra and there are centres in most of the big cities in U. P. including Allahabad. As the point was not raised we have no idea as to the number of people who might be following this faith but there is nothing to indicate that the number is so limited that it can be said that the Satsangis are numerically negligible, nor does the fact that converts are initiated by the Guru show that the Satsangis, who are probably thousands in number, can be said to be a group of persons selected by the Guru and must, therefore, be deemed to be a group of individuals collected by him.

(20) Great stress was laid by Mr. Pathak on the decision of the House of Lords in — 'Gilmour v. Coats', 1949 AC 426 (C). There a trust was created for the benefit of the nuns of the Carmelite Priories in the County of London, who were a community of cloistered nuns who devoted their time to prayer, contemplation, penance and self-sanctification within their Convent with the object of gaining salvation for themselves. It was held that the trust created for their benefit could not be deemed to be a trust for charitable purposes in the sense that it was not for the benefit of the public. The members of the Radhaswami faith cannot fairly be compared with the nuns of a priory and they may more appropriately be compared with the members of the Roman Catholic faith, though they may be much less numerically than the Roman Catholics, inasmuch as Roman Catholics recognise as their religious head the Pope and owe allegiance to him just as Satsangis owe their allegiance to the Sant Satguru and recognise him as their religious head.

(21) The other cases cited by Mr. Pathak are the following : — 'Cocks v. Manners', (1871) 12 Eq 574 (D) in which there was a trust created for the benefit of Domincan convent at C and it was held that it was a voluntary association of individuals and the trust was not for public benefit. The case is similar to the case of the nuns of Carmelite Priory.

(22) In the 'Trustees of Wernher's Charitable Trust v. Commrs. of Inland Revenue', 1938-6 ITR 701 (E) a trust was created to provide a playground for the employees of Electrolux Company Limited, and it was held that it was not a trust for public benefit but only for the benefit of the employees of a particular company.

(23) In 'Re Mercantile Bank of India (Agency) Ltd.', 1942-10 ITR 512 (Cal) (F), a trust for the benefit of persons who had been and were connected with Andrew Yule and Co., Ltd. was held by a bench of the Calcutta High Court not to be for public purposes. The bench followed certain English decisions relating to the cases of trust for the benefit of past or present employees of a company.

(24) In 'Scottish Flying Club Ltd. v. Commrs. of Inland Revenue', (1935) 20 Tax Cas 1 at p. 11 (G) was a trust created for the benefit of the members of a flying club and it was not held to be a trust for public purposes.

(25) None of these cases can be held to be applicable to the facts of the case before us where the only tie between the beneficiaries is that they are followers of a common religion.

(26) Before we leave this point we may mention that stress has also been laid on the word "general" in the definition of the words "charitable purpose" at the end of S. 4, Indian Income-tax Act. Charitable purpose has been defined as "including relief of the poor, education, medical relief, and the advancement of any other object of general public utility". Stress is laid on the word "general" and the argument is that it defines the word "public" and a trust to be for charitable purposes is intended to be for the benefit of the general public and any trust which is not for the benefit of the general public is not a charitable purpose within the meaning of the Act.

Reliance was placed in this connection on the observations of Beaumont C. J. in the case of — 'Commr. of Income-tax, Bombay v. Grain Merchants' Association, Bombay', AIR 1939 Bom 45 (H), which are—

> "In my opinion an object of general public utility means an object of public utility which is available to the general public as distinct from any section of the public."

With great respect to the learned Chief Justice we find it difficult to accept this view.

A reference to S. 4, Income-tax Act, itself would show that by the words "general public utility" the legislature could not have meant that the trust must be for the benefit of the general public and not a section of the public. Section 4(3)(ia) (b) of this Act provides that any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and the work in connection with the business is mainly carried on by the beneficiaries of the institution shall be excluded from the total income of the assessee. If the words "general public" excluded a section of the public, then the words "carried on by the beneficiaries of the institution" would be meaningless as the general public would be the beneficiaries of the institution and whoever carries it on would be part of the general public.

Trusts are generally created for the benefit of a section of community in which the creator of the trust feels interested and which he intends to benefit and the meaning given by learned counsel would mean that the income of no trust can be exempt from taxation unless it is a trust which is meant for the humanity as a whole and not for any section of that humanity howsoever numerous and by whatever classification it may be distinguished. Such a meaning, to our minds, was never intended by the words and the legislature probably intended, after having made provision for relief of the poor, education and medical relief, to provide a general head under which all charities, which are considered in this country to be of general utility to the public including a cross section of the public, may also get the exemption.

That this submission of learned counsel has no force may also be deduced from the two latest decisions of the Privy Council relating to trusts which can by no means be said to be for the benefit of the public at large, as opposed to a section of the public. In — 'Tribune Press, Lahore v. Commr. of Income-tax, Punjab', AIR 1939 PC 208 (I) their Lordships pointed out that the object of the paper may fairly be described as the object of supplying the Province with an organ of educated public opinion and it was held that that was an object of general public utility. Dealing with this case their Lordships observed in the — 'All India Spinners' Association, Mirzapur, Ahmedabad v. Commr. of Income-tax', AIR 1944 PC 88 at p. 93 (J) that—

> "These words, their Lordships think, would exclude the object of private gain, such as an undertaking for commercial profit, though all the same it would subserve general public utility."

It would appear from these remarks that the words "general public utility" were understood as "opposed to private gain."

(27) In the 'All India Spinners' Association of Mirzapur, Ahmedabad's case (J), a trust was created for the weaving of khaddar by the use of handlooms and for popularising its manufacture and use and it was held that this was a general public purpose.

(28) In 'Puran Atal v. Darshan Das', 34 All 468 (K), a bench of this Court held that a trust for the benefit of the fakirs of the Nanakshahi sect was a public trust and it was observed :

> "Even if we assume that the main purpose of the trust was to support 'Nanakshahi fakirs' and to spread the religion founded by Nanak, we think that the trust was for a "public purpose" within the meaning of the section (S. 539, Civil P. C., 1881, now S. 92, Civil P. C., 1908)".

(29) In 'Farman Ali Khan v. Mohd. Raza Khan', AIR 1950 All 62 at p. 66 (L), an attempt was made to distinguish a private trust from a public trust and it was held that

> "A private trust has been defined as a trust only for the private convenience and support of individuals or families while a public

trust may be for the benefit of the public at large or some portion of it answering a particular description, the object being to benefit an uncertain and fluctuating body and the trust being of a permanent and indefinite character."

(30) Judged by the test laid down in the last case or the test laid down in English cases it must be held that the Satsangis are a cross section of the public, being followers of one religion, and a charitable trust for the benefit of Satsangis as such must be deemed to be a trust for an object of a general public utility.

(31) The next question on which arguments have been advanced at some length is whether the properties held by the Sabha can be said to be held for a religious and charitable object. Again, as we have pointed out already, the finding on the point is against the Commissioner and one fact has not been doubted or disputed, and which has clearly been found by the Tribunal, that neither the income from 'bhent' nor the income derived from business is divisible among the Satsangis and no part of such income is payable either to them or to the Sant Satgurus. Even if at any time the Sabha happens to be dissolved the entire property must go under the Charitable and Religious Societies Act and under the Constitution of the Sabha itself to similar charitable objects.

The findings recorded by the Tribunal in its appellate order on the point are as follows:

"The industrial and commercial concerns run by the Sabha are, as is admitted by him (Appellate Assistant Commissioner), not run for individual profit nor are these profits divided among the members."

"The whole conduct of Sant Satgurus of the Dayalbagh School since the Sabha came into existence goes to show that they claimed no interest in the Sabha's properties or in the offerings made to the Sabha and never exercised any power of disposal or appropriation in respect of them."

At another place the Tribunal has found that

"All these institutions were established in the interest of the Satsangis of the Dayalbagh section and for the advancement of the objects of Radhaswami Satsang. No part of the earnings of the Sabha through such institutions has been applied for the purpose of the individual profit of any Satsangi. They have been all appropriated by the Sabha as a body. No division of profits amongst its members has taken place. No part of profits has even been paid to the Sant Satguru."

And as regards the property and funds on the dissolution of the Sabha the Tribunal has held that—

"under the statutory provisions of Ss. 13 and 14, Societies Registration Act (21 of 1860) the possibilities of a dissolution of the Sabha are rendered remote and even if dissolution takes place any property left after the satisfaction of the Sabha's debts and liabilities is not to be distributed amongst the members of the Sabha but is to be given to some other society to be determined by votes of not less than 3/5th of the members present personally or by proxy at the time of the dissolution or in default thereof by such courts as are constituted under the Act."

(32) The fact, therefore, that all the properties that vest in the Sabha vest under an obligation cannot be doubted and has clearly been found. At one stage Mr. Pathak, learned counsel for the Commissioner, urged that the properties neither belong to the Sabha nor are vested in it and are all vested in the Guru as his personal property and he relied upon the decision of the Privy Council in 'Chhotabhai's case (A)' but, when faced with the finding of the Tribunal and the fact that if the entire income is of the Sant Satguru then the Sabha could not be made taxable, learned counsel dropped the point and conceded that for the purposes of this case it may be treated that the properties vested in the Sabha.

(33) The argument, however, was that the objects for which the properties are held by the Sabha under an obligation are not all charitable and religious objects and in that connection learned counsel cited a large number of English cases to show what charity means in England. The first case cited by him is — 'Morice v. Bishop of Durham', (1804) 9 Ves Jun 399 (M).

That case is not very helpful. The point decided in that case was that a bequest for such objects of benevolence and liberality as the trustee in his own discretion shall most approve is not valid as the objects are uncertain but an exception is made in cases of a trust for charity where even if the particular objects of charity are not specified the trust will not fail. It may, however, be pointed out that in that case it was held that the list given in the preamble has not been considered to be exhaustive and even from the time of Elizabeth onwards the Court of Chancery included objects analogous to those enumerated within the term charitable. (See also Keeton's Law of Trust, 4th edn., 133).

(34) 'The Income-tax Commissioners v. Pemsel', 1891 AC 531 at p. 583 (N) is the famous decision by Lord Macnaghten in which charity was divided into four distinct heads. He said—

"'Charity' in its legal sense comprises four principal divisions; trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

This classification has been followed in almost all the cases in England since Lord Macnaghten's judgment, though there has been some difference of opinion as to what purposes can be considered to be beneficial to the community.

(35) In another part of the judgment Lord Macnaghten pointed out that the Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable.

(36) Lord Macnaghten said about this last head that

"The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as, indeed, every charity that deserves the name must do either directly or indirectly."

(37) In England the Judges had to be guided in their test as to what is beneficial to the community by the objects enumerated in the

preamble to the Statute of Elizabeth (43 Eliz. c. 4). It is not necessary to quote here those words. They are quoted in Halsbury's Laws of England, Hailsham Edition, Vol. 4, page 109, paragraph 144. The Courts having considered themselves bound by this preamble were placed in a position of some difficulty and, as has been remarked by them, the law as to what is beneficial to the community is in England more historical and empirical than logical.

(38) In 'Gilmour v. Coats', 1949 AC 426 (C) when discussing the various decisions as to what is charitable and what is not Lord Simonds was forced to remark that

> "it is, I think, conspicuously true of the law of charity that it has been built up not logically but empirically."

And in 'Oppenheim v. Tobacco Securities Trust Co. Ltd. (B)', cited above, Lord Normand said—

> "I remind your Lordships of the observations of Lord Simonds in 'Gilmour v. Coats (C)', that the law of charity has been built up not logically but empirically. It is this empirical development which has so often baffled efforts to reduce the law to systematized definitions."

(39) The other cases cited by learned counsel are: — 'Bowman v. Secular Society Ltd.', 1917 AC 406 (O) in which Lord Parker of Waddington observed that benevolent purposes were not charitable purposes and a trust for charitable or benevolent purpose was vague for uncertainty.

(40) In 'Re Town and Country Planning Act, 1947; 'Crystal Place Trustees v. Minister of Town and Country Planning', 1951 Ch D 132 (P) the claim of the society to exemption from payment of income-tax was resisted mainly on the ground that by reason of certain privileges which the members of the society possessed the objects of the society were for the benefit of the members rather than for public welfare for the improvement of agriculture.

The learned Judge Danckwarts J. held as follows :

> "In those circumstances, it seems to me that the intention of the Act (Crystal Place Act, 1914) in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees. It appears to me that the promotion of industry or commerce in general in such circumstances is a public purpose of a charitable nature within the fourth class in the enumeration of charitable purposes contained in 1891 AC 531 at p. 583 (N)."

The only support which learned counsel wanted to derive from this case was that promotion of industry or commerce in general may be a public purpose but that promotion of trade or industry in the interest of individuals will not be a public purpose. It was argued that the object being to promote trade and industry in the interest of the Satsangis who must be treated as individuals and not a cross section of the public the trust was not for a public purpose.

(41) It is not necessary for us to go into greater detail as to what are considered to be charitable objects in England, being considered to be beneficial to the community. Apart from the observations made by Lord Simonds and Lord Normand quoted above that the law in England is not logical, we have the observatons of their Lordships of the Judicial Committee that the law is not to be applied by the courts in India, in the — 'All India Spinners' Association case of Mirzapur, Ahmedabad (J)', cited above. In that case at page 91 their Lordships said—

> "It is now recognised that the Indian Act must be construed on its actual words, and is not to be governed by English decisions on the topic. The English decisions on the law of charities are not based on definite and precise statutory provisions. They have been developed in the course of more than three centuries by the Chancery Courts. The Act of 43 Elizabeth (1601) contained in a preamble a list of charitable objects which fell within the Act, and this was taken as a sort of chart or scheme which the court adopted as a ground-work for developing the law. In doing so they made liberal use of analogies, so that the modern English law can only be ascertained by considering a mass of particular decisions, often difficult to reconcile. It is true that S. 4 sub-section (3) of the Act has largely been influenced by Lord Macnaghten's definition of charity in — 'Income-tax Commissioners v. Pemsel', (N) but that definition has no statutory authority and is not precisely followed in the most material particular; the words of the section are for "the advancement of any other object of general public utility," whereas Lord Macnaghten's words were "other purposes beneficial to the community." The difference in language, particularly the inclusion in the Indian Act of the word "public" is of importance. The Indian Act gives a clear and succinct definition which must be construed according to its actual language and meaning. English decisions have no binding authority on its construction, and though they may sometimes afford help or guidance, cannot relieve the Indian courts from their responsibility of applying the language of the Act to the particular circumstances that emerge under conditions of Indian life."

This warning of their Lordships of the Judicial Committee has come in a series of decisions. In the — Commr. of Income-tax v. Shaw Wallace & Co.', A. I. R. 1932 P. C. 138 at P. 140 (Q) their Lordships said—

> "The Indian Act is not in pari materia; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under these conditions their Lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think that the solution of the problem lies very near the surface of the Act, and depends mainly on general considerations."

(42) In — 'Raja Bejoy Singh Dudhuria v. Commissioner of Income-tax, Bengal', A.I. R. 1933 PC 145 (R) their Lordships of the Judicial Committee agreed with the learned Chief Justice of the Calcutta High Court that a passage quoted from a judgment of Lord Davey in — 'London County Council v. Attorney-General', 1901 A. C. 26 (S) dealing with the Imperial Income-tax Act of 1842 was inapplic-

able in the interpretation of Indian Act and pointed out that:

"they have had occasion to show more than once of late, that the invocation of the Imperial Income Tax Code and of decisions pronounced upon it is apt to be very misleading in the interpretation of Indian Income-tax legislation which is framed on other and fortunately much simpler lines."

(43) Coming now to the objects of the trust, we have already said that the sect known as the Radhaswami Satsang was founded in the year 1861. At the time when the tenets of the faith were preached by the first Guru there was nothing in writing and in course of years as the sect developed its doctrines came to be more and more clarified. Ultimately after the schism, which divided the sect into two distinct communities — Swami Bagh sect and the Dayal Bagh sect — the Dayalbagh sect, under its able Gurus, attracted a large number of followers who dedicated to the cause of the sect properties which the Gurus belonging to the Dayalbagh sect treated as trust properties, and not for their personal use, and ultimately it became necessary to have a body constituted in whom all these properties should vest and who should be in charge of the management of the properties.

Thus the Sabha was founded in 1910 and came to be registered under the Charitable Societies Registration Act (No. 21 of 1860). The rules relating to the Sabha originally passed at the meeting of 29-12-1910, are quoted in para 15 of the appellate order of the Tribunal. Clause (b) of the Rules is important and is to the following effect:

"To take possession of all the movable and immovable properties which have upto this time been received as offerings made to Radhaswami Dayal or which may be received as offerings in future or which may be acquired for Radhaswami Satsang or which may be given to Satsangis aforesaid by way of offerings for the purposes of advancement of the object of Radhaswami Satsang and to protect and manage the same."

These rules were amended from time to time and the rules on which the Tribunal relied are of 1930 and are in the same paragraph of the appellate order and are to the following effect:

"(a) ....

(b) To collect, preserve and administer the properties movable and immovable that have been or may hereafter be dedicated to Radhaswami Satsang and to deal with and apply the same to the furtherance of the religious and charitable objects of that Satsang."

(44) These rules were further amended in the year 1937 and 1940 but for some reason not clear to us the Tribunal has given its decision on the basis of the rules in force in 1930. It does not seem to have been challenged before the Tribunal nor was it suggested to us that the amendments of 1937 and 1940 were not genuine and were not intended to be given effect to. The reason why the amendments of 1937 and 1940 were not relied on was that by that time the question whether the Sabha was liable to payment of income-tax had already arisen and those amendments were made in the constitution to clarify the position of the Sabha to escape assessment of income-tax (see para 16 of the Appellate Order of the Tribunal). If the amendments were genuine and were actually made in the rules governing the Sabha, then to all assessments after the years of the amendment the rules as amended were clearly applicable. It is not, however, necessary for us to refer to the amendments of 1937 and 1940 as they were really not amendments to the rules but merely clarification of what the rules of 1930 already contained.

One fact that is, however, important is that even in the rules in force in 1930 there was a clear provision that the entire income of the properties moveable and immoveable was to be utilised for the furtherance of the "religious and charitable objects" of the Satsang. Even if, therefore it is assumed that the Satsang had some objects which were not religious and charitable, the rules being clear that the income is to be utilised only for religious and charitable objects, any application of the income for any purpose, which is not religious or charitable, will not be in accordance with the rules. In this connection we may refer to two cases, both of the Bombay High Court.

(45) In the 'Tilak Jubilee National Trust Fund, Bombay, in re', AIR 1942 Bom 61 (T), Beaumont C. J. said as follows:

"Assuming the objects specified in sub-cl. (a) to be charitable, this is not the case of a gift for such charitable purposes as the Managing Committee may think fit. A gift of that sort would, no doubt, be good because the Managing Committee would be bound to keep within the ambit of charity, and if they go beyond the legal boundary, they can be controlled by the Court."

Kania J. expressed his opinion in these words:

"When there is a general charitable intention, the Court will uphold it, and if within that limit discretion is given to the trustees to select an object the trust will not fail because of the discretion so given. If a trustee selects an object, which is not charitable according to law, the Court can intervene and rectify the error."

(46) 'In re Vallabhadas Karsondas Natha', AIR 1947 Bom 382 (U) where the trust deed provided that the property was dedicated for religious and charitable objects such as, and then eight objects were enumerated, some of which were neither religious nor charitable, Stone C. J., dealing with the objection that the whole trust was invalid, said:

"the material words are that what is settled is to be dedicated 'for ever by me for religious and charitable objects, such as': and then are set out the eight objects, and the question is whether those eight objects predominate and govern the preceding trust or whether they are to be regarded as illustrative of the type of religious or charitable objects to which the trustees may apply the funds. In my opinion, the latter is the correct view, ..."

Chagla J. expressed himself in this way:

"The dedication is to religious and charitable objects and the trustees have no discretion to apply any of the trust income except to religious and charitable objects. If any of the eight objects which are specified as and by way of illustration do not fall within the category of religious and charitable objects, then the trustees must discard such objects and apply the trust income only to religious and charitable objects."

Mr. Pathak's argument is that these two decisions are distinguishable as Satsangis considered all the objects of the Sabha to be religious and charitable and the rules, therefore, must be interpreted to enjoin on the Sabha the duty

of administering the funds for the benefit of all the objects, whether religious and charitable or not. We do not think this argument has any substance. In our view, this case is a much stronger case than the Bombay decision — 'In re Vallabhadas (U)'. In the case before us, even the objects are not enumerated and all that is said is that the property is to be utilised in furtherance of the religious and charitable objects of the Satsang and if any object does not come in the category of being religious and charitable then the Sabha cannot utilise the income for that purpose.

(47) We may here mention, as we have already done before, that we are concerned only with two types of income, the 'bhent' income and the income from business. As a matter of fact the Tribunal pointed out that the arguments before the Tribunal were confined only to these two types of income and there were certain other miscellaneous items about which no arguments were advanced.

(48) 'Bhent' income is the offering made to the Supreme Creator Radhaswami Dayal or to the Sant Satguru as representing him on earth, or to the Sabha itself, for the purpose of being utilised for the religious and charitable objects of the Satsang. Bye-law 18, which refers to it (quoted in para 6 of the Appellate Order of the Tribunal) is as follows:

> "All offerings, movable and immovable, howsoever and through whomsoever presented to the Supreme Creator Radhaswami Dayal or to the Radhaswami Satsang Sabha, and all properties, movable and immovable, acquired or that may be handed over or placed in the charge of the Sant Satguru, the Executive Committee or any other Committee or any individual Member, Manager or Agent, or that may come in possession of any one of them in their official capacity as such, shall always remain vested in the Sabha."

And to this property which remains vested in the Sabha is applicable the rule which requires the Sabha to utilise it for the religious and charitable objects of the Satsang.

(49) When Sir Anand Sarup became the Sant Satguru he started certain educational institutions, hospitals, dispensaries, etc., and also certain model industries, which have brought a lot of income to the Sabha. It is admitted, as we have already said, that not a pie out of this income has either been given to any member of the Sabha or to the Sant Satguru, nor have the profits been ever divided between them. A part of the income thus made, however, has been allowed to accumulate and we shall deal with that question when we deal with Mr. Pathak's argument, whether the income unspent can be said to be income which has been applied.

The Tribunal's finding on this part of the activity of the Sabha is spread out at several places in its order but before we come to it we might mention that the clause relating to objects in the Constitution of 1930, was as follows:

> "To regulate the conduct of business pertaining to the Satsangis i.e. the followers of the Radhaswami faith and the institutions of the Radhaswami faith for the conduct of religious services, i.e. the Central Satsangis and Branch Satsangis."

was amended in 1937 to the following effect:

> "(a) To regulate the conduct of the followers of Radhaswami faith and to establish, run and subsidise religious, educational and industrial institutions with a view to advance the cause of religious, mental, moral and technical education amongst the followers of the Radhaswami faith solely with object of doing public good and not for purposes of profit."

In the year 1940 this clause was further amended and stood thereafter as follows:

> "To regulate the conduct of the followers of the Radhaswami faith and to establish, run and subsidise religious, educational, and industrial institutions solely with a view to advance the cause of religious, mental, moral and technical education with the object of doing public good."

And a new cl. (b) was added to the following effect: "to remove unemployment."

Even though the amendments of 1937 and 1940 came later, the facts as dealt with by the Tribunal and the evidence of respectable witnesses which the Tribunal has believed made it conclude and find that from the very beginning the objects with which the income was utilised by the Sabha were for the advancement of religious, mental, moral and technical education of the followers of the Radhaswami faith and not for purposes of profit.

In para 11 of the Appellate Order the Tribunal has found that the Sabha was a religious and charitable body, and has said:

> "It was religious inasmuch as it involved the propagation of the Radhaswami faith by maintaining institutions for the conduct of the religious services and for the regulation of the conduct of the Satsangis in consonance with the tenets of that faith. It was charitable inasmuch as it also intended to ameliorate the condition of the Satsangis in various phases of their life moral, mental, educational, intellectual, industrial and economic ..... The Sabha in furtherance of such objects provided support to the indigent and needy Satsangis. It started educational institutions for their children and opened industrial concerns and factories and thereby reduced unemployment among them to improve their economic life. It started league of youths for rendering humanitarian services to the Satsangis. All this is established from the mass of unrebutted evidence of a large number of respectable Satsangis on the record."

A criticism is, however, levelled by learned counsel on the word "economic" in the quotation given above and the argument is that economic amelioration of the condition of the Satsangis does not mean merely giving help to the poor and it might include also the object of making the rich Satsangis richer. We do not think that this is a fair criticism in view of the finding that the income from business is not divisible amongst the Satsangis, nor can it be used by or has ever been given away to the Sant Satguru or to any Satsangis. From the Appellate Order of the Tribunal it is clear that this economic amelioration of the condition of the Satsangis was intended to be effected in three ways: (1) by giving them training; (2) by setting up model industries; and (3) by reducing unemployment. We have already quoted the passage from para 11 of the Appellate Order of the Tribunal where the reducing of unemployment is mentioned.

In para 19 the Tribunal held that various industries, hospital, dairy and agricultural

farming and technical colleges were started as model industries. No objection is taken by Mr. Pathak to the first 10 heads which he admits are charitable objects even according to the English decisions. His main objections are to the textiles and hosieries and any similar industries that might have been started. Though the word 'model' is not mentioned in the list, yet before giving the list the Tribunal clearly indicated that these were model industries and must, therefore, be deemed to have been intended for the education of the Satsangis who might have been interested in textile or hosiery business. Leather working school and classes for instructions in the manufacture of electrical goods have, it will be seen, been described at some places in the Appellate Order as leather factory and factory for manufacture of electrical goods, but that does not mean that they were started as business concerns with the object of making profit in the commercial sense for the benefit of those who were running the business. As a matter of fact the Tribunal pointed out that it was admitted that these various concerns were not run for individual profit, nor were these profits ever divided amongst the members.

The economic welfare, therefore, which is the only object to which exception has been taken, can easily be held to be a charitable object, being educational in nature and also charitable in the sense that it provided employment and thus reduced unemployment amongst the Satsangis who were the beneficiaries of the trust. We, therefore, agree with the Tribunal that all the properties were held for charitable and religious purposes. On this point the findings of the Tribunal are enumerated in para 19 of the Statement of the Case.

Before, however, we leave this point we may refer to a passage in the decision of their Lordships of the Judicial Committee in AIR 1944 PC 88 (J), where their Lordships referring to the scheme said :

> "Nor is there any ground for the court holding that the scheme is not one which 'may be' (underlining is ours (here in ' ')) for the public benefit. The court might in proper cases refuse to admit as charitable schemes purposes eccentric or impracticable. But though economists might differ about the wisdom of some aspect at least of the Association's purposes, the court could not hold that it was beyond the pale of legitimate charitable trusts."

It is difficult for us, in view of the manner in which the activities have been carried on and the income utilised, to differ about the wisdom of some aspect of the purposes for which the income was utilised and to hold that it was beyond the pale of legitimate charitable trust.

(50) In this connection we may refer to the observations of Lord Macnaghten in 1891 AC 531, at page 583 (N) :

> "The trusts" (beneficial to the community)... "are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly."

And the mere fact that employment might have been given to some Satsangis, who could not be said to be in dire need of sustenance, or training was given to Satsangis, who might have received training in other institutions, cannot be said to make the trust any the less charitable because it happened to benefit not only those who were in real need but some of those who might have been able to fulfil their needs by other means.

(51) The next point urged by learned counsel is that income from business was not exempt from income-tax in England till the amendments made in 1921 and 1927 and our Indian Income-tax Act, which follows the English Income-tax Act, also did not exempt income from business till the amendments made in 1939 to S. 4(3) and income from business was not, therefore, exempt from income-tax till 1939. He has contended that business cannot be 'property' under S. 4(3) (i), Income-tax Act, and before the amendment of 1939, therefore, there was no exemption at all. As regards the law in England learned counsel has referred to a number of cases but it would be sufficient to give reference only to some of them.

(52) In 'Coman v. Governors of the Rotunda Hospital, Dublin', 1921 AC 1 (V) where the management of the Rotunda Hospital let out certain furnished rooms attached to the hospital for various purposes and made some income which was utilised in running the hospital and the question was whether such income was exempt from income-tax.

Viscount Finlay in the course of his decision said :

> "Profits are undoubtedly received in the present case which are applied to charitable purposes, but they are profits derived not merely from the letting of the tenement but from its being let properly equipped for entertainments, with seats, lighting, heating and attendance. The subject which is hired out is a complex one. The mere tenement as it stands, without furniture, etc., would be almost useless for entertainments. The business of the Governors in respect of these entertainments is to have the hall properly fitted and prepared for being hired out for such uses. The profits fall under Sch. D, and to such profits the allowance in question has no application, as they cannot be properly described as rents or profits of lands, tenements, hereditaments or heritages. They are the proceeds of a concern in the nature of a trade which is carried on by the Governors and consists in finding tenants and having the rooms so equipped as to be suitable for letting. The case does not in substance differ from the letting of furnished apartments."

At page 13 of the judgment Lord Birkenhead L. C. said :

> "the seating and heating are not the only matters to be considered, and to treat the user of the premises in this way is not the proper method to adopt. The question is whether the utilisation of these rooms and the provision of facilities and services in the way set out in the case, yielding, as it does, a regular annual income to the respondents above the letting value as a property and over and above the profit assessable to Sch. A, amounts either to the carrying on of a trade or business under Case 1 of Sch. D, or to a profitable activity which is assessable under Case 6 of that schedule. The provision of seating and heating is part of the whole of the circumstances upon which the determination of the real question depends."

The decision in the 'Rotunda Hospital case (V)' is based on the language of the Income-

tax Act of 1918 (8 and 9 Geo. V. c. 40) Section 37 of which was as follows:

"Exemption in respect of rents of lands belonging to hospitals and other charities.—
(1) Exemption shall be granted—
(a) from tax under Schedule A in respect of the rents and profits of any lands, tenements, hereditaments, or heritages belonging to any hospital, public school or almhouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes only."

The rest of the section is not material. The House of Lords were, therefore, called upon to consider whether the income with respect to which the exemption was claimed could be deemed to be rents and profits of any lands, tenements, hereditaments or heritages and their Lordships pointed out that it could not be said that the income was derived as rents and profits of any lands, tenements, hereditaments or heritages, considering that besides the rooms themselves there were other services provided. The language of our Act, S. 4(3) (i), however, is much wider and it uses the word 'property' and not the words 'lands, tenements, hereditaments or heritages.'

(53) In 1921 certain amendment was made by the Finance Act of that year and a cl. (c) was added which granted exemption

"from income tax under Sch. D in respect of the profits of a trade carried on by any charity, if—
the work in connection with the trade is mainly carried on by beneficiaries of the charity."

(54) Then came the decision of the House of Lords in — 'Brighton College v. Marriott', 1926 AC 192 (W), in which Viscount Cave pointed out that—

"by the Finance Act, 1921 (S. 30), exemption is granted from income-tax under Sch. D in respect of the profits of a trade carried on by any charity, if the work in connection with the trade is mainly carried on by beneficiaries of the charity and the profits are applied solely to the purposes of the charity."

His Lordship then said that—

"It has long been decided that, if a trade is in fact being carried on at a profit, it is immaterial that the profits must, under the constitution of the trading corporation, be devoted to public objects."

Again that—

"If a corporation established for charitable purposes and carrying on a subsidiary trade for the benefit of its main objects is chargeable with tax, the tax is equally chargeable where the very purpose and object of the charity is to carry on a trade. The surplus receipts in such a case, even if they were not profits, are certainly gains, and so fall under the burden of the tax."

(55) As a result of this decision a further amendment was made in the income-tax law by the Finance Act of 1927 (See S. 24) and a further exemption was granted if the trade was exercised in the course of the actual carrying out of a primary purpose of the charity.

(56) Viscount Cave, in the course of his judgment in the 'Brighton College case (W)', referred to above, when called upon to consider whether the fees realised by the school were exempt from taxation on the ground that they were an annual payment forming part of the income within the meaning of S. 37, Income-tax Act, 1918, said that the answer was two-fold, namely, first that the fees received from the scholars were not properly described as an annual payment, and secondly, that it was not sought to tax the fees but the profits.

(57) The language of the Indian Income-tax Act was entirely different from the language of the English Act, before the amendment of the Indian Act in 1939. Section 4(3) before its amendment in 1939 was as follows:

"Section 4(3)— This Act shall not apply to the following classes of income—
(i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application thereto.
(ii) Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes."

It is not necessary to quote other clauses of this sub-section.

In the year 1939, by the Income-tax (Amendment) Act (Act 7 of 1939), two changes were made. The words 'this Act shall not apply to the following classes of income' were replaced by the words 'any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them' and a clause (ia) was added as follows:

"Clause (ia)— Any income derived from business carried on on behalf of a religious or charitable institution when the income is applied solely to the purposes of the institution and—
(a) the business is carried on in the course of the carrying out of a primary purpose of the institution, or
(b) the work in connection with the business is mainly carried on by the beneficiaries of the institution."

(58) Mr. Pathak's argument is that, before clause (ia) was added, income from business was taxable in all cases as it could not be said to be income derived from property. He has, therefore, urged that the assessee can, in no case, claim any exemption of income from business made before the amendment of the Indian Income-tax Act in 1939.

(59) The reliance placed on the English cases, as we have already said, is wholly unjustified in view of the fact that the language of the Indian Act is materially different from that of the English Act. In the English Act, the words 'rents derived from lands, tenements, hereditaments' were much more restricted than the words 'income derived from the property' in the Indian Act. There is no reason to limit the word 'property' only to corporeal property and to exclude from its operation business which was itself held under trust or other legal obligation. The point now, to our minds, has been settled by two decisions of the Judicial Committee and by a decision of the Lahore High Court.

In — 'AIR 1939 PC 208 (I)', a trust was created of the Tribune Press of Lahore and the object mentioned in para. 21 of the trust deed was to the following effect:

"That it shall be the duty of the said Committee of Trustees to maintain the said press and newspaper in an efficient condition, keeping up the liberal policy of the said newspaper

and devoting the surplus income of the said press and newspaper, after defraying all current expenses in improving the said newspaper, and placing it on a footing of permanency."

The question was whether the income of the Tribune Trust in the hands of the trustees was liable to be assessed to income-tax. A Full Bench of the Lahore High Court by majority held that the income was so taxable. It must be remembered that, at the time when that case came up, the amendment of the Indian Income-tax Act had not been made and the Act had to be interpreted as it stood before its amendment in 1939. It was not disputed by eminent counsel appearing in the case, nor was it doubted by their Lordships that the income derived from the Tribune newspaper was income from property and they observed as follows:

"In the letter of reference there is no suggestion that the income under assessment is not derived from property held under the trust declared in the 20th and 21st para of the will.

Their Lordships are not prepared to hold that the property referred to in these paragraphs of the will is held for the purpose of "education" in the sense of that word as it appears in S. 4 of the Act. 'Prima facie', therefore, the only question for decision is whether that property is held under trust wholly for the advancement of an object of general public utility."

(60) In — 'Charitable Gadodia Swadeshi Stores v. Commr. of Income-tax, Punjab', AIR 1944 Lah 465 (X), the question arose whether income from business was income from property within the meaning of S. 4(3)(i), Income-tax Act. Dealing with this question the learned Judges observed:

"In fact, there is every reason to think that the term as used here was being used in the popular sense. It could not possibly be intended by the Legislature that, if, for example, a sum of money endowed to charity was deposited in a bank, instead of being invested in buildings, the interest accruing therefrom should not be exempt from income-tax. Similarly, interest on securities, though a separate head of income chargeable to income-tax under S. 6 as distinct from property, cannot but be considered to be within this clause. Now, a person may invest a sum that he proposes to endow to charity in business and provide that the income derived therefrom would be applied wholly and exclusively to charitable purposes. Will it be consistent with reason to urge that though cash or securities may be covered by the term 'property' as used in this clause, business is not? The Legislature was not so enamoured of buildings as to bring to bear a pressure on charitably disposed people to invest their money in them alone if they wanted to escape from the burden of income-tax."

(61) The learned Judges quoted from the Income-tax Manual, and our attention has also been drawn to that manual before the amendment of 1939, and pointed out that the instructions given in the manual to the Income-tax Officers were to the effect that they were to exclude the business income of a charitable or religious trust when the income was applied solely to the purposes of the institution and that the word 'property' in cl. (i) of sub-s. (3) of S. (4), Income-tax Act, does not bear the restricted meaning that it bears in S. 9 of the Act but includes business, profits or share in a business.

That the term 'property' does not necessarily bear a restricted meaning was also held by their Lordships of the Judicial Committee in — 'Commr. of Income-tax, Bombay v. Currimbhoy Ebrahim and Sons, Ltd.', AIR 1936 PC 1 (Y). While dealing with section 42, Income-tax Act, their Lordships pointed out that the word 'property', when used in S. 6 to describe a head of income, is not defined by the statute and is wider than the meaning given to it in S. 9 of the Act. Their Lordships pointed out that there was nothing in sub-s. (1) of S. 42, Income-tax Act, to exclude from its scope any of the six classes of income mentioned in S. 6 of the Act.

Whatever doubts might have been entertained at one time, those doubts must now be deemed to have been set at rest after the decision of their Lordships of the Judicial Committee in — 'AIR 1944 PC 88 (J)'. At page 92 of the judgment, Lord Wright remarked:

"On that footing a question was suggested that the property of the Association from which the profits were derived was not 'held' within the meaning of the section. But clause 3 provides expressly that the funds and assets of the Association are to vest in the trustees, to be held for the purposes of the Association. The High Court seems to have been of opinion that the property from which the profits were derived was the cloth which from time to time was sold. Their Lordships, however, prefer the view implied in the decision of the Board in — 'AIR 1939 PC 208 (I)' to which fuller reference will be later made, where the 'property' in question was the stock and good will of the press and newspaper. Here the property consisted of the organization and the undertaking as well as in the fluctuating stock of yarn and cloth."

This case also was decided under the Indian Income-tax Act as it stood before its amendment in the year 1939 and, according to their Lordships, the word 'property' in S. 4(3)(i) of the Act included the stock and good will of the press and newspaper in the — 'Tribune case (I)' and, in the — 'All India Spinners' Association case (J)', it included the organization and the undertaking as well as the fluctuating stock of yarn and cloth. The word 'property' used in S. 4(3)(i) was, therefore, used in its widest sense and there is no reason to give it the interpretation suggested by Mr. Pathak that it includes only corporeal property and does not include business which, according to learned counsel, includes not only the assets held by it but also the good will and the profits are made by the utilisation of human efforts and the assets held by the business.

(62) The next point suggested is that if the word 'property' is given the wide meaning as is suggested on behalf of the assessee, then there was no reason why the clause should have been amended in the year 1939; but a careful reading of the sub-section indicates that the two clauses deal with two different matters. Clause (i) of sub-s. (3) of S. 4 deals with income derived from property held under trust or other legal obligation for religious or charitable purposes, while cl. (ia) deals with income derived from business carried on on behalf of a religious or charitable institution. The two clauses, there-

fore, do not necessarily overlap. Clause (i) of sub-s. (3) of S. 4 of the Act, as we have already pointed out, applies to cases where the business itself is held under trust for religious or charitable purposes, while clause (ia) applies only to such business as is carried on on behalf of a religious or charitable institution which was not held under trust.

Both in the — 'Tribune case (I)' as well as — 'The Spinners' Association Case (J)' the business itself was the subject-matter of the trust and their Lordships of the Judicial Committee, therefore, held that the income from such business fell under S. 4(3)(i) of the Act. A type of case, to which S. 4(3)(i) will not apply but S. 4(3)(ia) might be applicable, came up before this Court — 'In the matter of Lachhman Das, Narain Das', AIR 1925 All 115 (Z). In that case, a partnership business was started in which the fourth partner was said to be Radhaballabh, a deity installed in a temple in Mathura, who was to receive a share in the profits to the extent of three annas. It was interpreted by the Court that this amounted to merely a dedication of a three-sixteenth share of the profits of the business for charitable purposes. The business, therefore, was not itself held under trust but it was carried on for the purpose of utilisation of a portion of the business for charitable purposes. To such a case, therefore, S. 4(3)(i) could not be applied.

The Court was justified in holding, if we may say so with respect, that the correct interpretation of the partnership deed was that only three-sixteenth share of the income was earmarked for charitable purposes as the deity installed in Mathura could not legally be a partner in the firm, nor was it liable for the losses of the partnership business. The learned Judges, in our view, on the facts of that case, rightly held that income derived from profits made by the trading concern was not income derived from property held under trust, but unfortunately, by reason of certain observations made later, the case was misunderstood when it was followed by a Special Bench of the Madras High Court in — 'The Commissioner of Income-tax, Madras v. Thevara Patasala', AIR 1926 Mad 949 (Z1). In the Madras case, the learned Judges were guided by the English decisions, specially, — 'The Rotunda Hospital case (V)' and, in view of what we have already said, it is not necessary to go into that question further. This disposes of almost all the points that were discussed at the Bar. There were two other small points mentioned at the Bar which we may dispose of here before we come to the questions referred to us for our decision.

(63) It has been urged that the Sabha is not an institution and importance has been placed on the words 'religious or charitable institution' in clause (ia) of sub-s. (3) of S. 4 of the Act. What is an institution has been discussed by the House of Lords in the case of — 'Minister of National Revenue v. Trusts and Guarantee Co., Ltd.', 1940 AC 138 (Z2). Their Lordships pointed out that—

> "It is by no means easy to give a definition of the word 'institution' that will cover every use of it. Its meaning must always depend upon the context in which it is found. It seems plain for instance, from the context in which it is found in the sub-section in question that the word is intended to connote something more than a mere trust."

In the case of — 'Mayor of Manchestor Corpn. v. McAdam', 1896 AC 500 (Z3), while dealing with the Income-tax Act of 1842, Lord Macnaghten observed:

> "It is a little difficult to define the meaning of the term 'institution' in the modern acceptation of the word. It means, I suppose, an undertaking formed to promote some defined purpose having in view generally the instruction or education of the public. It is the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle."

The Sabha, in the sense understood by Lord Macnaghten, is clearly an institution having been brought about to effect the purpose and to carry out the objects for which the trust was founded. The other word, on which reliance is placed, is the word 'applied' in clause (ia). This word 'applied' in this clause it is said means actually spent and it is pointed out that while, in clause (i) of sub-s. (3) of S. 4 of the Act, the words used are 'income applied or finally set apart', the words 'finally set apart' have not been repeated in clause (ia) of that sub-section. We do not think that the word 'applied' necessarily means 'spent'. Even if it has been earmarked and allocated for the purposes of the institution, it may, to our minds, be deemed to have been applied for its purposes. Neither the word 'applied' nor the word 'institution' is of any importance in this case, as, in our view, the case is governed by income from the property held under trust as laid down in S. 4(3)(i), Income-tax Act.

(64) Our answer to the first two questions formulated by the Tribunal is, therefore, as follows:

The 'bhents' (offerings) vest in the Sabha under a legal obligation wholly for religious or charitable purposes of the Sabha but the 'bhents' cannot be said to be income derived from property under S. 4(3)(i), Income-tax Act. They will properly come under clause (ii) of that sub-section meaning thereby that they are income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes.

(65) Our answer to the fourth and fifth question is that the income derived from industrial and commercial concerns is the income from property held under trust wholly for religious or charitable purposes and is exempt from income-tax under S. 4(3)(i), Income-tax Act and it is, therefore, not necessary to apply to such income S. 4(3)(ia) of the Act.

(66) Our answer to the third question is in the affirmative.

(67) Our answer to question No. 6 is that the income derived from industrial and commercial undertakings of the Sabha is exempt from income-tax under S. 4(3)(i) of the Act and the rest of the question, therefore, does not arise. Section 4(3)(ia), however, we may point out, gives exemption to a different type of income which does not come under S. 4(3)(i) of the Act.

(68) The assessee is entitled to its costs which we assess at Rs. 200/- in each case, i.e., Rs. 1200/- in all.

A/R.G.D. Questions answered accordingly.

A.I.R. 1954 ALL. 305 (Vol. 41, C. N. 141)

(LUCKNOW BENCH)

MALIK C. J. AND CHATURVEDI, J.

Thakur Appellant v. Mst. Maida Kuar and others —Respondents.

Second Appeal No. 539 of 1947 and C. M. Appln. No. 1550 of 1950 D/- 1-10-1953; from decree of Civil J.; Sitapur; D/- 13-8-1948.

Civil P. C. (1908) O. 22 Rr. 2, 3 — Death of sole appellant.

A suit for possession was filed against several defendants. Puttu and Thakur, two brothers were also arrayed as defendants to the suit. The suit was decreed. Thakur alone appealed. Subsequently the sole appellant, Thakur died. No application was filed to bring his legal representatives on the record within the period of limitation. Later on an application was filed on behalf of Puttu in which it was prayed that the name of the applicant be struck off as respondent No. 4, he be transposed to the array of the appellants in place of Thakur deceased and be allowed to prosecute the appeal against the respondent. It was mentioned that Puttu was the sole legal representative of the appellant Thakur who had died.

Held that the sole appellant being dead, there was, in fact, no appeal pending in the appellate Court and after the expiry of the period of limitation the appeal abated. The applicant Puttu could not claim that he must be deemed to be an appellant and the appeal must be deemed to be still pending. There being, therefore no pending appeal, he could not claim to be transposed. The proper course open to him was to apply for substitution of names within the period of limitation and, if the period of limitation had already expired, to apply under section 5 of the limitation Act for condonation of the delay, if he could make out sufficient cause for condonation. Case law discussed. (Paras 4, 8)

Anno. C. P. C. O. 22 R. 2 N. 1/4; R. 3 N. 3 and 14; R. 4 N. 12. 1953 Mulla O. 22 R. 3. P. 941 N. "Legal .... character" (points 2, 3 and 5 Extra in N. 12 to O. 22 R. 4 in AIR Com. AIR 1925 Rang. 95 not noted in N. 12 to O. 22 R. 4 or in N. 14 to O. 22 R. 3 in AIR Com.).

K. N. Tandon for Appellant; J. S. Trivedi for Respondent No. 1

CASES REFERRED: PARAS

(A) (V18) AIR 1931 All 349 (349, 350.): 53 All 521 6

(B) (V21) AIR 1934 Nag 165 (165): 150 Ind Cas 915 7

(C) (V30) AIR 1943 Nag 13 (15): ILR (1943) Nag 17 7

(D) (V27) AIR 1940 Bom 259 (259): ILR (1940) Bom 487 7

(E) (V36) AIR 1949 Sind 23 (Prs 1, 2): Pak Cas (1949) Sind 66 7

MALIK, C. J.:

A suit for possession was filed against several defendants. Puttu and Thakur, two brothers were also arrayed as defendants to the suit. The suit was decreed. Thakur alone appealed to this Court and impleaded as respondents, the plaintiff and the other defendants. In April 1949 the sole appellant, Thakur died. No application was filed to bring his legal representatives on the record within the period of limitation. On 11th December, 1950, an application was filed on behalf of Puttu in which the prayer was as follows:

"Wherefore it is prayed that the name of the applicant be struck off as respondent No. 4, he be transposed to the array of the appellants in place of Thakur deceased and be allowed to prosecute the appeal against the respondent according to law."

(2) In the application it was mentioned that Puttu was the sole legal representative of the appellant Thakur who had died. Notice of this application was issued to the other respondents. The plaintiff respondent contested the application and a learned single Judge directed that the application along with the appeal be put up before a Bench for decision. No application has been filed under section 5 of the Limitation Act as the contention of the learned counsel for Puttu is that the death of Thakur did not result in the abatement of the appeal since Puttu was already on the record arrayed as a respondent.

(3) Learned counsel has relied on O. 1, R. 10 C. P. C. and O. 22, Rr. 2 and 3 of the Code. O. 1, R. 10 C. P. C. gives a discretion to the Courts to correct an error in the array of parties and under sub-rule (1) of R. 10 if there is a bona fide mistake, the mistake can be corrected by the Court. Under sub-rule 2, the Court has the right to strike out the names of any party improperly joined and add any party the addition of whose name may be necessary for the proper decision of the case but this has to be done subject to the provisions of the Indian Limitation Act. O. 22, R. 2 provides that :

"Where there are more plaintiffs or defendants than one, and any of them dies and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants."

(4) It would appear from the above that this rule applies only to a case where in the array of plaintiffs there are more than one plaintiff or in the array of defendants there are more than one defendant and after the death of one, the cause of action survives in the remaining plaintiffs and after the death of one defendant the cause of action survives against the remaining defendants. It does not apply to a case like the present where there is only one appellant and that appellant has died and no legal representative nas been brought on the record within the period of ninety days provided under the Limitation Act or even within the further period of sixty days for setting aside the abatement. Rule 3 of O. 22 deals with a case where the right to sue does not survive to the surviving plaintiff or plaintiffs alone. An application to bring the legal representatives has to be made in such a case within the period of limitation. Sub-rule (2) provides that where no application is made within the period of limitation, the suit would be deemed to have abated and such abatement is automatic.

(5) The contention of learned counsel is that on the death of Thakur, the rights of Thakur survived to Puttu respondent and it was not necessary for Puttu to apply to have his name substituted in place of the name of Thakur or to have his name transposed from the array of respondents to the array of appellants within the period of limitation.

(6) The point is covered by a division Bench ruling of this Court in — 'Suba Govind Rai v.

Mt. Anar Koer', AIR 1931 All 349 (A). There also one of several defendants had filed an appeal and he had died. One of the defendants-respondents was his legal representative and it was contended on his behalf that he was virtually in the same position as the appellant himself and had the right to continue the appeal. The learned Judges held that he had no such right and observed as follows:

"O. 41, R. 4 merely enables one of several plaintiffs or defendants to appeal from a decree which proceeds on a ground common to them all. It does not provide that the plaintiffs or defendants who do not join with the appellant should be considered to be appellants for any purpose. It may be that the law entitled them to the benefit of the decree if it is obtained by a party whose interests are identical with their own but this circumstance cannot convert a respondent in the array of parties into an appellant. If, therefore, they cannot be considered to be appellants on that account, O. 22, R. 2, C. P. C. which applies only to a case of one of several appellants can have no application to the circumstances before us."

(7) Learned counsel has urged that this case was wrongly decided. We do not see any reason to agree with his submission. Nor does it appear to be necessary that the view expressed by the Division Bench should be reconsidered. This view was followed by a learned single Judge of the Nagpur High Court in — 'Santoolal v. Champalal', AIR 1934 Nagpur 165 (B). Reliance has, however, been placed by learned counsel on three other cases but none of them is really helpful nor do they support the contention raised by learned counsel. 'Sheoram v. Atmaram', AIR 1943 Nag 13 (C), was a case where there were several appellants. One of the appellants died and the surviving appellants decided to continue the appeal but brought it to the notice of the Court that the legal representatives of the deceased appellant were already on the record in the array of the respondents. In the circumstances there was no bar to the surviving appellants continuing the appeal. This case, therefore, has nothing to do with the case before us and is clearly distinguishable.

The second case relied on is — 'Naranlal Jethalal v. Shivprasad Achratlal', AIR 1940 Bom 259 (D). There the sole plaintiff died and his legal representatives were his three sons and his widow. Within a period of ninety days of the death of the sole plaintiff, the widow also died but before the death of the widow the three sons had applied to be brought on the record as the legal representatives of their father. It was urged that as the sons had applied to be brought on the record as legal representatives of the father, they did not represent the mother's one-fourth interest and to that extent the suit had abated.

The learned Judge observed as follows :

"I will assume, without deciding, that Bai Hira was one of the heirs of the plaintiff and that she ought therefore to have been brought on the record. But Bai Hira died on 15th April, 1938, which is less than 90 days from the date of the plaintiff's death, and her heirs were the three sons of the plaintiff, who were already on the record. It is argued however that as the three sons were not described on the record as suing not only as heirs of the plaintiff but also as heirs of their mother, the suit abated at any rate as to the mother's interest. That would seem to me to be a very unfortunate conclusion to arrive at, for I can see no justice in holding that a suit abates for want of parties when all parties interested were in fact before the Court."

The only other case relied on is — 'Hatimshah v. Ahmedshah', AIR 1949 Sind 23 (E). In that case one of the defendants died. The plaintiff was the legal representative of the deceased defendant. The learned Judges held that the plaintiff could at any time inform the Court that one of the defendants had died but that the plaintiff was his legal representative.

(8) In the case before us the sole appellant died in April 1949. No application was made by the legal representative of the deceased plaintiff (sic) that he be impleaded as appellant and allowed to continue the appeal. The sole appellant being dead, there was, in fact, no appeal pending in this Court and after the expiry of the period of limitation by the legal representatives of Thakur the appeal abated. The applicant Puttu cannot claim that he must be deemed to be an appellant and the appeal must be deemed to be still pending. There being, therefore, no pending appeal, he cannot claim to be transposed. The proper course open to him was to apply for substitution of names within the period of limitation and, if the period of limitation had already expired, to apply under section 5 of the Limitation Act for condonation of the delay, if he could make out sufficient cause for condonation.

(9) The application is dismissed and the appeal must, therefore, fail and is dismissed with costs.

B/D.H.Z. Appeal dismissed.

A.I.R. 1954 ALL. 306 (Vol. 41, C.N. 142)

HARISH CHANDRA J.

Daulat Ram and others, Applicants, v. Panchayat Adalat and others, Opposite Party.

Criminal Misc. Writ No. 185 of 1953, D/- 5-11-1953.

U. P. Panchayat Raj Act (26 of 1947) S. 83 — Secret inquiry.

S. 83 permits the panchayati adalat to make a local investigation in the village to which the dispute relates. But such local investigation cannot be allowed to take the shape of a secret inquiry. Such secret inquiry would not be "lawful". (Para 2)

D. P. Agarwala, for Applicants; Aqiq Hasan, for Opposite Party.

ORDER: This is an application directed against the decision of a panchayati adalat. From the Judgment of the panchayati adalat it appears that they upon a secret inquiry made by a "commission" of the adalat. They say that the secret inquiry proved that the complaint was true. No doubt they have considered the other evidence also which was on the record. But there can be no doubt that they were in their decision largely influenced by the secret inquiry.

(2) Such secret inquiry is not permitted by the provisions of the U. P. Panchayat Raj Act. No doubt according to section 83 of the U. P. Panchayat Raj Act, it is the duty of the panchayati adalat to ascertain the facts of every case before it by every means in its power. It further permits the panchayati adalat to make a local investigation in the village to which the dispute relates. But such local investigation cannot be allowed to take the shape of a secret inquiry. Such secret inquiry would, in my view, not be "lawful".

In this view of the matter the procedure adopted by the panchayati adalat appears to be illegal.

(3) I accordingly quash the order passed by the panchayati adalat on the 16th of July, 1951. The fines if paid will be refunded to the applicants.

B/D.H.Z. Application allowed.

A.I.R. 1954 ALL. 307 (Vol. 41, C.N. 143)

(LUCKNOW BENCH)

KIDWAI J.

Mt. Phulia, Plaintiff-Appellant v. Narpat Singh and others, Defendants-Respondents.

Second Appeal No. 739 of 1947, D/- 16-9-1953, against decree of Civil Judge, Unnao, D/- 20-8-47.

Hindu Law of Inheritance (Amendment) Act (1929), S. 2 — Scope — (Hindu Women's Rights to Property Act (1937), S. 4) — (Hindu Law — Succession).

K, a Hindu died in 1926 leaving behind T who was his widow, J who was a widow of his predeceased son, and P, daughter of that son. T died in 1938 whereupon J entered into possession and transferred the property. P challenged the sale, claiming that J had no interest in the property:

Held, that J was not an heir under Hindu law as applied in Oudh, and the Hindu Women's Rights to Property Act did not apply to her case since K had died before the commencement of that Act and condition of S. 4 was not fulfilled; J, therefore, had no right to succeed. But in the case of P who acquired the right to succeed by reason of the Hindu Law of Inheritance (Amendment) Act, the fact that K died before the Act came into force was immaterial since after the death of T the question was when the succession opened and not when the Hindu male died. P was therefore entitled as the predeceased son's daughter to succeed under S. 2 of the Act, 1929. AIR 1946 PC 173, Explained and followed. (Paras 4, 5, 6)

Anno: Hindu Law of Inheritance Act, S. 2 N. 1; H. W. R. to Property Act, S. 4 N. 1.

Kesri Bir Prasad, for Appellant; R. N. Shukla, for Respondent No. 1.

CASES REFERRED:

(A) ('46) AIR 1946 PC 173: 1947 Oudh WN 1 (PC) (Prs 3, 4)

(B) ('45) AIR 1945 Pat 87: 23 Pat 508 (Pr 3)

JUDGMENT : The property in suit belonged to one Kandhai Lodh who died on the 21-10-1926, leaving a widow Srimati Thakura, the widow of a pre-deceased son Srimati Jasodra and a daughter of that son Mst. Phulia. Thakura died in 1938 and Srimati Jasodra entered into possession and transferred the property by sale on the 6th of June, 1940 to Chandrabhal, defendant no. 2. A suit for pre-emption was instituted by Narpat Singh and a decree was passed in his favour on the 7th of July, 1941. He paid the money and obtained possession of the property on the 26th of February, 1942.

(2) In the meanwhile on the 4th of June, 1941 Mst. Phulia instituted a suit against Srimati Jasodra and Chandrabhal claiming to be the owner of the property as a reversionary heir of her deceased grand-father. This suit was compromised. A decree was passed in favour of Mst. Phulia on the 6th of August, 1941. She obtained possession under it on the 25th of February, 1942 but she was dispossessed when possession was delivered to the pre-emptor. She brought the suit out of which this appeal arises claiming that Srimati Jasodra had no interest in the property and could not sell it in her life-time to anyone.

(3) The trial Court decreed the suit but the lower appellate Court allowed the appeal of the pre-emptor against that decree and dismissed the suit. The learned Civil Judge purported to proceed on the basis of — 'Duni Chand v. Mst. Anar Kali', AIR 1946 PC 173 (A), and he did not accept the decision of — 'Nand Kumari Devi v. Mst. Bulkan Devi', AIR 1945 Pat 87 (B). The lower appellate Court seems not to have understood the point that it had to decide.

(4) The right which was conferred upon a predeceased son's widow to inherit was conferred by the Hindu Women's Rights to Property Act of 1937 and section 4 of that Act provides in clear terms that "nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act". In the present case the claim is made by Srimati Jasodra to the property of Kandhai Lodh who undoubtedly died before the Act came into force. The learned Civil Judge has ignored the clear provisions of this section by reason of the fact that their Lordships of the Privy Council in — 'AIR 1946 PC 173 (A)' have held that succession under the Hindu Law in a case where the widow has succeeded opens on the death of the widow. We are not concerned in the present case as to when succession opened and no provision similar to section 4 exists in the Hindu Law Amendment Act of 1941 which the Judicial Committee was interpreting.

(5) In the present case no matter when succession opened, the condition for the application of the Hindu Women's Rights to Property Act is that the Hindu to whose property the claim is made must have 'died after the commencement of the Act'. That condition is not fulfilled. No claim can, therefore, be made on the basis of it. Srimati Jasodra was not an heir under the Hindu Law as applied in this province but for the provisions of that Act and since that Act does not apply, Srimati Jasodra had no right to succeed.

(6) Mst. Phulia, the daughter of the predeceased son, had acquired the right to succeed by reason of the Hindu Law of Inheritance (Amendment) Act and the fact that Kandhai died before that Act came into force is immaterial since in the case of succession on the death of Srimati Thakura we have to see, as laid down by their Lordships of the Privy Council case to which I have already referred, when succession opened and not when the Hindu male died. Undoubtedly succession opened on the death of Srimati Thakura. Mst. Phulia was, therefore, entitled as the pre-deceased's son's daughter to succeed under section 2 of the Hindu Law of Inheritance (Amendment) Act 1929 whose suit should have been decreed.

(7) The result is that I allow the appeal, set aside the judgment and decree of the lower appellate Court and restore that of the trial Court. The appellant will be entitled to her costs throughout from the respondent no. 1.

B/H.G.P. Appeal allowed.

A.I.R. 1954 ALL. 308 (Vol. 41, C.N. 144)

SAPRU AND V. BHARGAVA JJ.

State of Uttar Pradesh v. Shyam Sundar Lal Jain, Opposite Party.

Criminal Misc. No. 10 of 1950, D/- 22-9-1953.

(a) Contempt of Courts Act (1952), S. 3 — Contempt proceedings — Object of.

The object of contempt proceedings is not to afford protection to Judges personally from imputations to which they may be exposed as individuals. It is rather intended as a protection to the public whose interests would be very much affected if by the act or conduct of any party, the authority of the Court is lowered and the sense of confidence which people have in the administration of justice by it is weakened. (Para 5)

(b) Contempt of Courts Act (1952), S. 3 — Jurisdiction under — Nature and limits of.

The contempt jurisdiction is a summary jurisdiction which should be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt. (1900) 2 QB 36, Rel. on. (Para 6)

The weapon should not be used except in order to maintain the dignity of the Courts and to uphold the majesty of the law. Courts should be reluctant to take notice of technical contempts of Court. (Para 6)

(c) Contempt of Courts Act (1952), S. 1 — Contempt, what constitutes — Representation to authorities in a registered letter.

A filed a complaint against B under S. 500, I. P. C. The Magistrate, holding that the case was not established, acquitted B. A then wrote a letter under registered cover to the Prime Minister of India in the form of a petition or representation making serious allegations of corruption and partiality against the Magistrate. In a proceeding for contempt against A:

Held that there must be something to show that the contempt was likely to interfere with the due administration of justice or undermine the confidence which the public rightly reposes in Courts of law as Courts of justice. That in this case, though the attack on the Magistrate was of a vile character, those particular tests were not satisfied and hence the remedy of contempt was not the appropriate remedy for the Magistrate. AIR 1954 SC 10, Applied. (Para 6)

Shri Ram, Dy. Govt. Advocate, for the State; Shambhu Prasad and Nand Lal, for Opposite Party.

CASES REFERRED: Paras

(A) (V37) AIR 1950 All 556 (Pr 6): 52 Cri LJ 1062 (FB) 1

(B) (V37) AIR 1950 All 549 (Prs 18, 19): 51 Cri LJ 1500 1

(C) (V41) AIR 1954 SC 10 (Prs 18, 19): 1953 SCJ 521 (SC) 1, 4

(D) (1900) 1900-2 QB 36 (40): 69 LJQB 502 6

SAPRU J.:

This contempt matter was referred by us to a Full Bench of five Judges as, in our opinion, there was a conflict between two cases, namely, the Full Bench case of — 'State v. Brahma Prakash', AIR 1950 All 556 (A), and the Bench case of — 'Rex v. B. S. Nayyar', AIR 1950 All 549 (B). Before the proposed Full Bench could dispose of the case, the Supreme Court gave its decision in — 'Brahma Prakash Sharma v. State of Uttar Pradesh', AIR 1954 SC 10 (C). In view of the fact that the point referred to the Full Bench has been considered and decided by the Supreme Court, the learned Chief Justice has returned the reference to this bench with the query whether it is any longer necessary to constitute a Full Bench. We have heard learned counsel for the parties and are clearly of the opinion that it is not necessary to constitute a Full Bench in view of the decision of the Supreme Court.

(2) We shall now proceed to give the salient facts of this case. Shri Shyam Sunder Lal Jain Sarraf, the opposite-party, was the complainant in a case under section 500 I. P. C. It was numbered as 20 of 1949 and came to be tried by Sri H. L. Mehra, a magistrate of the first class, Dehra Dun. The learned Magistrate came to the conclusion that the complainant had not been able to establish the case against the accused and by his order dated the 3rd August 1949 acquitted the accused on the ground that they were protected by Exception 9 to section 499 of the Indian Penal Code. The opposite-party took no further action by way of revision so far as this matter was concerned. He, however, wrote a letter to the Prime Minister of India. It is in the form of a petition or representation and is dated the 10th January 1950. In the course of this letter the opposite-party made serious allegations of corruption and partiality against the magistrate.

(3) The representation sent to the Prime Minister was forwarded by the Prime Minister's Private Secretary to the Chief Secretary to the Government of Uttar Pradesh, Lucknow, for disposal. The Chief Secretary passed on that letter to the Petitions Officer of Government U. P. for necessary enquiry and final disposal. On an enquiry by a letter dated the 12th March 1950 by the Petitions Officer, the opposite-party reiterated the allegations of dishonesty and partiality that he had made against the magistrate. He pointed out that the letter was not intended to interfere with the course of justice but was sent in order that an enquiry might be made into the conduct of the learned magistrate who, he alleged, had been corrupt. The Petitions Officer forwarded the petition as also the letter dated the 26th March 1950 to the District Magistrate of Dehra Dun for necessary action. The District Magistrate of Dehra Dun did not call upon the opposite-party to substantiate his allegations. He, in fact, did not hold any enquiry but took the view that the letter constituted a contempt of court and referred it to the Legal Remembrancer to Government. Thereafter this Court was moved to initiate contempt proceedings and notice was issued by the Vacation Judge on the 6th June 1950 to the opposite-party to show cause why he should not be committed for contempt. The opposite-party has now appeared and filed a counter-affidavit. The question before us is whether he is, in all the circumstances of this case, guilty of contempt.

(4) The first thing to note is that the representation which is the basis of the charge of contempt was made by the opposite-party in the form of a petition to the Prime Minister of India. There was, in this case, no general publication. The representation was sent in a registered cover to the Prime Minister. The letter or representation was sent by the Prime Minister's office to the Chief Secretary and thereafter it went to the District Magistrate. The basis of the present proceedings is, therefore, the letter to the Prime Minister. Now, we are not in a position on the material before us to say whether the letter or

representation was necessarily of a 'mala fide' nature. The position in this case appears to us to be that no enquiry of any sort was made by the District Magistrate before he decided to refer the matter to the Legal Remembrancer for contempt proceedings against the opposite-party. It may be further pointed out that the letter or representation cannot and could not amount in law to scandalising the court as it did not comply with the requirements for such contempt laid down by the Supreme Court in the case of — 'Brahma Prakash v. State of Uttar Pradesh (C)', referred to above. After distinguishing between a wrong done to a judge personally and a wrong done to the public and after pointing out that it is the latter which can properly be made the subject-matter of a contempt proceeding, his Lordship Mr. Justice Mukerjee who delivered the judgment of the Supreme Court goes on to observe that :

> "It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties."

(5) Now, there can be no question of causing embarrassment in the mind of the Judge himself as the representation was sent after the disposal of the case. There was no case pending before the learned magistrate or before any other court at the time the representation was sent to the Prime Minister. The letter was sent to a person who, the opposite-party thought, was the appropriate authority. Actually the Prime Minister was not the proper authority to be addressed. Any way there was here no publication to the public or any section of the public. The letter was in the form of a confidential letter. It was sent per registered post. Now, there may have been publication so far as the representation is concerned from the point of view of the law of libel. The letter is 'prima facie' of a libellous character and the magistrate whom it seeks to defame has a remedy by way of a libel suit or a criminal action for defamation against the opposite-party. The question, however, is whether the opposite-party can be held to be guilty of contempt on the ground that by so doing he has scandalised the court or brought the administration of justice into discredit or contempt. A letter sent to the prime minister and not intended to be broadcast to the public or any section of the public cannot create an apprehension in the minds of the people, to use the language of Mr. Justice Mukerjee, "regarding the integrity, ability or fairness of the judge". Further, it could not deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice for the obvious reason that they would know nothing about it, it not having been published to them. It may be remarked that, again, to use the language of Mr. Justice Mukerjee,

> "the object of contempt proceedings is not to afford protection to judges personally from imputations to which they may be exposed as individuals."

It is rather intended as a protection to the public whose interests would be very much affected if by the act or conduct of any party, the authority of the Court is lowered and the sense of confidence which people have in the administration of justice by it is weakened.

(6) It is well-known that the contempt jurisdiction is a summary jurisdiction. "This jurisdiction should be exercised", as is observed by Lord Russell, L. C. J., "with scrupulous care and only when the case is clear and beyond reasonable doubt". (vide 'R. v. Gray', (1900) 2 QB 36 (D)). This Court is reluctant to use this weapon except in order to maintain the dignity of the Courts and to uphold the majesty of the law. It may be emphasised that the Supreme Court view, as we read it, is that Courts should be reluctant to take notice of technical contempts of court. There must be something to show that the contempt was likely to interfere with the due administration of justice or undermine the confidence which the public rightly reposes in courts of law as courts of justice. In this particular case, while the attack on the magistrate is of a vile character, those particular tests are not satisfied. For these reasons we do not think that the remedy of contempt is the appropriate remedy for the Magistrate. We have come to the conclusion that, in all the circumstances of the case, it is not desirable to award costs to the applicant.

(7) The application is dismissed but without any order as to costs and the notice is discharged.

B/D.R.R. Application dismissed.

A.I.R. 1954 ALL. 309 (Vol. 41, C.N. 145)

AGARWALA J.

Narijan and another, Applicants v. State through Deopujan Ram and another, Opposite Party.

Criminal Misc. Writ Appln. No. 279 of 1953, D/- 4-11-1953.

U. P. Panchayat Raj Act (26 of 1947), S. 76(1) — Applicability — Pendency of matter in Revenue Court — Effect on Criminal proceedings.

Clause (1) of S. 76 does not apply to a criminal matter pending before a Panchayati Adalat, when a point in issue in the criminal matter is an issue in a Civil or revenue case in another Court of competent jurisdiction. Where, therefore, a criminal case is pending before a Panchayati Adalat, the mere fact that in a revenue proceeding for correction of names the same or similar point is to be decided by the Tahsildar does not bar the Panchayati Adalat from proceeding with the trial of the criminal case pending before it. (Para 2)

S. P. Kumar, for Applicants.

ORDER : This is an application under Article 227 of the Constitution against an order of the Panchayati Adalat convicting the applicants under sections 323 and 447 of the Indian Penal Code and sentencing each of them to a fine of Rs. 10/-. The first point urged by the learned counsel for the applicants is that there was another proceeding pending before a Tahsildar for correction of names in the revenue papers in respect of the possession over the plots in dispute in the present case, and that the contention of the applicants that they were in possession of the plots was to be decided by the Tahsildar and that, therefore, the Panchayati Adalat had no jurisdiction to decide the criminal complaint in which the same point was to be decided namely, whether the applicants were in possession of the plots in dispute. Learned counsel for the applicants relied on section 73 of the Panchayat Raj Act in support of his contention.

(2) In my judgment, section 73 of the Panchayat Raj Act does not apply to the case. I think

clause (1) of that section deals with Civil or revenue matter, and clause (2) deals with criminal matters. Under clause (1) the Panchayati Adalat is forbidden to

> "try any suit, proceeding or issue in respect of any matter, which is pending for decision in or has been heard or decided by a court of competent jurisdiction in a former suit between the same parties under whom they or any of them claim."

It is obvious from reading of Cl. (1) of Section 73 that the suit, proceeding or issue pending before the Panchayati Adalat must be of a Civil or revenue nature and the same matter must be pending for decision or must have been heard or decided by a court of competent jurisdiction in a former civil or revenue suit between the same parties under whom they or any of them claim. This clause does not apply to a criminal matter pending before a Panchayati Adalat, when a point in issue in the criminal matter is an issue in a Civil or revenue case in another court of competent jurisdiction. When a criminal case is pending in a Panchayati Adalat clause (2) applies. Clause (2) runs as follows:

> "Where a case is pending in any court against an accused person in respect of any offence or where an accused person has been tried for any offence, no Panchayati Adalat shall take cognizance of any such offence, or on the same facts, of any other offence of which the accused might have been charged or convicted."

Here a criminal case was pending before a Panchayati Adalat. The mere fact that in a revenue proceeding for correction of names the same or similar point was to be decided by the Tahsildar, did not bar the Panchayati Adalat from proceeding with the trial of the criminal case pending before it.

(3) Ths next point urged by the learned counsel is that he filed a revision against the order of the Panchayati Adalat before the Sub-Divisional Magistrate and he dismissed it because the counsel for the applicant was not present on the date of the hearing of the revision. If the counsel for the applicant is not present, the court may either dismiss the application in revision or may go through the judgment of its own accord and pass a suitable order. It is conceded before me that if the court had read the judgment no point would have been discovered which would have been in favour of the applicant, therefore nothing could be done by the Sub-Divisional Magistrate, when the applicant chose to absent himself on the date of the hearing. There is no force in this point also.

(4) The application is therefore, rejected.

B/D.R.R. Application rejected.

A.I.R. 1954 ALL. 310 (Vol. 41, C.N. 146)

SAPRU AND V. BHARGAVA JJ.

Abdul Jabbar and others, Appellants v. Audhesh Singh Ram Agyan Singh and others, Respondents.

Second Appeal No. 859 of 1945, D/- 9-12-1952, from decision of Dist. J., Ghazipur, D/- 15-8-1944.

(a) Partnership Act (1932), S. 69 (1) — 'Right arising from contract' — (Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 9).

A claim by the creditors in respect of a 'sarkhat' in Encumbered Estates Act proceedings for determination of the liability of the landlord applicant to them and for passing a decree in respect of the amount found due is a proceeding to enforce a right arising from the contract and is fully covered by S. 69 (1). (Para 2)

Anno: Part. Act, S. 69 N. 3.

(b) Partnership Act (1932), S. 74 (b) — "Commencement of the Act."

The words 'commencement of this Act' in S. 74 (b) refer to the coming into force of the Act on 1-10-1932, as laid down in S. 1(3), even though this was to be subject to an exception in respect of one section. (viz. S. 69). AIR 1941 All 178; AIR 1943 Nag 175; AIR 1938 Rang 273 (FB), Distinguished. (Paras 4, 6)

Anno: Part. Act, S. 74 N. 1.

(c) Partnership Act (1932), S. 69 — Scope and applicability.

There was no intention, in postponing the enforcement of S. 69, to grant any concession to the unregistered firms to continue to enter into fresh contracts during the period while S. 69 had not come into force and to enforce those contracts even subsequently without any registration. Section 74 was not intended to make S. 69 inapplicable to cases relating to rights arising out of contracts entered into after 1-10-1932. AIR 1936 All 3, Referred. (Para 7)

Anno: Part. Act, S. 69 N. 1.

(d) Civil P. C. (1908), Ss. 100 and 101 — New case.

A ground of appeal relating to question of fact which was not raised before and decided by the lower appellate Court, cannot be permitted to be raised in second appeal. (Para 8)

Anno: Civil P. C., Ss. 100 and 101 N. 55.

Kedar Nath Sinha, for Appellants; A. P. Pandey, for Respondents.

CASES REFERRED: Paras

(A) (V28) AIR 1941 All 178 (179): 1941 All LJ 107 7
(B) (V23) AIR 1936 All 3 (5): 1935 All LJ 1245 7
(C) (V30) AIR 1943 Nag 175 (177): ILR (1943) Nag 540 7
(D) (V25) AIR 1938 Rang 273 (273, 274): 1938 Rang LR 371 (FB) 7

V. BHARGAVA J.:

This second appeal arises out of proceedings under the Encumbered Estates Act. Respondent No. 1 presented an application under section 4 of the Encumbered Estates Act and, in the written statement filed by him under section 8 of the Act, he showed certain debts as payable by him, including a debt to a firm, Sheikh Mohammad Hashim Haji Pir Mohammad. A written statement was filed under section 9 on behalf of the firm by the two partners, Abdul Sattar and Abdul Jabbar, and they also claimed the same amount as had been shown by the landlord applicant in his written statement. When the learned Special Judge came to consider the amount due from the landlord applicant to these creditors, Abdul Sattar and Abdul Jabbar, the question arose whether the claim of Abdul Sattar and Abdul Jabbar could be entertained in view of section 69 of the Indian Partnership Act. The claim of Abdul Sattar and Abdul Jabbar was in respect of a 'sarkhat' executed in the year 1933, but before the 1st October 1933, by the landlord in favour of the firm, Sheikh Mohammad Hashim Haji Pir Mohammad. The application under section 4 of the Encumbered Estates Act was presented on the 27th October 1936 and the claim of Abdul Sattar

and Abdul Jabbar was made before the learned Special Judge on the 12th August, 1937. Up to that date the firm, Sheikh Mohammad Hashim Haji Pir Mohammad, was not registered, though it was claimed that it had been registered subsequently. The trial court on the 26th May 1943 held that there was no proof that the firm had ever been registered and that consequently the claim was barred under section 69 of the Indian Partnership Act. The contention on behalf of the partners of the firm that they were protected under section 74 (b) of the Indian Partnership Act was rejected by the trial court on the ground that the right in respect of which the claim had been filed had not accrued to Abdul Sattar and Abdul Jabbar before the commencement of the Partnership Act. On appeal, the learned Judge of the lower appellate Court agreed with the trial court and confirmed the order disallowing the claim of these persons. They have, therefore, come up in second appeal to this Court.

(2) The first point that we had to consider in connection with this appeal was whether the proceedings under the Encumbered Estates Act for determination of a claim of a creditor were at all governed by the provisions of section 69 of the Indian Partnership Act. This argument had to be considered in view of the language of subsections (1) and (2) of section 69 wherein a bar was placed against the institution of a suit only. Our attention has, however, been drawn to subsection (3) of section 69 which makes the provisions of sub-sections (1) and (2) of that section applicable even to a claim of set-off or other proceedings to enforce a right arising from a contract. It is obvious that the claim by the appellants in these Encumbered Estates Act proceedings for determination of the liability of the landlord to them and for passing a decree in respect of the amount found due is a proceeding to enforce a right arising from the contract and is fully covered by the language used in sub-section (1) of section 69.

(3) Normally, section 69 would bar such a claim unless the person putting forward the claim can rely on the benefit of section 74 so that the provisions of section 69 may not be applied to his case. The relevant portions of section 74 are as follows:

"Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect

(a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act or....."

(4) The contention on behalf of the appellants is that the right to recover the amount in respect of which they have filed the claim before the learned Special Judge accrued to the appellants before the commencement of the Indian Partnership Act and consequently the legal proceeding or remedy in respect of their claim in the Encumbered Estates Act case is not to be governed by the provisions of section 69 of the Indian Partnership Act.

The decision of this question depends on the interpretation of the words "before the commencement of this Act" used in clause (b) of section 74. The right to claim the debts, which are the subject-matter of this appeal, accrued to the appellants sometime before the 1st October 1933 and after the 1st October 1932. This fact is not contested by either party. The question is whether a right which accrued during the period between the 1st October 1932 and the 1st October 1933 must be deemed to have accrued before the commencement of the Indian Partnership Act or subsequent to its commencement. The argument arises because, under sub-section (3) of section 1 of the Act, it is laid down that the Act shall come into force on the 1st day of October, 1932, except section 69, which shall come into force on the 1st day of October, 1933. It was contended that the words "commencement of this Act" used in clause (b) of section 74 must mean the commencement of the whole Act, including every single provision of it, and not merely a part of it; and since section 69 did not come into force up to 1st October, 1933, it ought to be held that the commencement of this Act for purpose of section 74 was on the 1st day of October, 1933, There are two reasons why this argument cannot be accepted. Firstly the language of section 1(3) itself indicates that the legislature laid down that the Act was to come into force on the 1st day of October, 1932, with one exception, viz., that section 69 was to come into force on the 1st day of October, 1933. Even if the Act was to come into force with the exception of one provision of the Act, it must be held that the Act did come into force on that date, though subject to that exception.

When the legislature lays down that the whole Act is not to come into force on the same date, this intention can be expressed in various ways. Firstly, the legislature may lay down that the Act would come into force on a certain date with the exception of one or more provisions specified in the exception; secondly, it may lay down that certain provisions of the Act are to come into force on one specified date and the remainder of the Act on some other date; and thirdly, it may lay down that certain provisions or parts of the Act are to come into force on one date and other provisions or parts of the Act on another date. In the latter two cases, it may be possible to urge that the Act cannot be held to commence on the earlier date on which certain provisions or parts of the Act are to come into force, but, in this case, it is unnecessary for us to express any opinion on this argument. In the first case, however, the language itself indicates that the Act as such is to commence on the date specified and the mere fact that an exception is made in the case of some provisions of the Act would not change the date of commencement of the Act. The language used in section 1(3) of this Act clearly indicates that the Act itself was to come into force on the 1st day of October, 1932, and that must be held to be the date of the commencement of the Act even though there was an exception in respect of one provision of the Act. We, therefore, uphold the contention of the learned counsel for the respondents that the words "commencement of this Act" used in sub-section (b) of section 74 refer to the coming into force of the Act on the 1st day of October, 1932, as laid down in sub-section (3) of section 1; even though this was to be subject to an exception in respect of one section.

(5) The second ground, which appeals to us, is that, if the interpretation sought to be put on behalf of the appellants is accepted, the effect would be that the whole Act would become ineffective & inoperative up to 1-10-1933. Under S. 74, nothing in the Act would affect anything done or suffered or any right, title, interest, obligation or liability acquired, accrued or incurred or any

legal proceeding or remedy in respect of any such right, title, interest, obligation or liability if it happened before the 1st of October, 1933. On the interpretation sought to be put on behalf of the appellants, the result would be that S. 74 would, in effect, suspend the operation of all provisions of the Act up to the 1st of October, 1933, and the provision made by the legislature that the Act was to come into force on the 1st day of October, 1932, would become meaningless and ineffective.

(6) Learned counsel for the appellants further contended that, if it could not be held by us that the words "commencement of this Act" in section 74 are to be read as meaning commencement of the Act as a whole including section 69, we may, at least, hold that the commencement of the Act, for purposes of section 69, took place on the 1st of October, 1933, though it may have taken place, for purposes of other provisions of the Act, on the 1st of October, 1932. We do not see how this contention can be accepted because the words "commencement of the Act" occur in section 74 and not in section 69 and, in that section these words can signify only one single date. The commencement of the Act mentioned in section 74 could take place either on the 1st day of October, 1932, or, on the 1st day of October. 1933, but not on both dates. There can be only one date for the commencement of one Act. There can be different dates for the commencement of different parts of the Act. If the words, that have to be interpreted, mention "the Act" and not "parts of the Act", only one date can be determined for the commencement of the Act. In this case, as we have said earlier, on a correct reading of the language of sub-section (3) of section 1 as well as on other considerations, the only correct interpretation is that, for purposes of section 74, the Act commenced on the 1st day of October, 1932. Consequently, the appellants, whose claim is in respect of rights acquired after the 1st of October, 1932, are governed by the provisions of section 69 of the Indian Partnership Act and this provision is clearly applicable to this case.

(7) Learned counsel for the appellants referred us to several decisions of this Court as well as of other High Courts, but in none of those cases was the point, which has arisen in this appeal, raised or decided. Reference was made by learned counsel to the cases of — 'Ram Gopal Sriniwas v. Net Ram', AIR 1941 All 178 (A), — 'Danmal Parshottam Dass v. Babu Ram Chhotelal', AIR 1936 All 3 (B), — 'Jamal Usman v. Firm Umar Haji Karim Shop', AIR 1943 Nag 175 (C) and — 'Soonoiram Ramniranjandas v. Junjilal', AIR 1938 Rang 273 (FB) (D). In all these cases, the only question, that came up for decision, was whether section 74 applied to suits instituted before the commencement of the Act or to suits instituted after the commencement of the Act and almost every Court held that section 74 was applicable even to suits instituted after the commencement of the Act, provided the right in respect of which the suit was filed had accrued before the commencement of the Act. In none of the cases did any occasion arise to consider the question as to what was the date of the commencement of the Act for purposes of applying section 74. Learned counsel quoted before us the views of Sulaiman, C. J., in — 'AIR 1936 All 3 (B)', which were as follows:

> "Undoubtedly it is a significant fact that as provided in section 1(3), section 69 came into force one year after the coming into force of the Partnership Act. The reasonable inference is that the enforcement of this section was deliberately postponed in order to give unregistered firms a reasonable chance to get themselves registered before the section began to operate against them. Accordingly if there were nothing else in the Act, it would be a legitimate conclusion that section 69 would apply to all suits filed after the expiry of the period of one year. But there is also a possibility that the intention was to allow time to people, trading under the name of an unregistered firm, to come to know of the drastic change in the law, which should affect all contracts entered into after the expiry of that period."

From these words learned counsel infers that Sulaiman, C. J., intended to lay down that the Partnership Act only affected contracts entered into by unregistered firms after the expiry of the period of one year during which section 69 was not in force, whereas the rest of the Act was in force. So that the contract on which the appellants have based their claim in these Encumbered Estates Act proceedings would not be governed by section 69 as having been entered into during that period of one year in which section 69 was not in force. We do not think that the learned Chief Justice ever intended to lay down this principle and, if he did, we must say with respect that we find ourselves unable to agree with it. The first inference drawn by the learned Chief Justice that the enforcement of section 69 was deliberately postponed in order to give unregistered firms a reasonable chance to get themselves registered before the section began to operate clearly follows from the provisions of sections 1(3), 69 and 74; but this inference does not lead to the further position that there was any intention, in postponing the enforcement of section 69 to grant any concession to the unregistered firms to continue to enter into fresh contracts during the period while section 69 had not come into force and to enforce those contracts even subsequently without any registration. A reading of all the provisions of the Act and the scheme of the Act can, in our opinion, leave no doubt that section 74 was not intended to make S. 69 inapplicable to cases relating to rights arising out of contracts entered into after 1st October 1932 and consequently in this case the claim of the appellants had to be disallowed on the ground that their firm was an unregistered one and the contract was entered into in the name of the firm.

(8) Learned counsel for the appellants put forward an alternative argument, viz., that the firm of the appellants had been registered subsequent to the filing of their claim before the learned Special Judge & prior to the dismissal of it by him. But this argument cannot be accepted in view of the finding of fact given by the trial court, which was not challenged in the lower appellate court. In the trial court, though an opportunity was afforded to the appellants, they failed to produce satisfactory evidence to show that their firm had been registered and the learned Special Judge ultimately held that there was no proof that the firm of the appellants had ever been registered up to the date of his decision. This finding of fact was not challenged by the appellants in their memorandum of appeal before the lower appellate court and consequently the learned Judge of the lower appellate court had no occasion to reconsider that finding. In this Court the appellants have sought to raise this ground in their grounds of appeal. Since this ground relates to a question of fact which was not raised before and decided by the lower appellate court, we cannot permit it to be raised in this Court

(9) The appellants also sought to adduce documentary evidence in support of the contention that the firm had been registered. The application for admitting this additional evidence has to be rejected as evidence is sought to be given in respect of an issue which the appellants are not entitled to raise in second appeal and which we have refused to entertain.

(10) On these findings, the appeal fails and is dismissed with costs.

B/V.B.B. Appeal dismissed.

A.I.R. 1954 ALL. 313 (Vol. 41, C.N. 147)

(LUCKNOW BENCH)

AGARWALA AND RANDHIR SINGH JJ.

Ram Lakhan and another, Plaintiffs-Appellants **v.** Raj Kumar, Defendant-Respondent.

Second Appeal No. 57 of 1950, D/- 12-8-1953.

Court-fees Act (1870), Ss. 7 (vi-A) (U. P.), 2 (iv) and 2 (i) — Suit for partition — Appeal and cross objection — Court-fee.

Suit for partition — Plaintiff claiming half share in all items of property on ground that they were joint family property — Defence claiming only part of property to be joint and rest self acquired — Suit decreed in part and dismissed in respect of some of items — Appeal by plaintiff in respect of items which were held not joint family property — Cross objection by defendant in respect of some of properties which were held joint family property and not self-acquired of the defendants — Plaintiff valuing appeal at the value of property which was the subject-matter of appeal — Defendant similarly valuing his cross objection at value of property in respect of which he alleged it belonged to him exclusively — Court-fee according to one-fourth of the value of subject-matter of appellant's share involved in appeal paid — Similar court-fee paid by respondent — Both appeal and cross objection dismissed — Second appeal by plaintiff — Plaintiff valuing appeal at the valuation of the property in dispute in the second appeal and not at the value of the entire property which was the subject-matter of the original suit. (Para 3)

Held appeal and second appeal and cross objection in first appeal were properly valued and proper court-fee paid.

Under S. 7(vi-A) (U. P.) read with S. 2(iv) and S. 2 (i) the appellant in an appeal in a partition suit has to pay court-fee according to one-fourth of the value of the appellant's share of the property involved in the appeal. The same rule would apply to a respondent filing a cross-objection. F. A. No. 87 of 1945 (Oudh), Not followed. (Para 4)

Anno: Court-fees Act, S. 7 (iv) (b) N. 1a.

R. N. Shukla, for Appellants; Mohd. Naziruddin, for Respondent; B. N. Roy, holding brief of B. K. Dhoan, Sr. Addl. Standing Counsel, for the State.

CASE REFERRED: Para

(A) ('45) First Appeal No. 87 of 1945 (Oudh) 5

AGARWALA J.:

This is a report by the taxing officer about deficiency in Court fee. The facts are simple :

(2) Ram Lakhan and Ram Naresh, plaintiffs-appellants, filed a suit for partition against their uncle, Raj Kumar, in respect of movable and immovable properties. They claimed a half share in all of the properties on the ground that all of them were joint family properties. The defence to the suit was that part of the immovable property was the self-acquired property of Raj Kumar and the plaintiffs were not entitled to claim any share therein.

(3) The trial Court decreed the suit in part and dismissed it in respect of some items of the property in dispute. Both parties were dissatisfied with that decree. The plaintiffs appealed to the lower appellate Court in respect of items which were held not to be joint family property while the defendant filed cross-objections in respect of some of the properties which had been held to be joint family properties and not the self-acquired property of Raj Kumar.

The plaintiffs valued their appeal at the value of the property which was the subject-matter of the appeal. So did the defendant value his cross-objections at the value of the property in respect of which he alleged that it belonged to him exclusively and paid Court fee in accordance with such valuation. The court below dismissed both the appeals and the cross-objection. The defendant submitted to the decree of the Court below but the plaintiffs have filed the present second appeal in this Court and have valued their appeal at the valuation of the property in dispute in the second appeal and not at the value of the entire property which was the subject-matter of the original suit.

The taxing officer has reported that both in the Court below and in this Court the plaintiffs were liable to pay Court fee on the value of the entire subject-matter of the suit and not on the value of the items of property which were in dispute in the appeal in the Court below or which are in dispute in this second appeal. The report further says that the defendant-respondent was also liable to pay the deficiency in Court fee on the cross-objection filed by him in the lower appellate Court on the same ground.

(4) The point has to be decided upon the language of section 7(vi-A) which runs as follows:

"In suits for partition according to one-fourth of the value of the plaintiff's share of the property and according to the full value of such share if on the date of presenting the plaint the plaintiff is out of possession of the property of which he claims to be a coparcener or co-owner and his claim to be a co-parcener or co-owner on such date is denied."

It is the common case of the parties that the plaintiffs were liable to pay court fee on one-fourth of the value of the property and not on its full value. The whole question is whether they were to pay court-fee on the value of the plaintiff's share in the suit or on the value of the appellants' share of the property in dispute in the appeal. According to section 2(iv) of the Act, "suit" includes an appeal and according to section 2(i) an "appeal" includes a cross-objection. Therefore in order to compute the court-fee payable on an appeal, we have to read "appellant" in place of "plaintiff" and "appeal" in place of "suit". Thus substituting the word "appeal" for "suit" and "appellant" for "plaintiff" in section 7 (vi-A) the section would read thus:

"In appeals for partition according to one-quarter of the value of the appellant's share of the property....."

If the question is about the Court fee payable in a suit, obviously the property referred to in the section is the property involved in that suit.

Similarly if it is a question of appeal, the property referred to in the section would be the property involved in the appeal. Consequently the appellant would have to pay Court fee according to one-fourth of the value of the appellant's share of the property involved in the appeal. The same rule would apply to a respondent filing a cross-objection. It is not disputed that the Court fee has been paid in the present case, both in the Court below and in this Court, on the value of one-fourth of the appellants' share in the property involved in the appeal. There is, therefore, no deficiency in the payment of Court fee.

(5) Learned Counsel appearing for the taxing officer has pointed out that as against this view there is a decision of a Division Bench of the late Chief Court of Avadh in — 'Mool Chand v. Sita Ram', First Appeal No. 87 of 1945 (Oudh) (A). In that case it appears that the appellant filed a first appeal against a final decree for partition. Several questions relating to Court fee were raised and the last question raised was the same as arises in this appeal. The Court briefly disposed of the matter in these words :

> "The learned Counsel for the appellants contends, however, that he challenges only one item of the partition decree and does not challenge the rest. The contention, we think, is untenable. The decree stands or falls as a whole and the fact that the partition of one item alone is questioned would be hardly material. We, therefore, accept the office report that there is a deficiency of 'Rs. 131/4/- in respect of Court fee paid by the appellants nos. 1 to 6 in this Court."

The relevant provisions of the Court Fees Act were not considered by the learned Judges at all.

The question of Court fee has to be decided upon the language of section 7 (Vi-A) which has reference to the value of the plaintiff's share of the property. It is hardly relevant to consider whether the decree of the Court below will stand or fall as a result of the decision in the appeal. It does not appear that any clear argument was addressed to the Court. In the circumstances we do not think that the observations of the learned Judges are in any way binding on us. We, therefore, hold that the Court fee paid in the Court below as well as in this Court is adequate.

B/R.G.D. Order accordingly.

A.I.R. 1954 ALL. 314 (Vol. 41, C.N. 148)
(LUCKNOW BENCH)
RANDHIR SINGH J.

Gulab Singh, Defendant-Appellant v. L. Hira Lal, Plaintiff-Respondent.

Second Appeal No. 637 of 1947, D/- 24-9-1953, against decree of Addl. Civil J., Hardoi, D/- 20-5-1947.

Transfer of Property Act (1882), Ss. 58 and 68 (1) (b) — Mortgage by co-sharer — Security rendered insufficient.

A co-sharer has a right to mortgage his share in the property. If he mortgages the entire property, the mortgage is valid to the extent of his share of the property. If a suit brought by the other co-sharers for a declaration that the mortgage was not binding on their share is decreed, the property furnished as security for loan is evidently rendered insufficient and the mortgagee is entitled to sue under S. 68. AIR 1944 All 276, Distinguished. (Paras 3 and 4)

Anno: T. P. Act, S. 58 N. 21; S. 68 N. 3.

1949 Mulla: S. 58, P. 361 N. "Mortgagor" (Pts. 3 and 4 in N. 21 to S. 58 in A.I.R. Com. extra).

1949 Mulla: S. 68 P. 468 N. "sub-sec. (1) — Clause (b)" (Pts. 2, 5, 8, 10-13, 14, 16 and 17 in N. 3 to S. 68 in A.I.R. Com., extra).

M. L. Trivedi, for Appellant.

CASE REFERRED: Para

(A) (V31) AIR 1944 All 276 (277): ILR (1944) All 574 3

JUDGMENT: This appeal raises a short point. Gulab Singh 'alias' Sua Singh appellant made a mortgage of certain plots in favour of the plaintiff Hira Lal on the 5th January, 1951, and made over possession to the mortgagee Hira Lal. Hira Lal then made an application for fixation of ex-proprietary rent of these plots as Gulab Singh had his 'Khudkast' or 'Sir' in the plots. An objection was raised by the other brothers of Gulab Singh that Gulab Singh was the owner of only one-fourth share in the plots and had no right to make a mortgage of all the plots. This objection did not find favour with the Revenue Court and the three brothers of Gulab Singh then instituted a suit in the Court of the Munsif for a declaration that the mortgage made by Gulab Singh was not binding on the three-fourths share in the plots and the plaintiff was not entitled to possession of the shares owned by the three brothers. This suit was decreed.

The plaintiff then instituted the suit which has given rise to this appeal for the recovery of the mortgage money on the allegations that the security furnished by the mortgagor had been rendered insufficient and he was entitled under section 68 of the Transfer of the Property Act for a refund of the money advanced to the mortgagor. The munsif decreed the suit. The defendant then went in appeal to the District Judge. The Civil Judge who heard the appeal upheld the judgment of the Munsif and the defendant has now come up in second appeal.

(2) The respondent has not turned up and the appeal has been heard 'ex parte'.

(3) The only point which has been raised on behalf of the appellant in this case is that the mortgage made by Gulab Singh was void and as such the plaintiff was not entitled to a refund of the money advanced by him. In support of this contention a ruling reported in —'Ode Ram v. Chhida Singh', AIR 1944 All. 276 (A) has been cited. In this reported case the property mortgaged was ex-proprietary holding and it was held that a mortgage of ex-proprietary holding was void. Some other rulings have also been referred to in this reported case and all those cases relate to mortgages of occupancy holdings.

A mortgage or sale of occupancy holdings is void, but a mortgage or sale of a share in plots of which the transferor is the owner will not be void. If the transferor transfers a share in excess of his own share, the transaction would be valid so far as his share is concerned and would be invalid with regard to the share of the other co-sharers. In the present case Gulab Singh had a right to mortgage his share in the plots and as such the transfer could not be said to be void. The ruling has, therefore, no application to the facts of the present case. Gulab Singh's mortgage was valid in respect of his one-fourth share in the plots.

(4) Section 68 of the Transfer of Property Act lays down that a mortgagee has a right to sue for the mortgage money where, by any cause other than a wrongful act or default of the mortgagor or mortgagee the security is rendered insufficient within the meaning of section 66 of the Transfer of Property Act. The claim of the brothers of Gulab Singh in respect of three-fourths share in the property having been decreed, the property which was furnished as security for the loan had evidently been rendered insufficient and the plaintiff was, therefore, entitled to sue for his mortgage money under section 68 of the Transfer of Property Act. The view taken by the Courts below appears to be correct. No other point has been pressed in arguments.

(5) As a result the appeal fails and is dismissed. As the respondent is absent I make no order as to costs.

B/V.R.B. Appeal dismissed

A.I.R. 1954 ALL. 315 (Vol. 41, C.N. 149)

MOOTHAM AND SAPRU JJ.

Prem Dutta Paliwal, Applicant v. Superintendent Central Prison Agra and another, Opposite Party.

Criminal Misc. Writ No. 261 of 1953, D/- 29-10-53.

(a) Constitution of India, Arts. 22 (4), 226 — Power of High Court to grant writ of habeas corpus — (Public Safety — Preventive Detention Act (1950), S. 8).

Neither S. 8 of the Preventive Detention Act, 1950, nor Cl. (4) (a) of Art. 22 constitutes the Advisory Board a Court of law or imposes on it the duty of determining whether a person's detention is legal. All that S. 8 of the Preventive Detention Act does is to constitute a body which, as its name implies, is a purely advisory body whose duty it is to advise the Government whether in its opinion there is sufficient cause for the continued detention of a particular person or persons. Its opinion cannot operate to oust the jurisdiction of the High Court to determine whether the grounds upon which the petitioner was detained satisfied the requirements of the law. The High Court has no concern with the proceedings of the Advisory Board. The fact that the Constitution has provided an Advisory Board for advising on cases of preventive detention does not mean that the right of the High Court to grant a writ of 'habeas corpus' in cases where the initial arrest in the opinion of the High Court was illegal or improper has been taken away. AIR 1953 Raj 177, Rel. on. (Paras 5, 10)

(b) Public Safety — Preventive Detention Act (1950), S. 7 — Vague grounds — (Constitution of India, Art. 22 (5).)

In none of the grounds had any date or time been mentioned. In one of the grounds in which it was alleged that the petitioner organised two illegal strikes, not only was there no mention of the date but no particulars were given as to the place or places where the alleged strikes were said to have occurred nor of the persons against whom they were alleged to have been directed:

Held that these grounds were in terms which were too vague to enable the petitioner to make an adequate representation. AIR 1953 SC 318, Foll. (Paras 6, 13, 15)

(c) Public Safety — Preventive Detention Act (1950), S. 7 — Vague grounds — (Constitution of India, Art. 22(5)).

The fact that the petitioner would suffer no hardship or prejudice by reason of sufficient particulars not having been already furnished to him is immaterial. The question is not whether the petitioner will in fact be prejudicially affected in the matter of securing his release by his representation but whether his constitutional safeguard has been infringed. AIR 1953 SC 318, Foll. (Para 15)

(d) Constitution of India, Arts. 21, 22 (5) (6) — Good grounds mixed up with bad grounds — (Public Safety — Preventive Detention Act (1950), S. 7).

Where good grounds for detention have been mixed up with vague, indefinite and bad grounds the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 as the constitutional requirement with respect to each of the ground communicated to the person detained, subject to a claim of a privilege under Cl. (6) of Art. 22, is not satisfied. AIR 1953 SC 318, Foll. (Paras 6a, 15)

S. N. Dwevedi, for Applicant; Shri Rama D.G.A., for Opposite Party.

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 318 (Prs 4, 5): 1953 Cri LJ 1241 6, 6a, 12

(B) (V40) AIR 1953 Raj 177 (Pr 19a): 1953 Cri LJ 1424 11

MOOTHAM J.:

This is a petition under Art. 226 of the Constitution for the issue of a writ in the nature of 'habeas corpus'.

(2) The petitioner was detained on the 7th May, 1953, under S. 3(1)(a)(ii) of the Preventive Detention Act, 1950. On the 29th May he was furnished by the District Magistrate with the grounds of his detention. Subsequently the case of the petitioner was referred to the Advisory Board, constituted under S. 8 of the Preventive Detention Act, which came to the conclusion that there was a sufficient cause for the petitioner's detention. Thereafter the Governor by an order dated the 6th August, 1953, passed under sub-s. (1) of S. 11 of the Act directed that the petitioner continue to be detained for a maximum period of twelve months from the date of his detention.

(3) The petitioner contends that his detention is illegal as the grounds upon which he was detained were vague and indefinite and did not disclose sufficient particulars to enable him to make an effective representation to the authorities.

(4) The learned Deputy Government Advocate submits that even if the petitioner's detention was originally illegal it ceased to be so when the Advisory Board gave it as its opinion that there was sufficient cause for his detention. The validity of that detention, learned counsel argues, cannot today be challenged in this Court.

(5) Article 22(4)(a) of the Constitution, so far as it is material, reads as follows:

"22(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention."

This Article lays down a restriction on any law providing for preventive detention. Unless that law makes provision for the report by an Advisory Board constituted in the manner prescribed the consequence is that the law itself, in so far as it purports to authorise detention beyond three months, would be invalid. Such a provision is to be found in S. 8 of the Preventive Detention Act, 1950, but neither that section nor clause (4)(a) of Art. 22 constitutes the Advisory Board a court of law or imposes on it the duty of determining whether a person's detention is legal. All that S. 8 of the Act does is to constitute a body which, as its name implies, is a purely advisory body whose duty it is to advise the Government whether in its opinion there is sufficient cause for the continued detention of a particular person or persons. Its opinion cannot, therefore, in my view, operate to oust the jurisdiction of this Court to determine whether the grounds upon which the petitioner was detained satisfied the requirements of the law.

(6) Of the twelve grounds of detention served upon the petitioner learned counsel has drawn our attention to grounds 6, 12 and part of ground 7 which read as follows:

"6. That you have been planning designs with some two or three others for getting the houses of the mill-owners (M/s Ramdayal Chhitarmal) looted and for bringing them to humiliation and disrepute."

"7. That you have also been threatening the labour class which has not joined hands with you to leave the mills and join with you."

"12. That you have sponsored, led and organised two illegal strikes in which offences involving breaches of peace and disturbances of public order occurred."

The first question is whether these grounds are expressed in terms which are sufficiently clear and precise to enable the petitioner to make an adequate representation to the appropriate authorities. In none of the grounds has any date or time been mentioned. In the case of ground 12, in which it is alleged that the petitioner organised two illegal strikes, not only is there no mention of the date but no particulars are given as to the place or places where the alleged strikes are said to have occurred nor of the persons against whom they are alleged to have been directed. In my opinion these grounds, and in particular ground 12, are in terms which are too vague to enable the petitioner to make an adequate representation.

The Deputy Government Advocate has strongly urged before us that if the twelve grounds are read as a whole then the petitioner ought to have had no difficulty in understanding what it was which was made the subject matter of complaint in grounds 6, 7 and 12. A similar argument was addressed to the Supreme Court in — 'Ram Krishan Bhardwaj v. State of Delhi', AIR 1953 SC 318 (A), but was rejected in these words:

"Surely, it is up to the detaining authority to make his meaning clear beyond doubt, without leaving the person detained to be his own resource for interpreting the grounds."

(6a) The second question is whether one or more vague grounds among others, which are clear and definite, would infringe the constitutional safeguard provided in Art. 22(5) of the Constitution. This question is no longer open to argument. It has been answered in the affirmative by the Supreme Court in 'Ram Krishan Bhardwaj's case, (A)', to which I have just referred. The learned Chief Justice, delivering the judgment of the Court, said:

"Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. In this case, the petitioner has the right, under Art. 22(5), as interpreted by this Court by a majority, to be furnished with particulars of the grounds of his detention 'sufficient to enable him to make a representation which on being considered may give relief to him'. We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under cl. (6) of Art. 22".

(7) In my opinion the petitioner's detention cannot be held to be in accordance with the procedure established by law, and he is entitled to be released. I would direct that he be set at liberty forthwith.

SAPRU J.:

(8) I agree with the order proposed to be passed by my brother Mootham.

(9) The facts which have given rise to this petition have been narrated by him and I think it is unnecessary for me to repeat them. A point which was made by the Deputy Government Advocate, Sri Sri Rama, was that this petition was only presented to this Court on the 21st October, 1953, though the actual order of detention had been passed on the 27th May, 1953. It is contended by Sri Sri Rama that the petition having been made after the Advisory Board constituted under the Preventive Detention Act had forwarded its opinion to the State Government, the detention of the Petitioner is justified. The argument, in short, is that the detention of the Petitioner is 'now' at all events legal & that this Court cannot or should not therefore, grant him the relief asked for by him.

(10) Article 21 of the Constitution guarantees life and personal liberty 'according to procedure established by law'. Article 22 seeks to provide protection against arrest and detention in certain cases. In effect, what Art. 22(4) does is to lay down that it shall not be open to the legislature to pass any law authorising preventive detention of a person for a longer period than three months unless an Advisory Board constituted of persons who are or have been or are qualified to be High Court Judges has reported before the expiration of the said period that there is, in its opinion, sufficient cause for such detention. There is a further proviso that nothing in that sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7).

The Advisory Board has been constituted as a safeguard against a possible misuse of the power of preventive detention. The Advisory Board is not a judicial body; it does not follow strict judicial procedure; it is in fact in the nature of a body charged with the responsibility of advising the executive government in regard to cases of preventive detention where it is intended that such detention shall last for more than three months. I cannot, therefore, accept the contention that we have any concern with the proceedings of the Advisory Board. The fact that the Constitution has provided an Advisory Board for advising on cases of preventive detention does not mean that

the right of this Court to grant a writ of 'habeas corpus' in cases where the initial arrest in the opinion of this Court was illegal or improper has been taken away.

(11) I agree with the view which has been expressed by Wanchoo, C. J. in the case of — 'Durg Singh v. The State', AIR 1953 Raj 177 (B), that the fact that an applicant's case has been considered by the Advisory Board can make no difference to the order that we can pass in the circumstances of this case.

(12) The question which has to be considered is whether all the grounds supplied to the Petitioner are of a nature sufficient to enable him to make a proper representation. The view which has been taken by their Lordships of the Supreme Court in — 'AIR 1953 SC 318 (A)', is that preventive detention being a serious invasion of personal liberty, the duty of the Courts is to make sure that such meagre safeguards as the Constitution provides against its improper exercise are strictly enforced. The learned Chief Justice points out that the Petitioner has a right under Article 22 (5) to be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation which on being considered may give relief to him. The learned Chief Justice goes on to observe that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of Art. 22.

(13) Sri S. N. Duvedi who appears for the Petitioner has invited our attention to the grounds furnished to the Petitioner and has contended that three of them are of a most unsatisfactory nature, namely grounds Nos. 6, 7 and 12. In ground No. 6 it is stated that the Petitioner had been planning designs with some two or three others for getting the house of the mill-owners Messrs. Ramdayal Chhitarmal looted and for bringing them to humiliation and disrepute. It will be seen that neither the time nor the place nor the names of the persons with whom he was planning have been disclosed.

(14) In ground No. 7 it is alleged against the Petitioner that he had been threatening the labour class which had not joined hands with him to leave the mills and join with him; a specific instance has also been mentioned in the second part of this ground. No particulars of the labour class or of the mills have been given in this ground. I may say that I should not have disposed to look upon either of the grounds Nos. 6 and 7 as fatal had it not been for ground No. 12. I shall, therefore, come to ground No. 12.

(15) In that ground it is said that the Petitioner had sponsored, led and organised two illegal strikes in which breaches involving peace and public disturbance occurred. Neither the time nor the place of these strikes has been mentioned in this ground. Whether these strikes were organised in Agra or somewhere else is not at all clear from it. It cannot be said from reading it what the period when these strikes were organised was. Though these strikes are described as illegal, the matter in connection with which they were organised is not indicated. I am, therefore, driven to the conclusion that the grounds are unsatisfactory.

As Patanjali Sastri, C. J. points out, the fact that the petitioner would suffer no hardship or prejudice by reason of sufficient particulars not having been already furnished to him is immaterial.

"The question, however, is not", as he puts it,

"whether the petitioner will in fact be prejudicially affected in the matter of securing his release by his representation but whether his constitutional safeguard has been infringed."

This is a case in which possibly good grounds for detention have been mixed up with vague, indefinite and bad grounds. Having regard to the fact that the view which the Supreme Court has taken, is that the petitioner's detention cannot be held to be in accordance with the procedure established by law within the meaning of Art. 21 unless the constitutional requirement with respect to each of the ground communicated to the person detained subject to a claim of a privilege under clause (6) of Art. 22 is satisfied, there is no alternative before us but to direct release of the Petitioner.

(16) The petitioner must, therefore, succeed and I agree with the order of my brother Mootham that the Petitioner be released forthwith.

BY THE COURT:

(17) The petition is allowed with costs. The petitioner is entitled to be released and we direct that he be set at liberty forthwith.

A/D.H.Z. Petition allowed.

A.I.R. 1954 ALL. 317 (Vol. 41, C.N. 150)

MOOTHAM AND SAPRU JJ.

Mohammad Yasin, Applicant v. The Dist. Magistrate, Kanpur and another, Opposite Party.

Civil Misc. Writ No. 873 of 1953, D/- 18-11-1953.

Constitution of India (1950), Arts. 19 (1) (g) and 226 — Scope.

A petition writer has no legal right, let alone a fundamental right, to carry on his profession or business in the Collectorate compound. His case is wholly distinguishable from that of a person who is required by law to obtain a licence as a condition of carrying on his business or profession at all. Where the law lays down that a particular occupation cannot be carried on save under a licence, then the withdrawal of a licence has the obvious consequences of wholly preventing the person concerned from carrying on that business, and the question may arise whether there has been contravention of the provisions of Art. 19 (1) (g) of the Constitution. The petition writer has no right to carry on his business in the Collectorate compound save with the permission of the Collector, and if that permission is withdrawn it would still be open to him to carry on his occupation any where other than the Collectorate compound. He may have a grievance by the withdrawal of the permission but no legal remedy unless it can be founded on breach of contract. The remedy for breach of contract is by way of suit, and not a petition under Art. 226. (Paras 3, 8)

A provision in the order withdrawing the permission that "No application or papers written by him should be entertained in any Court" is however in excess of the powers of the officer making the order. (Paras 4, 9)

Anno: Civil P. C., App. III; Constitution of India, Art. 226 N. 13.

Mirza Hameedullah Beg, for Applicant; S. C. for Opposite Party.

CASES REFERRED: Paras

(A) (1915) 1915-1 KB 1 (3): 83 LJKB 1837 8

(B) (V32) AIR 1945 Cal 413 (416): ILR (1945) 2 Cal 361 8

(C) (V37) AIR 1950 EP 40 (Prs 11, 12) 8

MOOTHAM J.:

This is a petition under Art. 226 of the Constitution which, in my opinion, is misconceived. The petitioner is a petition-writer who held a licence issued by the Collector of Kanpur which permitted him to exercise his profession within the Collectorate at Kanpur. For this licence the petitioner made a quarterly payment of five rupees. Suspicion arose earlier in the year that the petitioner had been responsible for the typing of an anonymous letter addressed to the District and Sessions Judge, Kanpur. An enquiry of some kind was held and on the 1st September, 1953, the petitioner's licence as a petition-writer was cancelled by an order which reads as follows :

"The typing licence No. 17 issued to Sri Mohammad Yasin, a typist of the Collectorate Court Compound, Kanpur, has been cancelled for a period of five years with effect from 26-8-1953 for having worked in an objectionable manner.

No application or papers written by him should be entertained in any court."

(2) The petitioner has come to this Court from which he seeks a writ in the nature of 'certiorari' to quash this order of the 1st September. He claims that he has a fundamental right to carry on his profession of petition-writer in the Collectorate compound and that his licence can be cancelled only upon proof of the contravention of one of the conditions subject to which it was issued.

(3) Sri Hamid Ullah Beg, who has strenuously argued the case for the petitioner, has however been wholly unable to satisfy me that the petitioner has any legal right, let alone a fundamental right, to carry on his profession or business in the Collectorate compound.

The petitioner's case is I think wholly distinguishable from that of a person who is required by law to obtain a licence as a condition of carrying on his business or profession at all. Where the law lays down that a particular occupation cannot be carried on save under a licence, then the withdrawal of a licence has the obvious consequences of wholly preventing the person concerned from carrying on that business, and the question may very well arise whether there has been contravention of the provisions of Art. 19(1)(g) of the Constitution. That appears to me very far from the position in the present case in which it is not in dispute that the petitioner is free to carry on his occupation in any place other than in the Collectorate. The petitioner has, in my opinion, no right to carry on his business in the Collectorate compound save with the permission of the Collector, and if that permission is withdrawn the petitioner may have a grievance, but I cannot see that he has any legal remedy unless it can be founded on breach of contract. The remedy for breach of contract is of course by way of suit. The petitioner must satisfy this Court that he has a legal right and that there has been an infringement of that right; this in my opinion he has failed to do.

(4) The order of the 1st September, contains, however, one provision which though no objection to it has been taken in the petition, and no argument has been addressed to us on it on behalf of the petitioner, cannot, it is conceded, be sustained. I refer to the provision that "No application or papers written by him should be entertained in any court." Although it was no doubt intended to be effective only within the Collectorate this provision is clearly one which is in excess of the powers of the officer making the order, and the learned Standing Counsel has very properly given the Court an undertaking that this sentence will be deleted from the order.

(5) The petition must be dismissed, but in the circumstances I would make no order as to costs.

SAPRU J.:

(6) I concur. The petitioner was the holder of a licence for working as a steno-typist petition-writer in the court compound, Collectorate, Kanpur. His licence was cancelled by the Officer-in-charge Nazarat, Collectorate Kanpur. We understand that this officer is the City Magistrate, Kanpur. The order directs that the typing licence of the petitioner should be cancelled for a period of five years and that no application or papers written by him should be entertained in any court. The petitioner has come to this Court under Article 226 of the Constitution and the relief that he seeks is that of 'certiorari' quashing the order of the 1st September 1953. Certain other consequential reliefs have also been claimed.

(7) Mr. Hamid Ullah Beg who appears for the petitioner contends that the petitioner has a fundamental right under Article 19(1)(g) to carry on his business, trade or profession and that right has been interfered with by the order in question. I cannot understand how the petitioner can be said to have a fundamental right to carry on business in a place belonging to some other person and in this case the State. The Collectorate compound is the property of the State Government and as far as I can see the proper person to look after it is the Collector. The order cancelling the licence was passed by the City Magistrate as he was the officer deputed by the Collector to look after the Collectorate compound.

Before the petitioner can come to this Court for relief under Article 226 of the Constitution, it is incumbent on him to show that he has a legal right and that there has been an infringement of that legal right. In this case I can see no infringement of any legal right. The petitioner has not been able to establish what legal right he had to the unrestricted use of the Collectorate compound for working as a petition writer. There is no analogy between this case and that of a person who cannot carry on his profession, trade or business at all without a licence. The cancellation of a licence in a case of that nature would deprive a person of the means of his livelihood. In this case, the cancellation of the licence involves no such consequences for it is still open to the petitioner to carry on his business elsewhere than in the Collectorate compound. No person has a right to carry on his profession, business or trade in the premises of some other person and it strikes me, therefore, that the argument which has been advanced by Mr. Beg has no force.

(8) Mr. Beg contends that the petitioner has been deprived of his licence on grounds extraneous to those on which the licence had been granted to him. He had invited our attention to those terms. But here again it is well to remember that a licence can be revoked for misbehaviour, (see on this point the cases of — 'Hurst v. Picture Theatres Ltd.', (1915) 1 KB 1 (A); — 'Arpan Ali v. Jnanendra Kumar', AIR 1945 Cal 413

(B) and —'Dominion of India v. R. B. Sohan Lal', AIR 1950 EP 40 (C)). Learned counsel for the petitioner has not been able to point out that the petitioner had any right under any statute or statutory rule to carry on business in the Collectorate compound. For a contractual right or liability the remedy is not a petition under Article 226 but a regular suit. No reason has been advanced why this Court should exercise its powers under Article 226 of the Constitution in favour of the applicant.

(9) There is, however, one aspect of the case which frankly I do not like. The concluding part of the order of the City Magistrate is that "no application or papers written by him (i.e. the petitioner) should be entertained in any court". It may be that the City Magistrate had good reasons to be annoyed with the petitioner's behaviour. But it must be remembered that we are not living in the days of Nadir Shah but in a State which is subject to the rule of law. It was, in my opinion, grossly improper on the part of the magistrate to give expression to his feelings of annoyance by incorporating in his order something which he had clearly no right to incorporate. It was not open to him to prevent the petitioner from earning his livelihood by typewriting in places other than the Collectorate compound. The cancellation of the licence allowing him to work in the Collectorate compound for a period of five years for misbehaviour was in itself a severe punishment and I cannot understand how the City Magistrate thought that it was right or proper that he should go out of his way to pass an order which is highly unjudicial in tone and spirit.

Had it not been for the fact that the learned Standing Counsel has very properly given as an assurance that this part of the order will be expunged from the order, I might have considered the question whether we should not interfere with that part of the order passed by the City Magistrate. The learned Standing Counsel has given us the assurance that this part of the order will be expunged and I have no doubt that the undertaking will be honoured.

(10) Having regard to the fact that the petitioner has not been able to make out a case for the infringement of any legal right, there is no alternative for us but to dismiss the application. But, in the circumstances of this case, I would make no order as to costs.

A/M.K.S. Application dismissed.

A.I.R. 1954 ALL. 319 (Vol 41, C.N. 151)

(LUCKNOW BENCH)

SAPRU AND MUKERJI JJ.

Raj Narain Singh, Petitioner v. Atmaram Govind and another, Opposite Party.

Civil Misc. Appln. No. 20 of 1953, D/- 7-5-1953.

(a) Constitution of India, Art. 226 — Statement of reliefs.

A party seeking relief under Art. 226 of the Constitution should precisely state what writ, order or direction it is that he seeks for redressing a wrong which affects him personally. Otherwise the application is liable to be dismissed on the simple ground that the reliefs asked for are neither precisely nor intelligibly stated. (Para 2)

(b) Constitution of India, Art. 226 — Who can apply.

An application for a writ in the nature of mandamus or such like order or direction is not maintainable unless it has been filed by a person whose right is said to have been directly affected. The relief as claimed must have relation to the rights of the petitioner. AIR 1951 All 1 (FB), Rel. on. (Para 2)

(c) Constitution of India, Art. 226 — Application for writ against Legislature — Maintainability.

It is well known that no writ, direction or order restraining the Speaker from allowing a particular question to be discussed or interfering with the legislative processes of either house of the legislature or interfering with the freedom of discussion or expression of opinion in either house can be entertained. (Para 3)

(d) Constitution of India, Art. 226 — Declaratory relief.

The writ jurisdiction under Art. 226 should not be utilised for the purpose of granting merely declaratory reliefs. (Para 13)

(e) Constitution of India, Art. 194(3) — Parliamentary privilege — What is.

Parliamentary privilege of the House of Commons in United Kingdom is the sum of the fundamental rights of the House and of its individual members as against the prerogatives of the Crown, the authority of the ordinary Courts of law and the special rights of the House of Lords. (Para 9)

They are rights which a sovereign legislature must possess for the due execution of its powers. Some of them are enjoyed by individual members for the obvious reason that the House cannot perform its functions without an unimpeded use of their services and others by each House for the protection of its members and the vindication of its own authority, prestige, power and dignity. (Para 10)

Though the distinction between privilege and functions is not always apparent, the more convenient course is to reserve the term 'privilege' to certain fundamental rights of each House which are generally accepted as essential for the exercise of its constitutional functions. (Para 10)

(f) Constitution of India, Art. 194(3) — Breach of parliamentary privilege — Jurisdiction of Court.

Though neither House in England has ever expressly renounced the claim not only to be the judge of the breach of its own privileges but of their very existence or limits, the Courts have nevertheless consistently taken the view that neither House of Parliament has power by any vote, resolution or declaration to create for themselves new privileges not justified by the known laws and customs of Parliament. (Para 11)

Each House in Britain possesses (a) the right of being the exclusive judge of the legality of its own proceedings, (b) the right to punish its own members for their conduct in Parliament and (c) the right to settle its own proceedings. It is settled law that the House of Commons is not responsible to any external authority for following the rules it lays down for itself for the transaction of its own business. It is open to the House to depart from them at its own discretion. Even where the procedure of the House or the right of its members to take part in its proceedings is

dependent on statute — and this is important — the House is immune from scrutiny by Courts as to the manner in which it interprets them. It follows from this that for such purposes the House can practically change or supersede the law. (1704) 24 D Rayn 1105; (1811) 14 East 1 at p. 145; (1839) 9 Ad &E 1 at p. 14; (1840) 11 Ad & E 273 and (1884) 12 QBD 271. Ref. (Para 11)

†(g) **Constitution of India, Art. 194(3) — Breach of privilege — Finality of decision of Speaker.**

Even an erroneous decision by the Speaker or the House in respect of a breach of privilege cannot be the subject-matter of scrutiny by a Court of law. Finality attaches where under cover of it no new privilege is created by the house to a decision of the house in respect of a matter relating to its privileges. (1884) 12 QBD 271 and (1935) 1 KB 594, Rel. on. (Para 12)

Obviously, the High Court is not, in any sense whatever a Court of appeal or revision against the legislature or against the rulings of the Speaker who, as the holder of an office of the highest distinction, has the sole responsibility cast upon him of maintaining the prestige and dignity of the House. (Para 13)

(h) Constitution of India, Arts. 194(3), 121, 211 — Matter exclusively in Speaker's jurisdiction — Correct etiquette for Courts.

As it is right and proper that judicial authorities should be free from criticism so far as their judicial work is concerned in the State Legislature or Parliament, correct etiquette requires that the judiciary, on its part too, should refrain from comments in regard to a matter which is exclusively within the jurisdiction and authority of the Speaker and the State Legislature. (Para 13)

†(i) **Constitution of India, Art. 194(3) — Procedure followed by British Parliament — Binding effect on Indian Legislatures.**

Though Art. 194 declares that the Privileges of each House of the State Legislature and the members thereof shall be, save in respect of matters specified in clauses (1) and (2) of Art. 194, the same as those enjoyed by the British House of Commons and its members, it does not follow that the Speaker and the State Legislature are bound to follow the procedure in the British Parliament in every detail. After all, there is nothing sacrosanct about that procedure. (Paras 14, 15)

(j) Constitution of India, Arts. 208, 212 — Rules of Procedure of U. P. Assembly, Rr. 67, 189 (3) — Reference by Speaker to Committee of Privileges — Validity — Jurisdiction of Court.

A, a member of a State Legislature insisted on the immediate consideration of a certain motion but his request was not granted by the Speaker. On about three occasions A was asked by the Speaker to sit down; but, as he was not prepared to take notice of even the points of order raised, the Speaker asked him to withdraw from the House. A did not comply with that direction. Thereafter the Speaker drew the attention of the House to the defiant attitude adopted by A and ordered the police to remove him from the Assembly Hall by using the minimum amount of force necessary for that purpose. On being so ordered, the police forcibly removed A by bodily lifting him from the Assembly Hall, he having squatted on the floor of the House. Similar scenes happened in the case of two other members who were also ejected forcibly from the Hall. After their removal from the House the Speaker drew the attention of the House to the intransigent attitude that they had adopted and observed that, in his opinion, their conduct constituted a breach of the privileges of the House. As he did not think that the incident should be ignored, he referred the matter to the Committee of Privileges. On the recommendation of the Committee the House passed a resolution suspending A till the sitting of the House. A applied under Art. 226 of the Constitution for a writ against the Speaker on the ground that the resolution was void and the order passed upon it unconstitutional. It was further argued that the reference to the Committee of Privileges by the Speaker of a matter which could be dealt with by the standing orders or rules of the House was wrong and contrary to estabilshed Parliamentary practice and that it constituted the creation of a new privilege for the House.

Held that (1) The Speaker could, under R. 67 of the Rules of Procedure, refer any question of privilege to the Committee of Privileges for examination, investigation or report. Whether the question was one of privilege or not was a matter solely for the Speaker to decide. (Para 15)

(2) That even if there had been no such express rule the High Court had no jurisdiction to issue a writ, direction or order relating to a matter which affected the internal affairs of the House as under Art. 212 both the Speaker and the other officers were protected from scrutiny by a Court of law for what was done in the House. (Para 15)

(3) That there was no creation of a new privilege in the procedure adopted by the Speaker or the State Legislature. (Para 16)

(4) That the matters complained of were only of procedural character and that the resolution of the House did not go beyond a matter of procedure. (Para 16)

(5) That while there was no doubt that the right of a member to continue to represent his constituency in Parliament gets affected by his suspension for whatever period, yet even on that assumption there is no legal remedy open to a member if his rights get affected by something done within the walls of the legislature. Article 212(2) of the Constitution was decisive on the point. (Para 16)

(6) That there are good reasons why the Courts should not interfere with the mode in which the legislature conducts its internal affairs. In the ultimate analysis, it is in an assiduous education of the tremendous forces generated by a vast electorate that remedies against real or supposed highhandedness on the part of any particular legislature lies. With all those matters, which are of a political nature, the Courts have no concern. (Para 45)

(k) Constitution of India, Arts. 194(3), 20(2) — Art. 194(3) not governed by Art. 20(2).

Per Sapru J. (Mukerji J. contra) : Fundamental rights cannot govern, except of course where it is specifically or by implication intended that they should, various parts of the Constitution. The frame of Art. 194,

remembering the rules of grammatical construction, cannot be ignored. The omission of the words "subject to any provision of the Constitution" as governing clauses (2), (3) (4) of Art. 194 has a significance which cannot be omitted from consideration. It is thus clear that Art. 194(3) is not governed by Art. 20(2) of the Constitution. (Blitz case) and AIR 1941 Rang 151, Distinguished. (Paras 27, 30)

Per Mukerji J.: If there had been double punishment of the petitioner for the same offence — offence as contemplated by Art. 20(2) of the Constitution — then the petitioner would have been entitled to relief by the Court because the privileges, immunities and powers of the House or its Speaker could not override the positive prohibitions contained in the Constitution nor could they make the provisions of Part III — the Fundamental Right — nugatory, even though Art. 194(3) has not been made specifically subject to the other provisions of the Constitution. To hold otherwise would be to place the Speaker or the Legislature of a State above the Constitution which can never be held. (Para 68)

(l) **Constitution of India, Arts. 194(3), 20(2), 13(3) — Resolution of House — Nature of.**

A resolution is an expression of the opinion of the House or at best a recommendation on any particular matter. It has not the status of a law. (1839) 9 Ad & E 1 at p. 14, Rel. on. (Para 31)

Held that the resolution of a State Legislature suspending a member was not a law subject to the provisions of Art. 20(2) or a judgment of a Court of justice. (Para 31)

Further, that even having regard to the very wide language in which the word 'Law' is used in Art. 13(3), a resolution could not be accurately described as a law, for it was a mere expression of opinion which could have a binding effect in cases of privileges. (Para 32)

(m) **Rules of Procedure of U. P. Assembly, R. 189 — Speaker ordering member to withdraw from House — Nature of order.**

Per Sapru J.: The action of the Speaker of a State Legislature in ordering a member to withdraw from the House is in the nature of a punishment for the parliamentary offence of disorderly behaviour and not in the nature of preventive action. The notion of preventive action can have no application to a case where the Speaker takes disciplinary steps against a member. It is not for what a member threatens to do before the legislature starts actually functioning, but for what he does when it is in actual session that he can be dealt with by the Speaker. (Paras 33, 34)

Per Mukerji J.: The action of the Speaker in having a member removed from the House for unruly behaviour is not a punishment and is not, strictly speaking, 'expulsion' within the meaning of R. 63(4). When a member is asked by the Speaker to withdraw from the House for disorderly conduct under the powers conferred on him by Rule 189(1) and on his refusal to withdraw, the Speaker has him put out of the House under the powers vested in him by sub-rule (3) of R. 189, the action of the Speaker is not really punitive action, but is preventive action. (Para 67)

(n) **Constitution of India, Arts. 194(3) and 20 (2) — Rules of Procedure of U. P. Assembly, R. 189 — State Assembly — Not a Court of justice.**

The State Legislature is not a Court of law or of justice except, of course, in the most strictly limited sense that in the exercise of regulating its proceedings it can proceed against a person or even a stranger for breaches of privilege. (1884) 12 QBD 271, Rel. on. (Para 37)

(o) **Constitution of India, Art. 20(2) — Principle and scope of — (Criminal P. C. (1898), S. 403).**

Article 20(2) is based upon the principle of the 'double jeopardy' clause and lays down that no person should be put in jeopardy of his life or liberty more than once. This principle is so well established in the system of law that is administered in India that it is not surprising that it should have been elevated to the level of a fundamental right. The intention of the founding fathers appears to have been not to disturb the existing law which is to be found in S. 403 of the Code of Criminal Procedure relating to the extent of protection against 'double jeopardy' in the criminal law of this country. (Paras 38, 39)

Article 20(2) does nothing more than reproduce in effect the provisions of S. 403 of the Code of Criminal Procedure. It is clear that under that Code a discharged person can be put for retrial. Article 20(2) clearly uses the word 'and' in a conjunctive sense and it is only where the accused has been both prosecuted and punished for the same offence that a second trial is barred. AIR 1952 Mad 725 and AIR 1952 Cal 26, Ref. (Para 40)

Anno: Criminal P. C., S. 403 N. 13.

1949 Mitra: S. 403 P. 1197 N. "Explanation", P. 1198 Ns. "What.....acquittal" and "Discharge of accused" (3 Pts. extra in N. 13 to S. 403 in A.I.R. Com.—Bombay, Madras, Rangoon, Nagpur, Punjab and Sind views and contra views of Allahabad, Calcutta and Sind on the last proposition in N. "Explanation" on page 1197 not noted in Mitra).

(p) **Constitution of India, Art. 20(2) — Prosecution and punishment — Meaning — (Words and Phrases — Prosecution and punishment).**

The words 'prosecution and punishment' in Art. 20(2) have reference to criminal offences and have the effect of limiting the scope of the article to criminal proceedings before a Court of law or judicial tribunal competent to deal with criminal cases. AIR 1953 Cal 316, Rel. on. (Para 42)

(q) **Constitution of India, Arts. 20(2), 194(3) — 'Offence' in Art. 20(2) — Meaning — Breach of parliamentary privilege — Applicability of Art. 20 (2) — (General Clauses Act (1897), S. 3(37).)**

Taking Art. 20 as a whole, the context indicates that the word 'offence' as used in the Article contemplates a criminal offence and not all types of offences.

In any case, for an 'offence' there has to be an act or omission made punishable by any law for the time being in force. Significance has, therefore, to be attached to the word 'made', which carries with it the implication that some authority empowered to do so has laid down the law. The law contemplated in the Article would appear to be an enacted law by a legislature or by a body of persons authorised by the legislature to make it.

While the punishment for parliamentary offences has been prescribed by Rule 63 of the Rules of procedure of the Assembly framed under Art. 208 of the Constitution, the offences themselves have not been so defined by those rules. So long as this essential element of the word offence as used in Art. 20(2) has not been made out, a case of double punishment for a parliamentary offence cannot be held to be covered by Art. 20(2) of the Constitution. (Paras 43, 67)

(r) Constitution of India, Art. 194(3) — Use of English precedents — (Civil P. C. (1908), Preamble).

Apart from the persuasive authority of great value of English decisions there is a definite provision in Art. 194 (3) of the Constitution which enjoins the Courts to look to those authorities in order to know for certain what the powers, privileges and immunities of the Legislatures of the States are. (Para 65)

Anno: Civil P. C., Pre. N. 15.

Iqbal Ahmad, H. N. Misra, H. K. Ghose, Bishun Singh, Onkar Singh, Khuswaqt Rai and Jagdish Gopal Mathur, for Applicant; K. L. Misra, Advocate-General, B. K. Dhaon and Sachita Nand Sahai, for Opposite Party Nos. 1 and 2.

CASES REFERRED: Paras

(A) (V38) AIR 1951 All 1: 1950 All LJ 767 (FB) 2
(B) (1884) 12 QBD 271: 53 LJQB 209 8, 11, 12, 16, 37, 45, 64
(C) (1811) 14 East 1: 104 ER 501 8, 11
(D) (1839) 9 Ad & E 1: 112 ER 1112 8, 11, 31, 63
(E) (V26) AIR 1939 FC 1: ILR (1939) Kar (FC) 6 (FC) 8
(F) (1704) 24 D Rayn 1105 11, 63
(G) (1840) 11 Ad & E 273: 113 ER 419 11, 63
(H) (1935) 1935-1 KB 594: 104 LJKB 244 12
(I) ('52) Ori. Jurisdiction Petn. No. 75 of 1952 (SC) 29
(J) (V28) AIR 1941 Rang 151: ILR (1941) Rang 321 29
(K) (1914) 1914-2 KB 570: 83 LJKB 786 38
(L) (V39) AIR 1952 Mad 725: 1952 Cri LJ 1576 40
(M) (V39) AIR 1952 Cal 26: 1952 Cri LJ 204 41
(N) (V40) AIR 1953 Cal 316: 55 Cal WN 605 42
(O) (1703) 92 ER 126 63
(P) (1868) 4 QB 73: 38 LJQB 34 63A

SAPRU J.:

This is an application under Article 226 of the Constitution. The applicant, Shri Raj Narain Singh, is a member of the U. P. Legislative Assembly having been returned on the Praja Socialist Party ticket which is the main opposition party in the Legislative Assembly. He has the distinction of being the parliamentary leader of that party and, as such, is the leader of the opposition. The opposite parties to this application are the Speaker of the Assembly, Shri A. G. Kher, and the Secretary, Shri Kailash Chandra Bhatnagar. The reliefs sought by the applicant are that this Court may be pleased (a) to declare that the resolution of the U. P. Legislative Assembly dated the 30th March 1953 is void on the ground of inconsistency with the provisions of part III of the Constitution, (b) to call for the records of the U. P. Legislative Assembly proceedings dated the 30th March 1953, the proceedings of the privileges Committee dated the 7th, 17th, 25th and the 26th March 1953 and quash the resolution dated the 30th March 1953, (c) to issue a suitable order, writ or direction asking the opposite parties to expunge the above-mentioned resolution of the said Assembly dated the 30th March 1953 from the proceedings of the U. P. Legislative Assembly and (d) to order the payment of costs to the petitioner.

(2) I should have been disposed to reject this application on the simple ground that it is not competent to this Court, for reasons to be indicated hereafter, to grant the reliefs asked for, had it not been for the fact that the learned Advocate-General has made it clear that the opposite-parties do not wish to take their stand on the technical ground that the reliefs are not properly framed. Repeatedly this Court has emphasised that a party seeking relief under Article 226 of the Constitution should precisely state what writ, order or direction it is that he seeks for redressing a wrong which affects him personally. That the prayer for relief in this application has not been properly framed and does not clearly indicate the exact nature of the relief sought is not, indeed, denied by learned Counsel for the applicant. It is urged, however, that the writ jurisdiction being comparatively a new one so far as this Court is concerned and its practice being largely unfamiliar to the Lucknow Bench of the Court, we should not reject the application on the ground of the unsatisfactory nature of the prayer, if we are satisfied that the case is otherwise a fit one for granting some kind of relief. It is contended that we should look to the substance rather than to the form of the relief and that if that be done it will be found that what the applicant seeks is that the wrong done by a resolution which the applicant maintains was illegal and affected his rights as a member of the legislature should be redressed.

I would however, like to point out that the reliefs as they stand do not seek to enforce a personal right of the applicant which has been infringed. The applicant has merely asked for a declaratory relief. No relief is claimed quashing any unjust punishment supposed to have been inflicted upon the applicant in violation of any fundamental right. Further, it will be observed that there is no prayer seeking for a relief restraining any authority from carrying out that punishment which has, indeed, exhausted itself. The point that I wish to make is that the relief as claimed has no relation to the rights of the petitioner. An application for a writ in the nature of mandamus or such like order or direction is not maintainable unless it has been filed by a person whose right is said to have been directly affected (see — 'Indian Sugar Mills Association v. Secy. to Govt., Uttar Pradesh, Labour Department, Lucknow', AIR 1951 All 1 (FB) (A)).

(3) It will be seen that the writ is directed against the Speaker of the U. P. Legislative Assembly and the Secretary of the said Assembly. Why Mr. Speaker and the Secretary have been impleaded has not been explained because, as far as I can see, no relief save relief (c), is sought against both or either of them. The relief really sought is against a resolution of the U. P. Legislative Assembly. There is no doubt, therefore, that the case is unique inasmuch as it impleads the Speaker and confuses him with the legislature. It is well known that no writ, direction or order restraining the Speaker from allowing a particular question to be discussed or interfering with the legislative processes of either house of the legislature or interfering with the freedom of discussion or expression of opinion in either house can be entertained. On this part of the case, I may quote Article 285 of Mr. Ferris's Extraordinary Legal Remedies. It runs as follows:

"Under the common law mandamus is issued in the King's name to inferior Courts, officers,

corporations or persons. Being in the King's name, it did not run to himself; 'nor did it run to Parliament', nor to the judiciary, except to such inferior Courts as the higher Courts had the power to review. Under our system of Government the executive power answers to that of the King, the legislative power takes the place of parliament, and the judicial power is vested in Courts established in accordance with the provisions of the Constitution. Where the force and effect of the common-law writ of mandamus, and its objects and purposes are unchanged, it follows that the writ never issues to the legislative branch of the Government.

It is scarcely necessary to say, therefore, that under our form of Government, members of the legislative departments cannot be directly controlled in the exercise of their legislative powers by mandamus, or any other judicial process. Thus the legislature cannot be compelled to pass an act, even though the Constitution expressly commands it, nor be restrained from passing an Act, even though the Constitution expressly prohibits it. If it neglects or refuses to act, the responsibility is with the legislature alone."

It may further be mentioned that the resolution complained against was passed on the 30th March 1953 and its effects lasted for three days, i.e., till the 2nd April 1953 on which date the parliamentary punishment inflicted on the applicant exhausted itself. The writ was moved on the 2nd April 1953 and it is strange that in the writ application no relief either of an interim nature or of a substantive nature against the punishment inflicted was claimed. On the face of it, the writ does not seek to claim any personal relief but asks merely for a declaration of an academic nature regarding the validity of a resolution passed by the legislature. I may point out that in a recent Full Bench case of this Court, to which I was a party, it was held that the writ jurisdiction under Article 226 should not be utilised for the purpose of granting merely declaratory reliefs.

It is well known that Professor Dicey calls what Lord Birkenhead would have designated 'controlled legislatures' non-sovereign legislatures which are not constituent but within certain limits legislative assemblies, (vide Dicey's Law of the Constitution, page 101). He points out that, while the Courts have the right to pronounce, and, indeed, are bound to pronounce, on the validity of any law passed by such legislatures, no judge or Court declares invalid or makes void a law or regulation unless in a particular case the Court before which the proceedings take place is called upon to consider by the party affected by it whether the Act or regulation or bye-law which has been broken is within the powers given to the legislature by the constitution making body (see Dicey's Law of Constitution, 9th Edn., pp. 100-102). Reference may also be made to Rule 1(2) of Chapter XXII of the Rules of this Court. That rule requires an application under Article 226 not only to see out in numbered paragraphs the grounds upon which the Court is asked to issue a direction, order or writ but also to specify in the prayer clearly, so far as circumstances permit, the exact nature of the relief sought.

Undoubtedly, the prayer for relief in this case has not been framed with due regard to the considerations to which attention has been drawn above. While inviting our attention to the defects in the prayer for relief, the learned Advocate General, however, stated that he did not want a decision on technical grounds alone as not only a question of the status and the dignity of the Speaker but also that of the legislature was involved. While we would have been justified in dismissing this application on the simple ground that the reliefs asked for were neither precisely nor intelligibly stated, I think that having regard to the importance of the case and the issue that it raises and the further fact that the procedure in regard to writ applications is not very well understood, even after the framing of the new High Court Rules, it is not desirable to rest our decision on technical grounds alone. With these preliminary observations, I shall now proceed with a narration of the facts which have led to the filing of the present application.

(4) The applicant Shri Raj Narain, as has been stated before, is a member of the U. P. Legislative Assembly and was returned on the Praja Socialist Party ticket. He is the leader of the Praja Socialist Party which is the chief opposition party in the House. In that capacity he has the distinction of functioning as the leader of the opposition party. On the 4th March 1953, after question hour, Shri Raj Narain requested the Chair to allow him to move a motion for adjournment of the House to discuss a matter of urgent public importance, namely the forcible removal by the police of three teachers who were on hunger-strike from the semi-circle opposite the Council House. According to the affidavit which has been filed in support of the application, the applicant had arrived in Lucknow from Banaras on the morning that very day. On his way to his residence at Darulshafa quarters he saw the police encamped at the place previously occupied by the hunger-striking teachers. On enquiry he was reliably informed that they had been forcibly removed.

Shri Raj Narain Singh thereafter contacted the Speaker on the telephone in order to obtain his consent to move the adjournment motion referred to before that day in the U. P. Assembly. He was advised by the Speaker to contact the Treasury Benches. He was unable to contact on the telephone the Leader of the House. He, however, spoke on the telephone to the Government Chief Whip who promised to consult the Leader of the House and intimate to him his reactions. He was not, however, told what the Government attitude towards his adjournment motion would be prior to his actually moving for leave to move the adjournment of the House to discuss that question. It would seem that prior to the discussion relating to the adjournment motion, Shri Narain Dutt Tiwari, a member of the Praja Socialist Party, also saw the Speaker in his chambers along with the applicant. He requested him to allow him to move for the suspension under Rule 221 of Rule 71(3) of the Rules of Procedure of the Assembly requiring before an adjournment motion is allowed 1/12th of the total number of members of the house to rise in support of the adjournment motion, where objection to its discussion is raised.

(5) After question hour on that day, Shri Raj Narain Singh was allowed by the Speaker to make a short statement about the matter & to ask for leave of the House to move his adjournment motion. The applicant thereafter rose in his seat and after a short statement asked for the leave of the House. Objection to leave being granted was taken by the Minister for Home Affairs, Shri Sampurnanand. On that being done, the Speaker asked the members who were prepared to support the motion to rise in their places so that he might be able to find out if the requisite

number of thirty-six members was there to support the motion for leave. At that stage there was an intervention by another member, Shri Narain Dutt Tiwari. He requested the Speaker to give his consent under Rule 221 to enable him to move the suspension of Rule 71 (3). Rule 71 (3) requires that at least one-twelfth of the total number of the House, i.e., 36 members must rise in support of the motion for leave before such a motion can be considered if objection is taken by any member to its being taken up. The Speaker was not prepared to allow a consideration of the question of suspension of the rule under Rule 221 as it was a day fixed for the voting of the demands. An assurance was, however, given by the Speaker that permission to move the motion for the suspension of the rule would be given by him at 5 O'clock in the evening.

Meanwhile, he asked the members supporting the motion for leave to discuss the motion to rise in their places. The applicant thereafter requested the Speaker to take up the motion of Shri N. D. Tiwari first as his motion would become infructuous if the permission to suspend the rule was not given then and there. This the Speaker was not prepared to do. The applicant was, however, insistent that the decision on the question of the motion of Shri Narain Dutt Tiwari should be given in accordance with their desire as the party of which he was the leader had only twenty-two members and could not get thirty-six members to rise in their seats. The Speaker pointed out that it was not possible for him to comply with his request as it was a day fixed for voting demands. He further directed the applicant not to obstruct the business of the House and observed that he could not understand how he would be able to get a majority to support his motion if he could not get the support of even 36 members to rise in support of his motion for leave.

The applicant again made a request with folded hands for the immediate consideration of the motion for the suspension of the rule but it was not granted by the Speaker. On about three occasions, the applicant was asked by the Speaker to sit down; but, as he was not prepared to take notice of even the points of order raised, the Speaker asked him to withdraw from the House. The applicant did not comply with that direction. Thereafter the Speaker drew the attention of the House to the defiant attitude adopted by the applicant and ordered the police to remove him from the Assembly Hall by using the minimum amount of force necessary for that purpose. On being so ordered, the police forcibly removed the applicant by bodily lifting him from the Assembly Hall, he having squatted on the floor of the House. Similar scenes happened in the case of two other members, namely, Shri Ram Narain Tripathi and Shri Jagannath Mal. They were both ejected forcibly from the Hall. It may be mentioned that, while Shri Jagannath Mal used language which cast reflection on the impartiality of the Chair, there was at that time no allegation that the applicant had used any language attributing any bias to the chair.

(6) After Shri Raj Narain Singh and Shri Ram Narain Tripathi had been removed from the House, the Speaker drew the attention of the House to the intransigent attitude that they had adopted and observed that, in his opinion, their conduct constituted a breach of the privileges of the House. He did not think that the incident should be ignored. He referred the matter to the Committee of Privileges and suggested that the Committee should examine and investigate and report on the conduct of the members against whom action had been taken in the interests of order. The privileges Committee met on the 7th, 17th, 24th and 26th March 1953 and submitted its report. On the 17th March the applicant was called upon by it to state whether he was guilty of a breach of privilege of the House. He denied that he had been guilty of any breach. It may be added that according to the applicant it turned down his request to be represented by Counsel. It may also be mentioned that according to the applicant no charges were supplied to him even on his asking for them. The committee was not, however, unanimous in regard to the recommendation for action to be taken against the intransigent members, there being majority and minority reports. On the recommendation of the Privileges Committee, the following resolution was, however, passed after discussion by the House:

> "That this House accepts the report of the Privileges Committee on the question of breach of Privileges, by Sarvashri Raj Narain, Ram Narain Tripathi, and Jagannath Mal & resolves that Sarvashri Raj Narain, Ram Narain Tripathi and Jagannath Mal are guilty of breach of privileges of this august House and suspends Shri Raj Narain until the adjournment of the present sitting and Shri Jagannath Mal until the prorogation of this session from the services of the House and taking into consideration the statement of 'Shri Ram Narain Tripathi which he had made in the House today does not deem it fit to pass any orders in his case."

(7) It is contended by learned Counsel for the applicant that this resolution is void and the order passed upon it unconstitutional and should be declared to be so as the effect of it is to inflict a punishment for the second time upon his client for an offence for which he had been punished previously by the Speaker as the President of the House. It is contended that a resolution relating to privileges has the effect of or force of law and is in any case subject to the provisions of Article 20(2) of the Constitution which rules out a second punishment for an offence for which a person has been prosecuted and punished. It is further argued that the reference to the Committee of Privileges by the Speaker of a matter which could be dealt with by the standing orders or rules of the House was wrong and contrary to established Parliamentary practice. It constituted, indeed, the creation of a new privilege for the House.

(8) Our attention was drawn by learned Counsel for both the parties to the proceedings of the House as recorded in the Legislative Assembly proceedings. They were placed before us for our perusal, having been made part of the record of the case by the counter-affidavit which has been filed by the Secretary of the House, Shri Kailash Chandra Bhatnagar. Personally I strongly hold that it is not open to us to look into those proceedings. In regard to this matter, I am reminded of the famous observations of Lord Coleridge, C. J. in — 'Bradlaugh v. Gossett', (1884) 12 QBD 271 (B) at p. 275—

> "What is said or done within the walls of Parliament cannot be inquired into a Court of law. On this point all the Judges in the two great cases which exhaust the learning on the subject — 'Burdett v. Abbott', (1811) 14 East 1, at p. 148 (C) and — 'Stockdale v. Hansard', (1839) 9 Ad and E 1 (D) — are agreed, and

are emphatic. The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive. To use the words of Lord Ellenborough, 'They would sink into utter contempt and inefficiency without it. (1811) 14 East 1 at p. 152'(C)."

The facts which have been narrated by me are based upon the affidavits and have not been taken from the proceedings, but I have considered it necessary to state them as fully as I could as they are essential for an understanding of the points and issues which have been raised and the arguments which have been advanced in this case. I am well aware of the observations of Sir Maurice Gwyer, C. J. in — 'in the matter of the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938', AIR 1939 FC 1 (E), regarding the relevance for historical purposes, in constitutional cases of parliamentary paper such as, for example, the Proposals for Indian constitutional reform commonly known as the White Paper and the Report of the Joint Select Committee thereon but it may be said that while that learned Chief Justice was prepared to refer to the item of the appearance of taxes on the sale of commodities and on turnover in those papers as constituting the source of the legislation, he was considering, he did not look into the proceedings or debates of Parliament to see why a different formula was accepted. Thus the purposes for which parliamentary papers can be referred to if at all, are of a limited character. I may say with profound respect that the view I am taking is not inconsistent with that which commended itself to Gwyer C. J. or the Supreme Court in its recent judgments.

(9) Before considering the various arguments which have been advanced in this case, it would seem necessary to understand clearly the law relating to what is called 'the privileges of Parliament'. "Nothing" says Prof. Dicey in his introduction to the study of the law of Constitution at page 58 (footnote),

> "is harder to define than the extent of the indefinite powers or rights possessed by either house of Parliament under the head of privilege or law and custom of Parliament."

Parliamentary privilege is a difficult theme for precise legal definition. As is well, known Parliamentary privilege in Britain has a long and eventful history. The position, as it has crystallised itself after a series of conflicts between the Crown and the House of Commons, the House of Lords and the House of Commons and the Courts and the House of Commons, is that the British House of Commons possessed, at the commencement of our Constitution extensive privileges which will be found stated at p. 61 by Keith in his edition of Ridge's Constitutional Law of England. They are enjoyed by most democratic legislatures which look to it for inspiration and their members individually. They are regarded as essential for the adequate performance of the high and multifarious functions assigned to the Houses—functions which as a part of a sovereign legislature naturally exceed those possessed by other bodies or individuals. Parliamentary privilege is, indeed, to use the language of Redlich, quoted by May in his Parliamentary Practice (at p. 41):

> "The sum of the fundamental rights of the House and of its individual members as against the prerogatives of the Crown, the authority of the ordinary Courts of law and the special rights of the House of Lords."

Though the Houses have never expressly given up the claim that they and they alone can interpret and determine the extent and limits of their privileges, the position that the Courts have taken consistently is that it is for each House, unless Parliament decrees otherwise by law to determine the limits of the privileges of each House, while allowing each of them within those limits exclusive jurisdiction. The reasons for the importance attaching to privileges of Parliament are not far to seek. In order that a free competition of ideas in regard to the various matters the legislature has to deal with, including a ventilation of grievances through examination of legislative proposals or a reasonable scrutiny of administrative acts, might be effectively possible it is vitally necessary that not only should a member of the legislature not have the fear that he can be penalised for anything that is said or done within the four walls of the legislature, but also that each House should itself have complete control over its proceedings and internal affairs. Thus it is a truism to say that the right to regulate its own procedure and, indeed, its internal affairs is indispensable for the effective functioning of a democratic legislature. Without it, democratic legislatures would not only be impotent to perform the high functions entrusted to them but also not command the respect and prestige with which they should be looked upto by the people for whom they make laws.

(10) It follows from what I have said, that the distinctive mark of a privilege is, as May put it, its 'ancillary character'. They are rights which a sovereign legislature must possess for the due execution of its powers. Some of them are enjoyed by individual members for the obvious reason that the House cannot perform its functions without an unimpeded use of their services and others by each House for the protection of its members and the vindication of its own authority, prestige, power and dignity. Writers on the British Constitution point out that the distinction between privilege and functions is not always apparent, e.g., the Commons have certain exclusive financial rights. The more convenient course, therefore, is, as pointed out by May, to reserve the term 'privilege' to certain fundamental rights of each House which are generally accepted as essential for the exercise of its constitutional functions.

That being the position, a breach of privilege occurs when any of the rights and immunities either of the members individually or of the Assembly in its collective capacity which are known by the general name of privileges are disregarded or attacked by any individual or authority. An offence of the nature described above is called a breach of privilege and is punishable under the general law of Parliament. It is commonsense that a Legislative Assembly would not be able to discharge the high functions entrusted to it properly, if it had no power to punish offenders against breaches of its privileges, to impose disciplinary regulations upon its members or to enforce obedience to its commands. It took centuries for the simple principle to be firmly established in Britain. I think I would be correct in saying that by the time of Coke at the end of the 16th century the principle had got firmly established that a matter concerning either House of Parliament must be decided by the House to which it relates and not elsewhere.

(11) It must be borne in mind that each House exercises its own privileges without any reference to or dependence on the other. This enjoyment

is due, as May points out, at page ..... not to any separate right peculiar to each but solely by virtue of the law and custom of Parliament. Thus both Houses possess privileges, though they are not exactly similar in nature. They are declared, explained and interpreted by each House; their violations or breaches are adjudged and censured by each; but still it is the law of Parliament that is thus administered. While, to repeat what has been said already, neither House has ever expressly renounced the claim not only to be the judge of the breach of its own privileges but of their very existence or limits, the courts have nevertheless consistently taken the view that neither House of Parliament has power by any vote, resolution or declaration to create for themselves new privileges not justified by the known laws and customs of Parliament.

Reference may be made here to Article 9 of the Bill of Rights (1688) which confirmed the long standing claim of each House of Parliament to exclude all outside interference within its four walls. That great document lays down :

> 'that freedom of speech and debate or proceedings in Parliament cannot be impeached or questioned in any Court or place outside Parliament.'

I have mentioned all this to indicate clearly that each House in Britain possesses, (a) the right of being the exclusive judge of the legality of its own proceedings, (b) the right to punish its own members for their conduct in Parliament and (c) the right to settle its own proceedings. It is settled law that the House of Commons is not responsible to any external authority for following the rules it lays down for itself for the transaction of its own business. It is open to the House to depart from them at its own discretion. Even where the procedure of the House or the right of its members to take part in its proceedings is dependent on statute — and this is important — the House is immune from scrutiny by courts as to the manner in which it interprets them. It follows from this that for such purposes the House can practically change or supersede the law. For the principles enunciated above reference may be made to the following cases: 'Paty's case', (1704) 24 D Rayn 1105 (F); (1811) 14 East 1 at p. 145 (C); (1839) 9 Ad & E 1 at p. 14 (D). — 'Sheriff of Middlex's case', (1840) 11 Ad & E 273 (G) and (1884) 12 QBD 271 (B).

I may be permitted to draw particular attention to the observations of Lord Denman that

> "Whatever is said or done within the walls of either Assembly must pass without question in any other place";

of Littledale J. that

> "It is said that the House of Commons is the sole judge of its privileges; and so I admit as far as the proceedings in the House and some other things are concerned."

of Patteson J. that

> "Beyond all dispute it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examination elsewhere."

and of Coleridge J. that

> "The House should have exclusive jurisdiction to regulate the course of its proceedings and animadvert upon any conduct there in violation of its rights or derogation from its dignity, stands upon the clearest grounds of necessity. (see — '(1839) 9 Ad and E 1 (D))."

In saying all this, I do not mean to suggest that a resolution of the House of Commons relating to a new privilege cannot in some extreme cases be declared at the instance of a party affected by it to be of no effect. But the position is inescapable, to use the language of Lord Coleridge, C. J., in — '(1884) 12 QBD 271 (B)', that:

> "if the House of Commons is,—as for certain purposes and in relation to certain persons it certainly is, and is on all hands admitted to be,—the absolute judge of its own privileges, it is obvious that it can, at least for those purposes and in relation to those persons, practically change or practically supersede the law."

(12) I have considered it desirable to state the law relating to privileges before grappling with the questions which this case raises as I think that much of the argument in this case on behalf of the applicant is based upon the assumption that an erroneous decision by Mr. Speaker or the House in respect of a breach of privilege can be the subject-matter of scrutiny by a Court of law. There is nothing startling in the proposition that finality attaches where under cover of it no new privilege is created by the House to a decision of the House in respect of a matter relating to its privileges. On this part of the case, I may quote the observations of Stephen J. in — 'Bradlaugh v. Gossett (B)', referred to above. They are to the following effect:

> "It would, as I have already said, be wrong for us to suggest or assume that the House acted otherwise then in accordance with its own view of the law; and, as we know not what that view is, nor by what arguments it is supported, we can give no opinion upon it. I do not say that the resolution of the House is the judgment of a Court not subject to our revision; but it has much in common with such a judgment. The House of Commons is not a Court of justice; but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament. We must presume that it discharges this function properly and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal.
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> There is nothing startling in the recognition of the fact that such an error is possible. If, for instance, a jury in a criminal case give a perverse verdict, the law has provided no remedy. The maxim that there is no wrong without a remedy does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal and made without consideration; nor for many kinds of verbal slander, though each may involve utter ruin: nor for oppressive legislation, though it may reduce men practically to slavery; nor for the worst damage to person and property inflicted by the most unjust and cruel war. The maxim means only that legal wrong and legal remedy are correlative terms; and it would be more intelligibly and correctly stated, if it were reserved, so as to stand, 'Where there is no legal remedy, there is no legal wrong."

I may also, before parting with this part of the case, refer to a comparatively recent judgment in — 'Rex v. Graham-Campbell', (1935) 1 KB 594 (H). That case which related to the sale of liquor in the precincts of the House of Commons without a licence goes to the extreme length of holding that no Court of law has jurisdiction to interfere with the management in the refreshment Department of the House as that was a matter which fell within the internal affairs of the House. 'Bradlaugh's case (B)' was, as is well-known, of a duly elected member entitled to take the oath by law prescribed to be taken by the members of the House of Commons being refused to do so by the Speaker who directed the serjeant at arms to exclude him by actual force from the House until he should engage not further to disturb its proceedings. These cases forcibly illustrate the complete degree of internal autonomy which the House of Commons enjoys in a matter relating to its internal affairs. On this part of the case, see Holdworth's History of English Law, Vol. 10, pp. 539-550; Anson's Law and Custom of the Constitution. Vol. 4 (Parliament pages 151-178 also Vol. 6, pp. 268-273 of the Constitution; Keir and Lawson's cases on constitutional law, p. 72.)

(13) On the question whether it was wise and statesmanlike to pursue the matter after Shri Raj Narain Singh nad been ejected from the House it would be improper for me to express any opinion. Obviously, this Court is not, in any sense whatever a Court of appeal or revision against the legislature or against the rulings of the Speaker who, as the holder of an office of the highest distinction, has the sole responsibility cast upon him of maintaining the prestige and dignity of the House. Parliamentary government requires for its successful working a spirit of reasonableness and accommodation on the part of those, whether belonging to a majority or minority party, who have been elected by the people to be their chosen representatives in our legislatures. A perusal of Article 121 would show that the founding fathers have protected Judges from criticism in Parliament by laying down that there shall, except on a motion of misbehaviour, be no discussion in Parliament on the conduct of any Judge or Court of law having jurisdiction in any part of India in the exercise of his or its judicial functions.

Rule 32 of the Rules of Procedure of the U. P. Legislative Assembly relating to the form and content of questions lays down in Clause (10) that there shall be in the House no reference to the conduct of any Judge or Court of law having jurisdiction in any part of India in the exercise of his or its Judicial functions. Rule 79 lays down, as one of the conditions of the admissibility of the resolution, that a resolution shall not relate to any matter which is under adjudication by a Court of law having jurisdiction in any part of India. It is right and proper that judicial authorities should be free from criticism so far as their judicial work is concerned in the State legislature or Parliament. Correct ettiquette therefore requires that the judiciary on its part too should refrain from comments in regard to a matter which was exclusively within the jurisdiction and authority of the Speaker and the State legislature. For this reason, I think it undesirable that I should express any opinion on the controversy which led to the unfortunate incident and the mode in which it was dealt with by the Speaker and the State Assembly.

I may say that the basis of the argument of learned Counsel for the applicant is that the Speaker had no authority to refer, in view of the well established practice in British Parliament, matters which can be dealt with under the standing orders to the Committee of Privileges. (See May's Parliamentary Practice at page 437). The basis of Mr. Iqbal Ahmad's argument is that the reference to the Committee of Privileges was wrong and consequently the resolution based thereon was also void in so far as it affects the applicant.

(14) I have endeavoured to state what the present position in regard to the law relating to privileges of the British House of Commons is as Art. 194 declares that the Privileges of each House of the State Legislature and the members thereof shall be, save in respect of matters specified in Clauses 1 and 2 of Art. 194, the same as those enjoyed by the British House of Commons and its members. The broad facts on which the learned argument advanced to this Court by Shri Iqbal Ahmad is based have been stated by me in an earlier part of this judgment. What he contends is that under the procedure as it obtains in the British House of Commons under Standing Orders 21 to 24, the Speaker has been invested, with the power to direct a member whose conduct is disorderly in the House, to withdraw from the House and such withdrawal has the effect of suspending him for the rest of the day's sitting.

Where, however, a member is guilty of a disorderly behaviour for a second time, or where the Speaker thinks it desirable that a more severe notice should be taken of the member's conduct, the Speaker names the member, that is to say submits his conduct to the judgment of the House before the member actually leaves the house. The Speaker's naming of the Member is followed by a motion by the Leader of the House, or any other member acting on his behalf, suspending the member for periods the maximum of which is prescribed in the Standing Order. The motion made by the Leader is put to vote without any discussion, no amendment being allowed and when carried the member so named is forcibly made to leave the House, if he offers any opposition, with the minimum of force necessary for the purpose. Matters so dealt with are not referred to the Committee of Privileges. Shri Iqbal Ahmad has cited the high authority of May in this matter. May says at p. 364:

> "In judging whether a prima facie case of privilege is made out the Speaker excludes any matters which are otherwise properly to be dealt with under the practice or standing orders of the House." (See May's Parliamentary Practice, p. 362).

(15) The Standing Orders referred to by Shri Iqbal Ahmad have not superseded the ancient practice though it has become unusual to resort to it. Mr. Iqbal Ahmad contends that even under the ancient practice as it obtained in Britain, naming of a member before he actually withdraws or is made to withdraw from the House, in order that a more adequate punishment may be awarded, is necessary. For this too support has been sought from quotations from May's Parliamentary Practice, at p. 445. I feel no difficulty in coming to the conclusion that the procedure followed in the British Parliament by the Speaker and the House in dealing with members who are guilty of disorderly behaviour is exactly the same as that contended for by

Shri Iqbal Ahmad. It does not follow from the admission of this fact, that Mr. Speaker and the State Legislature were bound to follow that procedure in every detail, howsoever well established and reasonable it might seem to those who feel an instinctive respect for the conventions and traditions which that great House has built up for itself. After all there is nothing sacrosanct about that procedure.

The Indian Legislatures have been empowered to frame rules of procedure under Art. 208 of the Constitution. Our attention has been drawn to those rules. Rule 189 invests the Speaker with authority to deal with cases of disorderly behaviour. It is unnecessary to quote it but I would say that clearly the Speaker has under Clause (c) of those rules, the power to carry out his order at any stage of the proceedings. Undeniably the Speaker has been invested with the power under Rule 67 to refer any matter he chooses to the Committee of Privileges. The learned Advocate General has sought to justify the departure from British practice on the ground of its suitability to the peculiar requirements of working parliamentary institutions in a Country which is new to them.

On the question whether that reason is a good one or not, it would be improper for me to express any opinion for obviously the matter is capable of being looked at from different angles. There is the point of view that Oppositions are weak in our Legislatures, and that the tendency to associate every person in authority in any capacity with the Government of the day is still wrong. It may well be that naming a member, i.e., submitting him to the judgment of the House at the very time the incident occurs has the merit of not bringing the Speaker into the area of controversy. These are considerations, however, with which this Court has no concern and on which I do not think it proper to dogmatise.

Rule 67 of the Rules of procedure of the State Assembly makes it abundantly clear that, notwithstanding anything contained in these rules, the Speaker can refer any question of privilege to the Committee of Privileges for examination, investigation or report. Whether the question was one of privilege or not was a matter solely for the Speaker to decide. Even if there had been no express rule such as is to be found in the Rules of Procedure of the U. P. Legislative Assembly, I should have felt it incumbent on me to say unhesitatingly that this Court has no jurisdiction to issue a writ, direction or order relating to a matter which affected the internal affairs of the House. To borrow the language of Lord Coleridge, C. J.:

> "The Houses of Parliament cannot act by themselves in a body: they must act by officers."

The Speaker is the highest functionary of the House and he acts for it. The other officers who acted under his directions are recognised officers of the State Assembly and they executed his orders. The House had a right to decide on the subject-matter and the officers gave effect to its orders. Thus both the Speaker and the other officers are protected from scrutiny by a Court of law for what was done in the House. Clearly the matter in issue is a matter concerning the State legislature to borrow the language of Stephen J.,

> "in a matter arising concerning the State legislature."

The resolution suspending the applicant from the House was a thing done 'within the walls of the House.' Of a matter concerning its proceedings, the State legislature is the sole judge. The matter in issue is a proceeding of the House of Commons in the House and, therefore, 'it is part of the course of its own proceedings' and subject therefore to its exclusive jurisdiction. Both Article 212 and the authorities are so decisive and conclusive that there is no room for argument so far as this part of the case is concerned.

(16) I may also refer to the fact that under the Bill of Rights to which reference has been made by me previously, the House of Commons and, therefore, the State legislature has a complete freedom to discuss any question it chooses. Thus I can see no creation of a new privilege in the procedure adopted by the Speaker or the State legislature. The complaints which Sir Iqbal Ahmad has brought before us, whether justified or not, are of a procedural character. I am unable to agree with the view that the resolution of the House goes beyond a matter of procedure and on this point again I would invite attention to the observations of Stephen J. at p. 285: — '(1884) 12 QBD 271 (B)'. While there is no doubt that the right of a member to continue to represent his constituency in Parliament gets affected by his suspension for whatever period, yet even on that assumption there is no legal remedy open to a member if his rights get affected by something done within the walls of the legislature. Apart from the cases to which reference has been made, Article 212 (2) of the Constitution is decisive on this point. Article 212 is in the following terms:

> "212. (1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.
>
> (2) No officer or member of the Legislature of a State in whom powers are vested by or under this Constitution for regulating procedure or the conduct of business, or for maintaining order, in the Legislature shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers."

(17) For the reasons given above, this part of the case fails. But it is so interconnected with the other part that I shall have to consider some aspects of it when dealing with some other arguments which have been advanced by Sir Iqbal Ahmad.

(18) I now come to another part of the case. Sir Iqbal Ahmad's contention is that, whatever may be the position regarding the law relating to privilege in Britain, the position in our country is vastly different for we have what Lord Pirkenhead would have called a 'controlled Constitution' embodied in a written instrument by the founding fathers. This Constitution has conceded certain fundamental rights. Now one of those rights is the right not to be punished a second time for the same offence. Sir Iqbal Ahmad's contention is that Article 20(2) which lays down that "no person shall be prosecuted and punished for the same offence more than once" governs all the parts of Article 194 including the one which has reference to the powers, privileges and immunities of the State legislature and its members.

It is argued that the resolution in question in so far as it punished the applicant a second time for an offence for which he had been punished previously by the Speaker is (a) if it be regarded as a law, void by virtue of Article 13(2) for its inconsistency with Article 20(2), and (b) if it be treated as the decision of the State

legislature in its capacity as a Court which can punish breaches of privileges, illegal for the reason that it embodies a decision which has the effect of punishing the applicant a second time for the same offence on the same set of facts. The assumptions underlying the arguments on this part of the case are that (a) clause (3) of Article 194 is controlled by Article 20(2), (b) that the resolution amounted to a law within the meaning of that word in Article 13(2), (c) that alternatively in any case it was the decision of a Court which could be set aside by this Court, (d) that the applicant was in point of fact punished a second time for the offence, (e) that the word offence includes a parliamentary offence, (f) that the words "prosecute and punish for the same offence" do not limit the bar of what American Jurists would call 'double jeopardy' and purely criminal actions only. I shall deal with each of these points seriatim.

(19) I shall first proceed to consider whether Article 194 (3) is subject to the provisions of the Constitution, and, if so, whether Article 20 (2) governs it. To appreciate this point, it is desirable to reproduce Article 194.

"(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

"(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the Committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees, at the commencement of this Constitution.

(4) The provisions of Clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature."

(20) It will be noticed that the Article is divisible into four distinct clauses and that its form is such as to lead to the irresistible inference that only the first clause has been made subject to the provisions of the Constitution. I cannot understand why if it was intended by the legislature that part (3) of Article 194 or the whole Article should be subject to Article 20 (2) or to any other provision of the Constitution, the frame of the Article should not have been different. Easily the founding fathers could have made it clear that all the parts and not only Clause (1) of the Article would be subject to the provisions of the Constitution. It is not as if the founding fathers are silent as to the applicability or otherwise of the other parts of the Constitution. They have specifically mentioned in Clause (1) that freedom of speech shall be subject to the provisions of the Constitution. By necessary implication, therefore, they must be deemed to have intended by omitting any reference to the other parts of the Constitution that the other clauses shall not be governed by the other provisions of the Constitution. It strikes me that a clear distinction has been made between the language of Art. 194 (1) and Art. 194 (3) and that the fact cannot be ignored.

(21) It is contended that it is only where the founding fathers had made any specific provision for a matter dealt with by an article of the Constitution that they used such expressions as 'subject to the provisions of the Constitution' or 'notwithstanding anything to the contrary.' It is argued that where no provision has been made by the Constitution in respect of any matter dealt with by the Constitution, every article of the Constitution must be construed with reference to the other articles so as to enable a construction to be placed on the Constitution which produces the greatest harmony and the least inconsistency between different parts of the Constitution.

(22) While it may be admitted that in the case of an ambiguity or inconsistency between different parts of the Constitution, Courts should look into all parts of the Constitution and harmonize them to the utmost extent possible, I do not think that we would be justified in going so far as to say on the basis of speculation that words like 'subject to the provisions of the Constitution' have been used only where a matter dealt with by an article is also the subject-matter of some other article. It strikes me that whenever the founding fathers intended that a provision of the Constitution, whether it be described as Fundamental or not, should govern it they said so. Incidentally it may be pointed out that the Fundamental rights conceded by our Constitution have not been conceived of as 'natural, sacred and inalienable' rights which may not be changed at all like the Law of the Medes and Persians, but as rights which can be changed in the exercise of the constituent powers conceded to Parliament by a procedure which is less rigid than that reserved for an amendment of certain other parts of the Constitution.

In any case, the use of the words 'subject to the provisions' 'only' in connection with the right of freedom of speech and its omission from the other parts of the article cannot be ignored. The way in which the whole article has been framed clearly indicates, to my mind, that the fundamental rights which they were conferring on the houses of the legislature were not to be subject to or governed by any other part of the Constitution. It must be remembered that Article 194(3) occurs in a later part of the Constitution than Article 20(2). Both are parts of the Constitution, having been enacted by the founding fathers. The fact that a provision is either described as fundamental or occurs in the part relating to fundamental rights does not 'ipso facto' make it govern other parts of the constitution. Both Article 20(2) and Article 194(3) find a place in the Constitution and it cannot be assumed that an Article described as fundamental was intended to govern not only laws made by the Legislature but the various other parts of the Constitution, even where the context indicates that it was not intended to apply to them.

Had the intention been to make Article 194(3) subject to the other provisions of the Constitution the founding fathers who knew what they had said previously about Article 194(1) would have said so clearly. I am, therefore, driven to the conclusion that it will be unsafe to accept as correct the argument that Article 194(3) must be deemed by necessary implication to be subject to the other parts of the Constitution either on the

basis that words such as 'subject to the provisions' have been used only where some specific provision having been made, it was intended to make it clear that that article would also operate so far as that article is concerned or on the assumption that the whole article and not only Clause (3) has, notwithstanding the frame of the article and its divisibility into distinct parts, been made subject to the Constitution. Why the founding fathers reserved freedom of speech which is vital for unfettered parliamentary discussion for special treatment I cannot say. It would be outside the scope of the question before us to speculate into the possible reasons for that special treatment. I am unable to hold that it was necessary for the founding fathers to use some such words as 'irrespective of the Constitution' if the article was not to be subject to the Constitution.

(23) Sir Iqbal Ahmad contends that the view that Article 194 (3) is not subject to the Constitution is bound to lead to the anomalous position that as long as the Houses do not define their privileges by a law enacted by themselves, their privileges, being the same as those of the British Parliament, will not be subject to the operation of either Article 20(2) or to any other provision of the Constitution, while a law passed relating to them shall be subject to the provisions of the Constitution and thus liable to be declared void, under Article 13(2), on the ground of inconsistency with it. Sir Iqbal Ahmad contends that it could hardly have been the intention of the founding fathers that during the interim period when privileges have not been defined by the statute itself, privileges should not be subject to the Constitution. Now, it strikes me that in declaring that the privileges etc. of the State legislature shall be the same as those of the British Parliament, until so otherwise determined by legislation, the founding fathers followed the precedents created for them by the framers of both the British North America Act and the Australian Act.

(24) It is interesting to note that while in Canada the houses of legislature cannot enlarge their privileges by any law made by them beyond those enjoyed by the British House of Commons, there is no such limitation under Section 49 of the Commonwealth of Australia Act on the powers of its parliament, it being presumably open to it either to curtail or enlarge them. Possibly in laying down that the powers, privileges and functions assigned to each House can only be changed by law if they want them to be somewhat different from the British House of Commons, the founding fathers were enacting a safeguard which would make them subject to the provisions of the fundamental rights guaranteed by the Constitution. It is on this basis understandable that they did not think it necessary to make them until they were so changed by law, subject to the other parts of the Constitution. For the privileges of the House of Commons are well-known and can be easily ascertained from any standard work on the Constitution.

(25) Another argument which was advanced was that from the nature of our Constitution itself, which is a republican one, it could not have been contemplated by the framers of the Constitution that all the powers, privileges and immunities enjoyed by the House of Commons shall be enjoyed by the State legislatures. The privileges of the House of Commons have been enumerated by Mr. Keith in his revised edition of Ridges' Constitutional Law of England at page 67. They are classifiable under two headings, (1) those which the Speaker demands from the Crown at the commencement of each Parliament and are guaranteed as a matter of course, and (2) those which are demanded by the Speaker. The first group comprises—

(a) Freedom from arrest.
(b) Freedom of speech.
(c) The right of access to the Crown.
(d) The right of having the most favourable construction placed upon its proceedings.

The second group comprises the following:

(a) The right to provide for the due composition of its own body.
(b) The right to regulate its own proceedings.
(c) The right to exclude strangers.
(d) The right to prohibit publication of its debates.
(e) The right to enforce observance of its privileges by fine, imprisonment, or expulsion.

(26) Now, it is pointed out that the State legislatures have not been conceded the right to provide for the due composition of its own body as that is a right which has been specifically and separately dealt with in Part XV, Articles 324 and 329 of the Constitution, the powers of superintendence, direction and control of elections having been vested in an Election Commission. Freedom of speech is the subject-matter of a separate article viz., Article 19(a) of the Constitution. The right to prohibit publication of its proceedings is dealt with under sub-article (2) of Article 194.

It is further contended that some of the privileges of the House of Commons can have no meaning with reference to the Indian Constitution, our being a republican one. There are others again which have either become obsolete or meaningless in Britain or which Parliament has given up itself. For example, it is pointed out that the right to provide for the due composition of its own body has been modified by Parliamentary enactments in Britain which give authority to Courts of law to adjudicate on disputed questions of law. In our own Constitution Articles 324 and 329 deal with election matters. Now, on this basis it is urged that the only rights which had not been the subject-matter of definition in previous or subsequent articles by the Constitution are the rights to regulate its own proceedings and the right to enforce observance of its privileges by fine, imprisonment or expulsion. On the basis of these facts, it is argued that it is only where specific matters have been dealt with by some other parts of the Constitution, that the founding fathers made a mention of the fact that a particular Article or clause was subject to the provisions of the Constitution, it being understood that the other Articles are to be read in a connected manner, all being subject, at all events, to the fundamental rights conceded to its citizens or persons by the founding fathers.

(27) I am unable to accept the argument as representing a correct approach to the various articles of the Constitution. It must not be overlooked that Part III occurs in a later part of the Constitution than Article 20 (2). The fact that a particular right has been classified as 'fundamental' cannot make it paramount over an Article in a part of the same Constitution framed by the same founding fathers and the same Constituent Assembly. Fundamental rights cannot govern, except of course where it is specifically or by implication intended that they should, various parts of the Constitution. There is a clear distinction between the language of Article 194 (1) and Article 194 (3). The substantive provision in

Article 194 (3) is that the privileges etc. of the State legislature shall be, unless determined otherwise by the legislature, the same as those of the British Parliament. It would be contradictory to hold that Part III can be controlled by Cl. (1). It would be to subject them to a limitation which it was intended should not apply to them.

The British House of Commons cannot be controlled by any Court in respect of any punishment it chooses to inflict upon its members for parliamentary offence within its walls on the ground that the punishment is of a double nature. Can we read a limitation of this nature in our Constitution when expressly the State legislature has been given all the privileges possessed by the British Parliament? I venture to think that to do so would be to impose a restriction not contemplated by the founding fathers. For the effect of doing so would be to make the specific provision declaring the privileges to be the same as those of the British Parliament subject to fundamental rights. This would nullify the fundamental rights granted to the legislature and its members specially treated qua their parliamentary capacity. The article deals with privileges of the Houses and its members; they have been put on a special footing. The entire purpose will be nullified or defeated if the privileges which have been defined to be those of the House of Commons were made subject to fundamental rights. Fundamental rights cannot govern, except of course where it is specifically or by implication intended that they should, various parts of the Constitution. The frame of Article 194, remembering the rules of grammatical construction, cannot be ignored. The omission of the words "subject to any provision of the Constitution" as governing Clauses (2), (3) and (4) of the Article has a significance which cannot be omitted from consideration.

(28) As regards the argument that the law when made relating to privileges would be subject to the fundamental rights and thus subject to Art. 13 (2) whereas privileges as conferred by the Constitution with reference to the British House of Commons would not be so subject, the answer is that the founding fathers contemplated a clear distinction between the two periods, viz., (1) until so defined and (2) when so determined. In one case the privileges well known to be possessed by the House of Commons were being conferred by the Constitution. In the other case the privileges made were to be laid down by the authority of the State legislature. Clearly, the founding fathers did not desire a law so made not to be subject to some safeguard.

(29) Support was sought to be derived for the proposition enunciated above from a decision of the Supreme Court in what has come to be known as the Blitz case: — 'Ganapatu Keshavaram Reddy v. Nafisul Hasan and State of Uttar Pradesh', Ori. Jur. Petn. No. 75 of 1952 (SC) (I). In that case one Shri Homi Mistry was arrested in Bombay under a warrant issued by the Speaker of the Uttar Pradesh State legislature. The warrant of arrest was signed by the Speaker and he was brought and kept in detention in the Speaker's custody at Lucknow. On his applying for a writ of 'habeas corpus', Patanjali Sastri C. J. directed his release as Shri Mistry had not been produced before a Magistrate within the time allowed. It was held that the term of Article 22(2) were peremptory and admitted of no doubt.

All that I understand that case to lay down is that any person arrested, whatever be the nature of that arrest and whichever be the authority on whose behalf he has been arrested, must not be confined in custody beyond the period indicated in Article 22(2) without the authority of a magistrate. The question of the extent of the privileges enjoyed by the State legislature or the Speaker as representing the State legislature and their subjection to fundamental rights was not specifically dealt with by his Lordship and I cannot read him to have laid down that Article 194 (3) is subject to the other provisions of the Constitution.

I may say that strong reliance was placed by Sir Iqbal Ahmad on the case of — 'U Aye v. U Chit Hlaing', AIR 1941 Rang 151 (J). This was a case of a member of the Burma legislature who, on accepting a commission in the armed forces of the Crown, was declared to have vacated his seat by the Speaker of the Assembly. The High Court intervened holding that it was beyond the powers of the Speaker to decide whether the applicant had or had not continued to be a member of the House of representatives of the Burma legislature. Clearly in that case the Speaker had no power to make that declaration for he was not in any sense a Court. In any event, this was a case of the legislature of a State which was not fully self-governing and can be no authority for a case like this where we are dealing with a 'controlled' legislature possessed of all the privileges which the British House of Commons possesses.

(30) I am unable, therefore, to hold that the cases cited above govern this case. From what I have said it will be apparent that, in my opinion, Article 194 (3) is not governed by Art. 20 (2) of the Constitution.

(31) I shall now proceed to consider what the exact nature of a resolution of a house of legislature is. It was held in the famous case of — 'Stockdale v. Hansard (D)', that a resolution of the House of Commons cannot alter the law of the land. For legislation both under the British Constitution and the Constitution as it obtains in the Uttar Pradesh State three parties are necessary. In our State the parties are the two Houses of the Legislature and the Governor. A resolution is an expression of the opinion of the House or at best a recommendation on any particular matter. It has not the status of a law. A declaration or resolution of either House, as Dicey points out on the basis of — 'Stockdale v. Hansard (D)', is not in any sense a law. For no resolution of the House of Commons ordering or approving of a member's act could be pleaded by a person as a legal defence to proceedings, either civil or criminal, against him. See — '(1839) 9 Ad and E 1 (D)'.

The difficulty as pointed out by Prof. Dicey is, however, that though the resolution of neither House is a law, each House of Parliament has complete control over its own proceedings and in so doing has also the right to protect itself by committing for contempt any person who commits any injury against or offers any affront to the House, and no Court of law will inquire into the mode in which either House exercises the powers which it by law possesses. While Lord Coleridge C. J. would concede to it the position of at least 'for certain purposes and in relation to certain persons', the effect of practically changing or practically superseding the law. Stephen J. compares it to 'the judgment of a Court' not subject to the decision of Courts of law. It is that Lord Coleridge C. J., did not go as far as describing it as a Law. It is equally clear that Stephen J. did not go as far as describing it as a judgment of a Court, though it has much in common with

a judgment, not subject to the revisional jurisdiction of the High Court.

It is important to note that Stephen J. expressly said that the House of Commons was not 'a Court of justice'; but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament. Both Lord Coleridge C. J. and Stephen J. however, stated that whatever way it may be looked at, extraordinary circumstances might require when acts are done under cover of its authority its being declared invalid. It is important to note that while no British Court of law can declare an Act of Parliament void on any ground whatever, it can declare a resolution invalid in certain conceivable circumstances. Such an extraordinary circumstance arose in the well-known case of — 'Stockdale v. Hansard (D)'. I cannot accept as correct the argument that the resolution in this case is a law subject to the provisions of Article 20 (2) or a judgment of a Court of justice such as we conceive Courts of justice to be. The notion of the High Court of Parliament has no application here and it is unnecessary to discuss the matter at any length.

(32) It was contended by Sir Iqbal Ahmad that the word 'law' has been used in Article 13 (3) in the widest sense possible as including any ordinance, order, bye-law, rule, regulation, custom or usage having in the territory of India the force of law. I am inclined to think that even having regard to that very wide language, the resolution cannot be accurately described as a law for it is a mere expression of opinion which can have a binding effect in cases of privileges.

(33) Whatever be the position of a resolution of a House, whether it be looked upon as a law or as a judgment of a Court or the expression of an opinion which may practically have the effect of law, the question still remains whether the resolution complained against awarded a punishment for an offence within the meaning which must be attributed to those words in Article 20 (2) of the Constitution. Before dealing with this part of the case, I may quite frankly state that on the facts which have been placed before us, I am unable to hold that the action of the Speaker in ordering the applicant to withdraw from the House was not in the nature of a punishment for the parliamentary offence of disorderly behaviour.

The learned Advocate General contended that what the Speaker did initially when the applicant was made forcibly to leave the House merely was in the nature of preventive action. The notion of preventive action can, in my opinion, have no application to a case where the Speaker takes disciplinary steps against a member. Preventive action in Parliamentary proceedings is unheard of. Preventive action in relation to Parliamentary proceedings is, I venture to think, against the whole spirit of the British Constitution. To uphold the view that preventive action can have a place in the regulation or conduct of the business of a legislature would be to go back upon the principles firmly established by the constitutional struggles so famous in British history. Exalted as the position of the Speaker is, important and onerous as his duties and functions are, he is, in no sense, if I may say so with the utmost respect, the head of a State authorised under the Constitution to take precautionary as distinguished from punitive action for possible disorders likely to occur in the conduct of the business of the House.

In order to make this point clear, I may point out that, according to that great authority — Sir William Anson, — the duties of the Speaker are of a three-fold character. (See Anson's Law and Custom of the Constitution, Vol. I, pp. 149-151). He is firstly, the spokesman and representative of the House. Secondly, the Speaker is required under the provisions of the Parliament Act to discharge duties of a judicial or interpretative character, having finality attached to them under the Parliament Acts. Thirdly, the Speaker is the Chairman of the House, and in that capacity he maintains order in its debates, decides such questions as may arise upon points of order, puts the questions, and declares the determination of the House. It will be seen that his position in no way corresponds to that of the head of the State. An enumeration of these duties will show that the action taken by the Speaker in repressing disorder is not of a preventive but of a punitive character. Preventive action is in the nature of precautionary action. It is taken in the interests of maintenance of order or the security of the State or the maintenance of essential supplies when necessity compels an authority specifically endowed with power to use it to resort to it. Punitive action, on the other hand, is action for some breach actually committed and has the character of a punishment or a disciplinary order. 'In so large and active an Assembly as the House of Commons', observes May in his Parliamentary Practice

> "It is absolutely necessary that the Speaker should be invested with authority to repress disorder and to give effect, promptly and decisively, to the rules and orders of the House."

"The ultimate authority", Sir J. Erskine May further observes,

> "upon all points is the House itself, but the Speaker is the executive officer by whom its rules are enforced."

May further observes that

> "the power to punish disorder is regulated partly by practice and partly by standing order."

"the change introduced", he continues.

> "by standing orders may be described briefly as giving the Chair power to deal with minor offences, but as leaving punishment to the House, while making its infliction more certain than immediate."

May further observes that

> "the ancient usage has been so modified by recent standing orders, which cover the majority of cases likely to arise, as to be largely inapplicable." (May's Parliamentary Practice, pp. 445-447).

(34) From these quotations it will be observed that the order of withdrawal is in the nature of a punishment for what the member has actually done and not likely to do and does not partake of the character of preventive action. I may say that the use of the word "repress" by May is very important. It is not for what a member threatens to do before the legislature starts actually functioning, but for what he does when it is in actual session that he can be dealt with by the Speaker.

(35) Now, the first question which has to be considered is whether there was any punishment in this case, and the second question is whether that punishment is the kind of punishment contemplated by Article 20 (2) of the Constitution. The powers of the Speaker to order withdrawal of a member or to suspend a sitting are to be found in Rule 189 of the Rules of Procedure of the Assembly. From the very wording of the rule it is clear that in directing a member to withdraw from the House, the Speaker has to come first to a finding that the conduct of the member

is disorderly. Having come to that finding, he can direct him to withdraw for the rest of the day and in order to be able to do so, he has been invested with full authority to carry out his order by the use of such force as may be necessary for that purpose. The Speaker when acting in this capacity is exercising a power on behalf of the House.

Withdrawal of a member from the House even for a brief period is a serious matter both for the member and his constituency. Important debates and votes may take place during his absence even if the period be brief and he may not be able to present his view-point or that of the group or that of the constituency he represents. It is, however, in the nature of a disciplinary or punitive action for a specific parliamentary offence, namely, disorderly behaviour. According to Rule 63, the punishments which the House can inflict, among others, are (1) admonition, (2) reprimand, (3) imprisonment, the time whereof is at the pleasure of the House but cannot extend beyond the prorogation, (4) suspension or expulsion of the member. The offences for which punishments can be so inflicted have nowhere been defined but broadly they are for breaches of privilege including contempt of the House or the Speaker as representing the majesty of the House. The order of withdrawal has the effect of suspension and in any case comes within the category of the punishment classifiable in the words 'among others'. Sir Iqbal Ahmad is, therefore, indisputably right when he says that Shri Raj Narain was punished by Shri Speaker when he was forcibly made to withdraw from the House and very properly he does not question the correctness or justice of that order. Indeed, it would have been grossly improper for us to sit in review in any sense over that order.

In order to appreciate, however, the point which has arisen under Article 20(2) of the Constitution, it is necessary to appreciate exactly what was done after the reference to the Committee of Privileges by the House. Sir Iqbal Ahmad's argument is that his client was, contrary to established parliamentary practice in Britain, punished a second time by the House on the same set of facts for the offence or offences for which he had been punished or could have been punished then and there by the House.

(36) Now, as far as I can see, there is no doubt that further action was taken against Mr. Raj Narain for the incident for which disciplinary action had been taken against him by Mr. Speaker. On the question whether that further punishment was in the nature of a second punishment or an enhancement of the punishment inflicted previously on Shri Raj Narain it is unnecessary to enter for the purposes of deciding this case, having regard to the view that I take of the meaning to be assigned to the word punishment. For this question could, and would, have been important 'only' if I had come to the conclusion, which I may quite frankly state I have not, that punishment for a parliamentary offence is covered by Article 20(2) of the Constitution.

(37) Before considering the exact scope of Article 20(2), there is yet another argument urged by Sir Iqbal Ahmad which deserves to be noticed. Sir Iqbal Ahmad contends that each of the Houses of the British Parliament is a 'court' and on that basis contends that the Houses of the State Legislatures are courts. Sir Iqbal Ahmad's contention is correct only, as Mr. Keith observes in his edition of Ridges' Constitutional Law in a sense. The late Sir William Anson quotes Lord Coke to the effect that,

> "the Lords in their House have power of judicature, and the Commons in their House have power of judicature, and both Houses together have power of judicature."

He goes on, however, to add that the sense in which judicial attributes are assigned to the two Houses severally and jointly must be limited. The power of the House of Commons in dealing with the Constitution of its own body and the right of persons who claim to be members of that body is not today what it was before. The House of Commons has jurisdiction, as pointed out by Sir William Anson, over its own members and even the general public in respect of contempt against itself. In respect of the other matters referred to by him, the position has considerably changed during recent years. There is the high authority of Stepehen J. in — 'Bradlaugh v. Gossett (B)', that the House of Commons is not 'a court of justice'; it is by virtue of the privilege that it enjoys to regulate its own internal affairs that it becomes practically vested with a judicial character when dealing with Acts of Parliament. To say this, however, is not to say that the House of Commons is a court or even a quasi-judicial tribunal in the sense in which those words are generally understood. I am not prepared, therefore, to hold that the State Legislature is a court of of law or of justice except, of course, in the most strictly limited sense that in the exercise of regulating its proceedings it can proceed against a person or even a stranger for breaches of privilege.

(38) And this brings me to the question of the exact scope of Article 20(2) of the Constitution. That Article reads as follows :

> "No person shall be prosecuted and punished for the same offence more than once."

It is clear that this Article is based upon the principle of the 'double jeopardy' clause and lays down that no person should be put in jeopardy of his life or liberty more than once. This principle is so well established in the system of law that we administer that it is not surprising that it should have been elevated to the level of a fundamental right. In the case of — 'Rex v. Barron (No. 2)', (1914) 2 KB 570 (K), Lord Reading C. J. quotes a statement of the law by Hawkins J. that,

> "It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts."

Lord Reading C. J., however, made it plain that the learned Judge did not intend to lay down and did not lay down as a general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different. Whether the view taken by Lord Reading C. J. be correct or not, section 403 of the Code of Criminal Procedure would seem to be based upon a principle which found favour with Hawkins J. Section 403 of the Code of Criminal Procedure runs as follows :

> "(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence, for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.
>
> (2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might

have been made against him on the former trial under section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences, which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code."

(39) Now, it is not necessary for the purposes of this case to express any opinion on the point whether the prohibition in Article 20(2) which relates to a prosecution and punishment for the same offence would be operative also against a subsequent trial for a different offence on the same facts. The important point, however, to note is that the word 'prosecute' has been deliberately introduced in order to make it clear that the bar relates to a punishment by a court of law and not to other types of punishment. The intention of the founding fathers appears to have been not to disturb the existing law which is to be found in section 403 of the Code of Criminal Procedure relating to the extent of protection against 'double jeopardy' in the criminal law of this country.

(40) It strikes me that on a correct reading of the section, having regard to the background of Article 20(2) as discoverable by a reference to section 403 of the Code of Criminal Procedure, the word 'and' has been used not in a disjunctive but in a conjunctive sense. To read the word 'and' as 'or' would be to read something into the article which is not there. That being so, it strikes me that Article 20(2) does nothing more than reproduce in effect the provisions of section 403 of the Code of Criminal Procedure. It is clear that under that Code a discharged person can be put for retrial. Article 20(2) clearly uses the word 'and' in a conjunctive sense and only where the accused has been both prosecuted and punished for the same offence is a second trial barred, according to the judgment of a learned single judge of the Madras High Court in — 'In Re C. Devanugraham', AIR 1952 Mad 725 (L).

(41) In the case of 'Raman Lal v. Commr. of Police, Calcutta', AIR 1952 Cal 26 (M), the observation was made by Mukerji J. in a case under the Preventive Detention Act, 1950, that the principle of 'autre fois acquit' under section 403 of the Code of Criminal Procedure has no application to a case under the Preventive Detention Act and that the constitutional protection of Article 20(2) of the Constitution is also inapplicable because 'satisfaction under the Preventive Detention Act is not a prosecution'. There is and can be no identity of offence or of prosecution between detention under the Preventive Detention Act and trial and conviction by a court of law. Now, with preventive detention I am not concerned. The point, however, is that Mukerji J. emphasises that it is only trial and conviction by a 'court of law' for the same offence that can bring a case under Article 20(2) of the Constitution.

(42) I may also refer to a case, namely, — 'Suresh Chandra v. Himangshu Kumar', AIR 1953 Cal 316 (N), where a learned single Judge of the Calcutta High Court held that the word 'prosecution' in Article 20(2) means judicial proceedings before a court or legal tribunal and could not include departmental or disciplinary proceedings taken for inflicting departmental penalty or punishment on an officer belonging to the department for any misconduct. Now it strikes me that the words 'prosecution and punishment' have reference to criminal offences and have the effect of limiting the scope of the article to criminal proceedings before a court of law or judicial tribunal competent to deal with criminal cases.

(43) A further complication is the use of the word 'offence'. The word 'offence' has been defined in section 3(38) of the General Clauses Act, 1897, in the following terms :

" 'Offence' shall mean any act or omission made punishable by any law for the time being in force."

Now, Article 367 directs that

"Unless the context otherwise requires, the General Clauses Act, 1897, shall subject to any adaptations and modifications that may be made therein under article 372, apply for the interpretation of this Constitution as it applies for the interpretation of Act of the Legislature of the Dominion of India."

Article 372(1) preserves

'subject to the other provisions of the Constitution all the law in force in the territory of India immediately before the commencement of this Constitution until altered or repealed or amended by a competent Legislature or other competent authority.'

The effect of this Article read with section 403 of the Criminal Procedure Code is that section 403 of the Criminal Procedure Code continued to be a law on the date the Constitution came into force. Having regard to these considerations, I am driven to the conclusion that Article 20(2) did nothing more than elevate the principle laid down in section 403 of the Code of Criminal Procedure to the status of a fundamental law.

Bearing these considerations in mind, I am driven to the conclusion that taking the article as a whole, the context indicates that the word 'offence' as used in the Article contemplates a criminal offence and not all types of offences. In any case, for an 'offence' there has to be an act or omission made punishable by any law for the time being in force. Significance has, therefore, to be attached to the word 'made'. That word carries with it the implication that some authority empowered to do so has laid down the law. The law contemplated in the Article would appear to be an enacted law by a legislature or by a body of persons authorised by the legislature to make it. A difficulty that I feel is that while the punishment for offences has been prescribed by rule 63 of the Rules of Procedure of the Assembly framed under Article 208 of the Constitution, the offences themselves have not been so defined by those rules. Can we go to the extent of holding that the whole law of the Parliament, i.e., the British Parliament, as developed in the course of centuries relating to breaches of privilege was also made a part of the law of this country by Article 194 (3) of the Constitution. I feel that I cannot hold that the essential elements of the word 'offence' as used in Article 20 (2) have been made out. For this reason I am unable to hold that the case before me, assuming it to be one of double punishment for a parliamentary offence

which is nowhere defined in the Rules, is covered by Article 20 (2) of the Constitution.

(44) I have indicated my views on the various parts of this case. I would like to make it clear, however, that the basis of my judgment is the view that Article 194 (3) which relates to fundamental rights of each house of the State legislature, known as powers, privileges and immunities, is not governed by the fundamental rights conceded to a citizen or person under Article 20 (2) of the Constitution. The important point which has to be remembered is that the privileges etc. of the State legislature have been defined for, at all events, until such period as the legislature determines otherwise by law to be the same as those of the British House of Commons. The Article itself is in the nature of a charter of fundamental rights for the State legislature. To subject this Article when it is well-known that even in defiance of a statute, the British Parliament can, by placing its own interpretation, prevent a member from taking the parliamentary oath he was entitled to would be to whittle them down. This would be, in my opinion, contrary to the intentions of the founding fathers, regard being had to the necessary implications of the scheme of Article 194 (3).

(45) On an analysis of all the arguments advanced in this case, the conclusion that I have arrived at is that this Court can give no relief to the applicant. With political remedies this Court is not concerned. Important as they are, they lie beyond our sphere. As I have indicated, there are good reasons why this Court should not interfere with the mode in which the legislature conducts its internal affairs. In the ultimate analysis. it is as was hinted at by Lord Coleridge C. J. in — Bradlaugh v. Gossett ', (B) (supra), in an assiduous education of the tremendous forces generated by a vast electorate that remedies against real or supposed highhandedness on the part of any particular legislature lies. With all those matters, which are of a political nature, this Court has no concern.

(46) Before parting with this case, I would like to record my thanks to learned counsel for the applicant, Sir Iqbal Ahmad, and the learned Advocate General, Mr. Kanhaiya Lal Misra, for the valued assistance which they rendered in this case to us. I am deeply grateful to them for the thoroughness with which the case was placed before us.

(47) For the reasons given above, I would dismiss this application.

MUKERJI J.:

(48) This is an application under Article 226 of the Constitution seeking certain relief by means of requisite orders or directions or writs. The effective, or the main, prayer is that a resolution which was passed by the U. P. Legislative Assembly on the 30th March, 1953, be declared void as being inconsistent with the provisions of Part III of the Constitution. It was further prayed that this Court be pleased to call for the records of the U. P. Legislative Assembly proceedings of the 30th March, 1953, as also the proceedings of the "the Privileges Committee" dated 7th, 17th, 25th and 26th March, 1953, and after examining the legality of those proceedings, to quash the resolution which was the culmination of those proceedings and which was recorded on the 30th March, 1953. There is also a prayer to expunge the aforementioned resolution of the U. P. Legislative Assembly of the 30th March, 1953, from the proceedings of the Assembly. I have deemed it necessary to enumerate the reliefs claimed by the petitioner at the outset of my judgment because a good deal of argument on both sides centred round the appropriateness of the reliefs sought by the petitioner as also the jurisdiction of this Court to grant the reliefs prayed for. This matter has been considered at length by my learned brother and I need add nothing of my own to that consideration.

(49) The facts which gave rise to these constitutional proceedings before this Court lie in a narrow compass and I shall now state them very briefly.

(50) The petitioner, Raj Narain Singh, is a citizen of India and is an elected member of the Uttar Pradesh Legislative Assembly. The petitioner claims to be the leader of the U. P. Praja-Socialist Legislature Party which according to the petitioner's allegations forms the opposition in this Legislature. This claim of the petitioner has not been controverted by the opposite parties to this petition.

(51) On the 4th March, 1953, the petitioner was informed that the police of the State had forcibly removed certain teachers of Primary Schools who were on hunger-strike and were squatting in front of the Council House. The petitioner wished to move an adjournment motion in the Assembly, the Assembly being then in session, in order to discuss the situation which had arisen out of the strike which had been organized and indulged in by some of the primary school teachers of the State and the action taken by Government to curb that strike. The petitioner with this idea contacted opposite party No. 1 Sri Atmaram Govind Kher, who is the Speaker of the U. P. Legislative Assembly and he was advised to consult, according to the petitioner, the Treasury Benches, and according to the opposite party No. 1, the Chief Whip of the Assembly. Some parleys appear to have taken place between the petitioner on the one hand and members of Government on the other in order that the petitioner may have facility in moving his contemplated adjournment motion in the House. It also appears that there was no agreement between the majority party and the opposition in regard to this matter.

(52) The petitioner, thereafter, sought the permission of the Speaker from the floor of the House to move his adjournment motion. Under the rules of procedure, framed by the U. P. Legislative Assembly, in pursuance of the provisions of Article 208(1), namely, under rule 68, the consent of the Speaker is necessary to make such a motion. The Speaker is under this rule, made the sole judge as to whether the proposed motion is for the purpose of discussing a definite matter and is of urgent public importance or not. In the event of the Speaker being of the view that the matter to be discussed is definite and is of urgent public importance, he is empowered to accord permission to the mover to seek the leave of the House to move the motion. Under rule 71 of the aforesaid rules, there is a mode prescribed for asking for leave to move an adjournment motion. Under rule 71(1), the Speaker is enjoined to take up the motion after the 'questions' and before the 'list of business' is entered upon if he holds that the matter proposed is in order and gives his consent under rule 68. He then calls on the member concerned to ask for the leave of the House to move the adjournment motion. Rule 71(3) provides thus:

> "If objection to leave being granted is taken, the Speaker shall request those members who are in favour of leave being granted to rise in

their places and if not less than one-twelfth of the total members of the House for the time being (in the present case thirty-six members) rise accordingly, the Speaker shall intimate that leave is granted. If less than the required number of members rises, the Speaker shall inform the member that he has not the leave of the House."

Under this rule the petitioner was called upon by the Speaker to seek the leave of the House. There was an objection to leave being granted — objection having been taken by the Home Minister — and consequently the petitioner required the support of thirty-six members of the Assembly before the adjournment motion could be taken into consideration. The petitioner was conscious of the fact that he could not get the support of thirty-six members of the Assembly to his resolution, the strength of his party being very much less than thirty-six and hence a motion was made for the suspension of rule 71(3) under the provisions of Rule 221. Rule 221 is in these words :

"Any member may with the consent of the Speaker move that any rule may be suspended in its application to a particular motion before the House and if the motion is carried, the rule in question shall be suspended for the time being."

"The Speaker shall decide the procedure to be followed in lieu of that contained in the suspended rule."

It is clear to me that if the petitioner could not get the support of thirty-six members in order to have the opportunity of placing the adjournment motion before the House, the petitioner obviously had less chance of getting the necessary support of the House to carry his motion in regard to the suspension of rule 71(3). It appears to me that the reason for making this motion of suspension of the rule was to get an opportunity, indirectly, to discuss the same thing as was contemplated for discussion if and when the adjournment motion was before the House. I am fortified in this view of mine by the line of action which was taken by the petitioner and some of his supporters when both these questions were before the House. We are, however, not called upon to pronounce upon the appropriateness or otherwise of the action of the petitioner.

(53) The Speaker could not allow the adjournment motion to be placed before the House because the requisite support was not forthcoming for the motion. The Speaker further did not wish to let the motion for the suspension of rule 71(3) to be discussed because of the fact that the day on which these motions were placed before the House was a day set apart for the voting on demands. Under the rules of procedure, the days set apart for the voting on demands are to be exclusively devoted to such business and other motions, save adjournment motions, could not be permitted to take precedence over it. Nonetheless the Speaker appears to have pointed out that he could accord permission to move the motion for the suspension of rule 71(3) later in the day, presumably after the time for the budget discussions was over. The petitioner and his supporters did not agree to accept this concession or suggestion which the Speaker made.

The result was that the petitioner persisted in his demand for having the adjournment motion as also the motion for the suspension of rule 71 (3) placed before the House. The Speaker called the petitioner to order several times but the petitioner disregarded the orders of the Speaker. There was, therefore, without doubt disorderly behaviour on the part of the petitioner. By virtue of the authority conferred on the Speaker under rule 189, the Speaker in order to 'preserve order' directed the petitioner to withdraw immediately from the House. The petitioner even disobeyed this order with the result that the Speaker was compelled to direct that the petitioner be removed from the House and in removing the petitioner if the employment of force was necessary to employ such force. The result was that the petitioner was removed from the House. After the petitioner had been removed, the Speaker drew the attention of the House to the disorderly behaviour of the petitioner and stated that he was of the opinion that as a matter of principle (siddhanta), he should not leave the matter at that but should refer this incident to the Committee of Privileges for their report.

(54) A reference was accordingly made to the Committee of Privileges of the Assembly which considered this question at several sittings and then made a report to the House on the 26th March, 1953. The report of the Committee of Privileges was considered by the House and a resolution in approval of the report was adopted on the 30th March, 1953, whereby the petitioner was found guilty of a breach of privilege and was suspended from participating in the proceedings of the House till the end of the session. It is this resolution, as I have indicated earlier, which is the main target of attack by the petitioner.

(55) It is interesting to observe here again, that the resolution was dated the 30th March, 1953, and then the fact that the session of the House ended on the 2nd April, 1953, at 5 p.m. This petition was moved on the 2nd April, 1953, at 10-15 a.m. before us. I am drawing attention to these dates because of the fact that on behalf of the opposite parties an objection was taken to the hearing of this petition on the ground that the petition had become more or less infructuous, inasmuch as the punishment, if there was any punishment, had spent itself out. It was further argued by the learned Advocate-General that any harm that may have accrued by the resolution cannot now be undone by our intervention.

(56) This petition was moved before us, as I have said, on the 2nd April, 1953, and we issued notice to the opposite parties because of the importance of this case and the importance of the issues which it raised and also because we thought it proper under the circumstances to decide the questions which were raised concerning the dignity of the Speaker of the House, its privileges and the protection which the petitioner claimed, after deliberation and after having the full assistance of learned counsel on both sides.

(57) On behalf of the petitioner the points that were raised were these. First, that the procedure which had been adopted by the Speaker in referring the matter of the "disorderly conduct" of the petitioner was unwarranted by the rules of procedure prescribed and as such was in effect the creation of a new privilege, or in any event was the extension of a privilege.

(58) Second, that the Speaker having ordered the forcible eviction of the petitioner from the House for disorderly conduct, he could not subsequently refer that very conduct to the Committee of Privileges for report and that the House could not on the basis of the report of the Committee of Privileges punish the petitioner a second time

as they had by resolving to have him suspended. On behalf of the petitioner it was contended that this second punishment, so to speak, was a breach of Article 20 (2) of the Constitution and as such an invasion on the fundamental rights of the petitioer.

(59) The two main questions referred to earlier, which were canvassed before us were argued with considerable ability and thoroughness by counsel on either side. The entire field of parliamentary procedure and practice was covered and all conceivable authorities on the point were placed before us by Sir Iqbal Ahmad appearing on behalf of the petitioner and the learned Advocate-General appearing on behalf of the opposite parties. My learned brother has exhaustively dealt with the authorities and I do not, therefore, wish to encumber my judgment by a repetition of the same. I, therefore, propose to refer to only those authorities which in my judgment most properly determine the questions raised, and to very briefly indicate my reasons for agreeing with my learned brother in his conclusions.

(60) Sir Iqbal Ahmad contended that the Speaker could not refer the disorderly conduct of a member of the House to the Committee of Privileges and that the only power which the Speaker had of dealing with such disorderly conduct was provided for by rule 189 of the Rules of procedure of the U. P. Legislative Assembly. The aforesaid rule is in these words:

"189(1)— The Speaker shall preserve order; and may direct any member whose conduct in his opinion is disorderly, to withdraw immediately from the House and the member so ordered to withdraw shall do so forthwith and absent himself during the remainder of the day's sitting.

"(2) If any member is ordered to withdraw a second time in the same session, the Speaker may direct him to withdraw from the meetings of the House and may name him. Similarly, if a member when ordered by the Speaker to withdraw, does not obey the order, the Speaker may name him. As soon as the member is named, the leader of the House shall forthwith make a motion to the effect that the member so named be suspended for the period to be mentioned in the motion:

Provided that this period shall in no case be longer than the remainder of the session:

Provided further that the House may at any time, on a motion being made, resolve that such suspension be terminated.

"(3) The Speaker shall have full authority to carry out his order or the decisions of the House and may employ or authorise the employment of necessary force at any stage of the proceedings.

"(4) The Speaker may in the case of grave disorder arising in the House suspend any sitting for a time to be determined by him".

By virtue of the provisions of sub-r. (1) quoted above, it was contended by Sir Iqbal Ahmad that the Speaker having directed the petitioner to withdraw from the House and having used force under sub-rule (3) for the enforcement of the order of withdrawal, the Speaker had exhausted all the power that he had in respect of that disorder. It was contended that the Speaker not having "named" the member and there not having been a motion by the leader of the House forthwith to suspend the member named, the Speaker had no jurisdiction or power to have the suspension of the member brought about through the mediation of the Committee of Privileges. It was strenuously contended by Sir Iqbal Ahmad that the procedure adopted by the Speaker was a novel procedure—a procedure unknown to Parliamentary practice.

According to Sir Iqbal Ahmad, there never had been a case in parliamentary history where a member's disorderly conduct had been referred to the Committee of Privileges by a Speaker without naming him and after he had been physically ejected from the House. In support of his contention passages from Sir T. Erskine-May's Parliamentary Practice were quoted. I do not consider it necessary to quote the passages from May's Parliamentary Practice on which reliance was placed but I do propose to consider the question raised at a later stage while determining whether or not it is open to this Court to go into these questions in view of the fact that the Constitution precludes us from going into these questions.

(61) Although on behalf of the Speaker, objection was taken to our jurisdiction to investigate into the questions raised by this petition yet it was stated on his behalf by the learned Advocate General that the Speaker did not wish to claim the privilege of shutting out from our scrutiny the proceedings of the House in respect of the actual incident. As a matter of fact the learned Advocate-General made the relevant proceedings of the Assembly part of the counter-affidavit which was filed on behalf of the Speaker. This attitude made it possible for us to look into the proceedings and know exactly what happened on the 4th March, 1943, in the House. From the proceedings it appears that the applicant was excluded from the House by the use of force when he refused to follow the direction of the Speaker to leave the House.

It also appears from the proceedings that the Speaker of his own accord referred the matter of the petitioners unruly behaviour to the Committee of Privileges of the House for consideration and report and that Committee made a report to the House on which the House recorded the resolution of the 30th March, 1953, which is, as I have already stated, being impugned by these proceedings in this Court. The learned Advocate-General argued that the conduct of the proceedings by the Speaker was strictly in accordance with the rules of procedure prescribed. It was contended by the learned Advocate-General in reply to Sir Iqbal Ahmad's contention that it was not obligatory under rule 189 (2) to name the offending member. It was further contended that apart from the provisions of rule 189 (2) it was open to the Speaker, under rule 67, to refer the conduct of the applicant to the Committee of Privileges for examination, investigation and report. I do not consider it necessary, in view of what I shall say presently, to express any opinion as to whether or not the interpretation put by the learned Advocate-General on rule 189 as also on rule 67 is correct.

(62) The main question which to my mind calls for determination in this application is whether this Court has the power to review the action taken by the Speaker in regard to the conduct of the applicant in the House on the 4th March, 1953. Further, whether it is open to this Court to scrutinise and pronounce upon the decision taken by the Speaker in referring the question to the Committee of Privileges and further to pronounce upon the legality or otherwise of the resolution of the House adopted on the report of the Committee of Privileges.

(63) It must be conceded that the House is the sole judge of its own privileges. It must also be

conceded, however, that Courts elsewhere have from time to time scrutinised as to whether or not in judging their privileges and in pronouncing upon those privileges, the Houses of Parliament have not 'in fact' exceeded their well recognised privileges or have in fact attempted to create new privileges. This position in England was crystallised by a long process. During the period of the growth of these principles, historians have noticed a struggle between the Courts and the Legislature. In India we have no such history. In England, four cases to my mind consolidated the position of the Courts and Parliament vis-a-vis each other. These cases are: — 'Ashby v. White (1703) 92 E. R. 126 (O), Paty's case (F)', — 'Stockdale v. Hansard (D)', and the 'case of the Sheriff of Middle-sex (G)'.

The ratio of these cases appears to be that the Courts deny to the Houses the right to determine the limits of their privileges while allowing them within those limits exclusive jurisdiction. The Courts have always allowed the Houses complete and exclusive jurisdiction in regard to everything which takes place within the walls of Parliament and the Houses have long claimed little else in England. As a matter of fact they have consented to statutory limitations being placed on many privileges since the claims to privileges were first made by Parliament. The undoubted privileges of the House of Commons therefore, appear to be of three kinds:

(1) Exclusive jurisdiction over all questions which arise within the walls of the House except perhaps in cases of felony and like offences.

(2) Certain personal privileges which attach to members of Parliament, and

(3) Power of executing decisions on matters of privileges by committing members of Parliment or any other individuals to imprisonment for contempts of the House.

(63a) Another ancillary matter may here be noticed so as to make the category of privileges complete, namely, the right which newspapers claimed, to publish, fair and accurate reports of Parliamentary debates—this right appears to have been conceded once for all by the decision in — 'Wason v. Walter (1868) 4 QB 73 (P)'. The privilege here is really a qualified privilege which is familiar as a defence to actions of defamation. It has, however, nothing else but its name in common with Parliamentary privilege.

(64) In the case of — '(1884) 12 Q. B. D., 271 (B)', Stephen J. quoted Lord Denman with approval thus:

> "Whatever is done within the walls of either assembly must pass without question in any other place".

Littledale J. was then quoted thus:

> "It is said the House of Commons is the sole Judge of its own privileges; and so I admit as far as the proceedings in the House and some other things are concerned".

Stephen J. also quoted with approval the following passage of Patteson J.:

> "Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examination elsewhere."

Coleridge J. is reported to have said.

> "That the House should have exclusive jurisdiction to regulate the course of its own proceedings and animadvert upon any conduct there in violation of its rules or derogation from its dignity stands upon the clearest grounds of necessity."

On these high authorities, which I have quoted above, it is clear to me that the security which the petitioner in this case wants us to make into the proceedings of the House cannot be made by us.

(65) Apart from the persuasive authority of great value of English decisions we have definite provisions in our Constitution enjoining us to look to those authorities in order to know for certain what the powers, privileges and immunities of the Legislatures of our States are, for, Article 194(3) of the Constitution provides:

> "In other respects the powers, privileges and immunities of a House of the Legislature of a State, and of the Members and the Committees of a House of such Legislature shall be such as may from time to time be defined by the Legislature by law and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution".

It was because of this provision in the Constitution that it became necessary for counsel on either side, and for us, to go to English precedents and to examine the question partially on the footing, as if it arose in England, and had to be decided according to English precedents.

Sir Iqbal Ahmad contended that the aforequoted provision of the Constitution in regard to the powers, privileges and immunities of the House had to be read subject to the other provisions of the Constitution, inasmuch as all the powers, privileges and immunities which the House of Commons of the Parliament of the United Kingdom enjoyed could not possibly be enjoyed by State Legislatures in India. One little illustration was taken to illustrate this point. The illustration taken was that the Houses of Parliament had the privilege of regulating its own composition and as such to decide upon elections etc. while there is no such privilege vested in the State Legislatures because the Constitution has made specific provision for the conduct of elections. A reference was made to Part XV of the Constitution. It was further contended that Article 194 in its entirety was subject to the other provisions of the Constitution and therefore if the House had by a resolution on any question of privilege contravened any of the Constitutional privileges, then it was not only open to the Court but it was the bounden duty of the Court to declare such resolution 'ultra vires'.

(66) If a resolution of the House which does not enjoy the status of law nor has the power to alter the law infringes any constitutional provision or is in the teeth of any constitutional prohibition then obviously such a resolution may not be binding and a remedy may be had against such a resolution. With the aforesaid exception the constitutional provisions, to my mind, give the proceedings in the Legislative sanctity and make them inscrutable to the same extent as the proceedings of the House of Commons. The provisions which to my mind determine this question are the provisions of Article 194 (3) and Article 212 of the Constitution. Article 212 is in these words:

> "(1) The validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure.
>
> (2) No Officer or member of the Legislature of a State in whom the powers are vested by or under this Constitution for regulating proce-

dure or the conduct of business, or for maintaining order in the Legislature shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers."

What was done by the Speaker was in the exercise of powers vested in him for regulating the conduct of business of the House and for maintaining order in the Legislature. This conduct, under Article 212 (2) must, in my judgment, remain without scrutiny by the Courts. The petitioner in effect challenges the validity of the proceedings in the Legislature, inasmuch as he says that the Speaker did not follow the well recognized parliamentary practice but invented a procedure of his own when he referred the conduct of the petitioner to the Committee of Privileges without naming him. This in my judgment must also be deemed to be outside the scope of our scrutiny, for Article 212 (1) in terms prohibits the validity of proceedings being questioned on the ground of alleged irregularity of procedure. It was argued that the irregularity which the Speaker in this particular case committed was not really an irregularity in procedure but was a matter of substance and in effect it was the creation of a new privilege. I have not found it possible to agree with the contention, for in my judgment the matter under controversy was nothing but a matter of procedure.

(67) The next argument which was raised on behalf of the petitioner was that he had been punished twice over for the same offence. It was submitted that the exclusion of the petitioner from the House by force for unruly conduct was a punishment and the suspension recommended by the Committee of Privileges and approved by the House was also a punishment for the same unruly conduct for which he had been ejected from the House under the orders of the Speaker. It was contended that by virtue of Article 20(2) of the Constitution there can be no double punishment like this for the same offence. Article 20 (1) is in these words:

"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence".

This, in fact, makes punishment by means of 'post facto' laws, or awarding enhanced punishment under 'post facto' laws, illegal. It was on clause (2) of Article 20 that reliance was placed — that clause is in these words:

"No person shall be prosecuted and punished for the same offence more than once."

In order to have the protection provided by this clause, it must be found first that the petitioner was 'prosecuted' and "punished" for the same 'offence' more than once. The word 'offence' appears in all the three clauses of Article 20 and, in my judgment the word must bear the same meaning in all the three clauses of the Article. The use of the word 'offence' in clause (1) of Article 20 makes it perfectly clear to me that by the word 'offence' in Article 20 is meant something which is a violation of a law in force and for the violation of which the law prescribes a penalty. The use of the word 'offence' in clause (3) also indicates, to my mind, that it has reference to an act in respect of which a person can be accused and where in respect of that accusation there is a question of taking evidence and deciding upon the culpability or otherwise of the person charged. The use of the word 'prosecuted' in Article 20 is also indicative of the fact that it has a reference to a prosecution for an offence before a Court.

Further by Article 367 the provisions of the General Clauses Act, 1897, subject to any adaptations and modifications that may have been made therein under Article 372 are made applicable to the interpretation of the Constitution in the same manner as they are made applicable to the interpretation of an Act of the Legislature of the Dominion of India. By section 3(37) of the General Clauses Act 'offence' has been defined to mean any act or omission made punishable by any law for the time being in force. To me it appears that the ingredient of the act or the omission which is to constitute the offence must be found in a law and the same law must prescribe the punishment.

Breaches which may loosely be termed 'offences' cannot, to my mind, fall within the purview of Article 20 of the Constitution. We speak loosely of social offences and of departmental offences, but these lapses cannot obviously come within the purview of the word ' offence' within the meaning of Article 20. All lapses in the social sphere are punished in some form or other, if the word 'punishment' is to be given the same loose and wide meaning as was attempted to be given to the word 'offence'. It was argued by Sir Iqbal Ahmad that under rule 63 of the Rules of Procedure of the U. P. Legislative Assembly certain punishments, as punishments, have been catalogued and prescribed. It was also pointed out that expulsion of a member and the suspension of a member are both classed as punishments under the rules. In my judgment, the word 'punishment' in rule 63 has been used in a wide and popular sense and not in the sense in which the word has been used in the Constitution in Article 20.

There is, in my judgment, another way of looking at this matter. The action of the Speaker in having the applicant removed from the House for unruly behaviour was not a punishment and was not, strictly speaking, 'expulsion' within the meaning of rule 63 (4). The Speaker, it must be remembered, asked the applicant to withdraw from the House for disorderly conduct under the powers conferred on him by rule 189 (1). When the applicant refused to withdraw then the Speaker had him put out of the House under the powers vested in him by sub-rule (3) of rule 189. This action of the Speaker was not really punitive action, but was preventive action. Under rule 189 (1) the Speaker has been given power to preserve order and he has further been armed with the power to direct a member to withdraw if his conduct appears to be disorderly to the Speaker; the Speaker has further been given the power to enforce his decision under sub-rule (3). He has not been empowered, as such, to punish any member for disorderly conduct.

It appears to me, therefore, that the action which the Speaker took was for preserving future order for he could not possibly preserve that order which had already been broken and he had not been given any other power save the power to preserve order under rule 189(1). Anything that is done in order to safeguard against a future recurrence of the same danger is not punitive action but is preventive action, but what was done by the resolution of the House was to suspend the petitioner for the disorderly conduct for which he had not really been punished earlier. In my judgment in this view of the matter

also, there was no breach of Article 20 (2) of the Constitution.

(68) I wish, however, to make it clear that in the event of my being persuaded to hold that there was double punishment of the petitioner for the same offence—offence as contemplated by Article 20 (2) of the Constitution — then I would have felt little difficulty in holding that the petitioner would have been entitled to relief by this Court because in my judgment the privileges, immunities and powers of the House or its Speaker could not override the positive prohibitions contained in the Constitution, nor could they make the provisions of Part III — the Fundamental Rights—nugatory, even though Article 194(3) has not been made specifically subject to the other provisions of the Constitution. To hold otherwise would be to place the Speaker or the Legislature of a State, above the Constitution — that, in my judgment can never be held. The constitutional guarantees, subject to the limitations as are permissible under the Constitution, contained in Part III of the Constitution must reign supreme above everything created under the Constitution.

(69) In the result I agree with my learned brother in the order which he has proposed, namely, that this petition has no merits and must be dismissed with costs.

(70) BY THE COURT: For the reasons given in our respective judgments we dismiss this application with costs.

A/D.R.R. Application dismissed.

A.I.R. 1954 ALLAHABAD 340 (Vol. 41, C.N. 152)

CHATURVEDI J.

Jagan and others, Applicants v. Ram Kishore Pandey and others, Opposite Party.

Criminal Misc. (Writ) No. 168 of 1953, D/- 24-11-1953.

(a) U. P. Panchayat Raj Act (26 of 1947), Ss. 85 and 110 — U. P. Panchayat Rules, R. 95A — Rule not ultra vires.

Rule 95-A is not 'ultra vires' as being inconsistent with the provisions of S. 85. The Rule really lays down the procedure to be followed when a revision is preferred under S. 85 of the Act and it is in no way inconsistent with the provisions of the section. (Para 2a)

(b) U. P. Panchayat Raj Act (26 of 1947), S. 85 — Revision not accompanied by affidavit — Power to dismiss at any stage.

A revision under S. 85 of the Act if not accompanied by an affidavit as required by R. 95A of the U. P. Panchayat Rules, is a defective application and can be rejected at the outset. But even if it is admitted, the magistrate has jurisdiction to dismiss it at any stage if he finds that it is defective and has not been properly filed. (Para 3)

(c) U. P. Panchayat Raj Act (26 of 1947), S. 85 — Power to act suo motu when a revision is found to be defective — (Constitution of India, Art. 226).

Where a revision application under S. 85 even though not accompanied by an affidavit as required by Rule 95A has been admitted but the defect is discovered at the time of final hearing when both parties are present the revising authority is not bound to dismiss such application at that stage on the ground of such defect but should consider the question whether it would act 'suo motu' in exercise of its powers under S. 85. If it finds that there are some defects in the decree or order of the Panchayati Adalat leading to miscarriage of justice, then certainly it is open to it to exercise its powers 'suo motu'. (Para 4)

Generally speaking, it is not necessary for Magistrates exercising powers under S. 85 of the Act, to say in every order whether they would like to exercise their powers 'suo motu' or not. But in a case of this kind, where the case has reached the stage of final hearing and the defect in the revision is discovered at that stage, it is certainly desirable that the Magistrates should consider whether they would act on their own motion or not in that particular case, and this consideration of theirs should appear from the order passed by them, or by the Munsifs as the case may be. (Para 6)

Where the order of the Magistrate in dismissing the revision shows that he never applied his mind to this aspect of the question but on the other hand was oblivious of his powers to act 'suo motu' in such cases, his order is liable to be quashed by a writ of certiorari. (Paras 4, 5)

Krishna Shanker, for Applicants; Iqbal Ahmad, for Opposite Party (No. 1).

ORDER: This case was ordered to be connected with Civil Misc. Writ No. 187 of 1953. In Misc. Writ No. 187 of 1953, the learned Judge admitted the application, mentioned three points which were considered to arise in that case. These points have been argued in the present Writ case, and I now propose to deal with them after briefly giving the facts of the case.

(2) The Panchayati Adalat of Bhabhot Circle, district Sultanpur, passed an order on the 27th June, 1951 holding that the applicants had committed an offence under sec. 447, I. P. C. and sentenced them to a fine of Rs. 50/- each. A revision against this order was preferred before the Sub-Divisional Magistrate, Sadar, on the 30th July, 1951. When it was filed, there was no affidavit along with it as provided by Rule 95-A(1) of the Rules framed under the U. P. Panchayat Raj Act. An affidavit, however, was subsequently filed some months after revision had been filed. The matter came on for hearing before the learned Sub-Divisional Magistrate on a number of dates, and the learned Magistrate dismissed the revision by his order dated the 21st April, 1953 on the ground that the revision was incompetent, inasmuch as it was not accompanied by an affidavit.

The present application under Articles 226 and 227 of the Constitution prays for setting aside the order of the learned Magistrate as also of the Panchayati Adalat. The learned counsel has argued that the order of the learned Magistrate shows that he thought that he was helpless in the matter; and in view of the defect of not filing an affidavit with the Revision application, he had no power to interfere with the order of the Panchayati Adalat.

(2a) It was urged by the learned counsel, in the first instance, that Rule 95-A is ultra vires, inasmuch as it is inconsistent with the provisions of sec. 85 of the U. P. Panchayat Raj Act. I am unable to accept this contention of the learned counsel. What Rule 95-A(1) lays down is that an application filed under sec. 85 should be accompanied by an affidavit stating the specific grounds on which it is based, and a certified copy of the order against which it is made. Sub-rule (2) then goes on to provide that notice of the application would be sent to the opposite party with a copy

of the application; and a report of the Sarpanch would also be called for. Sub-rule (3) says that the court shall, before passing orders on the application give a reasonable opportunity to both the parties of being heard. It would be clear from the provisions of this Rule that it really provides a procedure which is to be followed when a revision is preferred under sec. 85 of the Act. Section 85 of the Act says that a court may act on the application of any party or on its own motion. The Rule in question further adds that that application should be accompanied by an affidavit. I find nothing inconsistent in the provisions of sec. 85 and Rule 95-A. There are numerous instances in the different Acts where the Rules provide for the filing of additional documents, and the validity of the Rule has never been questioned on that ground. I, therefore, do not see any reason to hold that Rule 95-A is, 'ultra vires' as being inconsistent with the provisions of sec. 85. The Rule really lays down the procedure and it is in no way inconsistent with the provisions of the section.

(3) The next point that was argued was that the revision having once been admitted, it was not possible for the learned Magistrate to have rejected it on the ground that it was not accompanied by an affidavit. Here again I do not find it possible to agree with the contention of the learned counsel. It is quite clear from Rule 95-A that the revision petition must be accompanied by an affidavit, and if a revision petition is filed without any affidavit, then obviously the revision is not complete. It could have been rejected the very moment that it was preferred; but if for some reason the defect was not noticed at that stage and was pointed out by the opposite party at the date of the final hearing, the position is really not in any way altered. The revision was a defective revision, and if the office of the Magistrate did not notice the defect, there is no reason for holding that the learned Magistrate had no jurisdiction at that stage to dismiss the revision on the ground that it was not accompanied by an affidavit. The revision being clearly a defective one, the learned Magistrate had a jurisdiction to dismiss it at any stage of the proceedings whenever the defect was brought to the notice of the learned Magistrate. From what I have stated above I am of the opinion that it is open to a Magistrate to dismiss a revision at any stage of the case before him, if he finds that it is defective and has not been properly filed.

(4) The next question as to whether he is bound to dismiss such an application may be considered from two aspects—namely the right of the party and the power of the Revising authority. As far as the right of the party is concerned, the party not having acted according to the provisions of law, his right came to an end and it is open to the Revising authority to dismiss the revision on the ground of its being a defective one. But this does not necessarily lead to the conclusion that the power of the Revising authority to interfere with the decree or order of the Panchayati Adalat also does not exist at all in such a case.

Section 85 clearly provides that a Magistrate or Munsif can cancel the jurisdiction or quash any decree or order, on the application of any party or on his own motion. If the revision has been entertained and the record has been summoned, and both the parties are present, then the learned Magistrate should consider whether, in a case like that, he would like to dismiss the revision, or act 'suo motu' in the matter, the power being undoubtedly there to act on his own motion. If he finds that there are some defects in the decree or order of the Panchayati Adalat leading to miscarriage of justice, then certainly it is open to him to exercise his powers 'suo motu'. The case having reached that stage, it would not be desirable to dispose it of simply on the ground that there was a defect in the revision, which was not noticed previously and which, if noticed, could have been easily remedied.

I have already said that the Magistrate certainly has a discretion to dismiss the revision at any stage of the case. But at the same time if it has been brought to his notice that the order of the Panchayati Adalat is liable to be quashed, then certainly he has a right of his own accord to interfere with the order and to quash the decree or order passed by the Panchayati Adalat. He might very well say that the revision is defective and he is dismissing it on that ground; and at the same time, he is quashing the order 'suo motu' because of certain defects found in the order. The position, therefore, is that if a revision has been admitted, notice issued to the other party and the record is before the court then the Revising officer must apply his mind to find out whether it is a case in which he would like to act 'suo motu' or not. It is open to him to say that, looking to the facts of the case, he would not like to exercise his discretion of acting of his own accord, and it would be equally open to him to set aside the order of the Panchayati Adalat if he considers it proper to do so.

What I wish to emphasise is that if the revision once having been admitted, is ready for final hearing and it is then found to be defective, then the learned Magistrate should further consider the question whether he is inclined to interfere with the order of the Panchayati Adalat of his own accord or not. His interference of his own accord is also discretionary but the order of the learned Magistrate should show that he has considered the question whether he would like to interfere with the order of his own accord, or he would not like to so interfere. In the absence of the expression of his opinion on this point, a doubt remains whether the learned Magistrate was really conscious of his power of setting aside the order of the Panchayati Adalat of his own accord. In the order under consideration the learned Magistrate remarked:

> "The words of the statute must be given their literal meaning and it is not open to a court to introduce any consideration of public policy or equity to control or restrict the natural meaning of the words used by the legislature. The word "accompanying" mentioned in Rule 95-A can have the only literal meaning of the affidavit filed with the revision application at the same time and legally the application is not, therefore, maintainable."

These observations of the learned Magistrate show that he thought that he was powerless in the matter and, therefore, never applied his mind to the further question as to whether the order of the Panchayati Adalat was such as would induce him to interfere with it of his own accord.

(5) In this view of the matter I think that this order should not be allowed to stand. I, therefore, quash the order of the learned Sub-Divisional Magistrate of Sadar, district Sultanpur, and send the case back to him to be restored to its original number. The learned Magistrate should further consider the question whether this is a case in which he considers it proper to interfere with the order of the Panchayati Adalat of his own accord or not.

(6) Generally speaking, it is not necessary for Magistrate, exercising powers under sec. 85 of the Act, to say in every order whether they would like to exercise their powers 'suo motu' or not. But in a case of this kind, where the case has reached the stage of final hearing and the defect in the revision is discovered at that stage, it is certainly desirable that the learned Magistrates should consider whether they would act on their own motion or not in that particular case, and this consideration of theirs should appear from the order passed by them, or by the learned Munsifs as the case may be.

(7) The writ petition is allowed and the order of the learned Magistrate is quashed, and the case is sent back to him for a fresh decision in the light of the observations made above.

(8) As it is a criminal case, no question of costs arises.

A/K.S.B. Petition allowed.

A.I.R. 1954 ALLAHABAD 342 (Vol. 41, C.N. 153)

DESAI J.

Prem Shankar, Applicant v. State.

Criminal Revn. No. 1713 of 1953, D/- 12-10-1953, against order of S. J., Farrukhabad, D/- 7-7-1953.

Police Act (1861), Ss. 20, 23, 24 — Station officer making report under S. 70 of the U. P. Excise Act — (U. P. Excise Act (4 of 1910), S. 70).

The regulating of criminal procedure does not seem to be any of the objects behind the passing of the U. P. Excise Act and it cannot be said to have been passed for regulating criminal procedure. Therefore, under S. 20 a station officer cannot exercise any authority conferred upon him under the U. P. Excise Act. But S. 20 permits him to exercise authority conferred upon him by the Police Act itself. So he can detect and bring offenders to justice and can lay any information before a Magistrate. Section 70 of the U. P. Excise Act specifically, and regardless of the provisions of the Police Act, permits a Magistrate to take cognizance of an offence on his report. It is of no consequence that he cannot validly exercise the powers of an Excise Officer; his ability to do so is not a condition precedent for his making a report, and his making a report is not necessarily exercising an Excise Officer's powers. His making a report can be treated as exercising his powers under the Police Act.

(Paras 1, 2)

Anno: Police Act, S. 20 N. 23; S. 23 N. 1; S. 24 N. 1.

P. C. Chaturvedi, for Applicant.

ORDER: The applicant, who has been convicted under Section 60 (a) of the Excise Act, challenges the conviction on the ground that the Magistrate took cognizance of the offence said to have been committed by him on a report made by a station officer of a police station in contravention of the provisions of Section 20 of the Police Act. Under Section 70 of the U. P. Excise Act, no Magistrate can take cognizance of an offence punishable under Section 60 "except.....on the complaint or report of an Excise Officer." An Excise Officer is defined in Section 3(2) to mean "any officer or person appointed or invested with powers under Section 10." Section 10 authorises the State Government to empower officers and persons to perform certain acts and duties. The State Government has, in exercise of that power, conferred powers upon station officers in charge of police stations some of the powers mentioned in Sec. 10. Accordingly a station officer in charge of a police station is an excise officer and a Magistrate can take cognizance of an offence on a report made by him.

In the present case, the learned Magistrate took cognizance of the offence on the report of a station officer. Section 20 of the Police Act lays down that police officers enrolled under the Police Act

> "shall not exercise any authority, except the authority provided for a police officer under this Act and any other Act which shall hereafter be passed for regulating criminal procedure."

Under Section 23 of the Police Act, it is the duty of every police officer

> "to prevent the commission of offences and public nuisances, to detect and bring offenders to justice and to apprehend all persons whom he is legally authorised to apprehend."

Section 24 makes it

> "lawful for any police officer to lay any information before a Magistrate and to apply for a summons, warrant etc."

(2) The argument advanced on behalf of the applicant is that, though the learned Magistrate could take cognizance of an offence on a report of an excise officer, a station officer is prohibited by Section 20 of the Police Act from exercising the powers of an excise officer and therefore from making a report to a Magistrate for taking the cognizance of an offence. It may be assumed that the U. P. Excise Act is not an Act passed for regulating criminal procedure within the meaning of Section 20 of the Police Act, though some of its provisions do regulate criminal procedure. Section 20 does not say that the Act must have been passed exclusively for regulating criminal procedure but the regulating of criminal procedure does not seem to be any of the objects behind the passing of the U. P. Excise Act and it cannot be said to have been passed for regulating criminal procedure. It can, therefore, be said that a station officer cannot exercise any authority conferred upon him under the U. P. Excise Act.

But Section 20 permits him to exercise authority conferred upon him by the Police Act itself. So he can detect and bring offenders to justice and can lay any information before a Magistrate and can apply for the issue of a summons, warrant etc. The station officer, in the present case, has simply laid information before the learned Magistrate that the applicant has committed an offence and applied for the issue of a summons against him. It cannot be disputed that he could do this under the Police Act. It does not matter if the offence that the applicant is said to have committed is punishable under the U. P. Excise Act. The powers conferred by Sections 23 and 24 are with regard to all offences punishable under any Act whatsoever.

If the station officer had not been conferred the powers of an excise officer, though he could report to the Magistrate that the applicant has committed an offence punishable under Section 60 of the Excise Act, the Magistrate could not take cognizance of the offence on that report because he would be barred from doing so by Section 70 of the Excise Act. But in the present case, the station officer has been rightly or wrongly given the powers of an excise officer. He is a 'de facto' excise officer, if not a 'de jure' excise officer. Section 70 contemplates a 'de facto' excise officer; there are no such words as "duly appointed" in it. Further when the Act itself treats him as an excise officer, he must be deemed to satisfy the requirements of Section 70. The Act must be

read as a whole and it would be against all canons of interpretation to hold that he is not an Excise Officer within the meaning of Section 70, when he is one as defined in Section 3 (2) of it.

Section 70 specifically, and regardless of the provisions of the Police Act, permits a Magistrate to take cognizance of an offence on his report. It is of no consequence that he cannot validly exercise the powers of an Excise Officer; his ability to do so is not a condition precedent for his making a report, and his making a report is not necessarily exercising an Excise Officer's powers. His making a report can be treated as exercising his powers under the Police Act. Section 70 does not require that he must make a report as an Excise Officer, or in the exercise of his powers of an Excise Officer, but even if it is interpreted to require this, the requirement is subject to the provisions of Section 3(2) as explained above. It is the Excise Act which requires a report by an excise officer and it is that very Act which creates an excise officer.

There is nothing in it to prevent a police officer's being conferred the powers mentioned in S. 10 of it. It contemplates the conferring of these powers upon a police officer. As soon as the powers are conferred upon him he becomes an excise officer even if he cannot validly exercise them. It is irrelevant to consider whether the Police Act prevents the conferment of those powers upon him. The question before us is whether he is an excise officer within the meaning of the Excise Act and not whether he is an excise officer within the meaning of the Police Act. Therefore, I find that the station officer was not debarred from making a report and is an excise officer; the learned Magistrate could take cognizance of the offence on his report.

(3) There is no other contention raised before me and the application is dismissed.

(4) There is no justification for certifying that the case is a fit one for appeal to the Supreme Court under Art. 134 (1) (c) of the Constitution.

B/D.H.Z. Revision dismissed.

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*A.I.R. 1954 ALLAHABAD 343 (Vol. 41, C.N. 154)

(LUCKNOW BENCH)

AGARWALA AND RANDHIR SINGH JJ.

Raj Kishore, Applicant v. State of Uttar Pradesh and another, Opposite Party.

C. M. An. (O. J.) No. 66 of 1953, D/- 19-11-1953.

(a) Constitution of India, Art. 311 — "Removal", meaning of — (Words and Phrases).

The word 'removal' in Art. 311 is not used in its wider sense of termination of service but is used in its restricted sense of removal by way of punishment. Consequently, a Government servant, who, under Rule 465 of the Civil Service Regulations as adapted in Uttar Pradesh, has been made to retire compulsorily is not entitled to an opportunity of showing cause as contemplated in that article. AIR 1954 All 235, Foll. AIR 1953 SC 250, Rel. on. (Paras 11, 15)

†***(b) Constitution of India, Arts. 311 and 226 — Government servant compulsorily retired — He has no legal remedy — (Master and servant) — (Civil Service Regulations, Rule 465).**

A Government servant who has been compulsorily retired under Rule 465 of the Civil Service Regulations, as adapted in Uttar Pradesh, without giving any reasons and without following the procedure as laid down in the Government notifications of 1949 and 1952 and contrary to the latter part of the note appended to Rule 465 has no legal right to get his compulsory retirement set aside by a Court of law. His remedy is merely political. (Para 16)

(c) General Clauses Act (1897), S. 21 — U. P. General Clauses Act (1 of 1904), S. 27 — Power to amend rule — Binding nature of such amendment — (Civil Service Regulations, Rule 465) — (Master and servant).

The authority which can make a rule (e.g. Rule 465 of the Civil Service Regulations dealing with compulsory retirement) has also the power to alter or modify it from time to time. It follows, therefore, that every Government servant is bound by any subsequent alterations, amendments or additions made in the rules in existence when he was recruited to the service. (Para 18)

(d) Constitution of India, Art. 16 — Civil Service Regulations, Rule 465 is not 'ultra vires.'

Rule 465 of the Civil Service Regulations, as adapted in Uttar Pradesh, dealing with the compulsory retirement of a Government servant, is not 'ultra vires' of Article 16 of the Constitution of India, as neither clause (1) nor clause (2) of that article applies to the question of retirement. (Para 19)

†***(e) Constitution of India, Arts. 310, 311 and 14 — Civil Service Regulations, Rule 465 — Termination of service — General and special provisions — Article 310, is not controlled by Article 14 — Rule 465 is not 'ultra vires' of Art. 14.**

In the matter of termination of the services of a Government servant, the provisions to be considered are Articles 310 and 311. Article 14 does not control Article 310. The reason is that Article 14 is a general provision relating to all kinds of laws and all kinds of persons, while Article 310 deals with a special or particular matter, namely, Government servants and termination of their services. The maxim 'generalia specialibus non derogant' applies. (1898) AC 748 (754), Foll. (Para 21)

That portion, therefore, of Rule 465 of Civil Service Regulations which vests arbitrary power in the hands of the Government to single out one from the class of Government servants who have completed 25 years of service for special treatment by compulsorily retiring him without assigning any reason, while not applying the same rule to another Government servant belonging to the same class even though violative of the spirit underlying Article 14 of the Constitution is not 'ultra vires' on that account because the rule is consonant with the principle embodied in Article 310 and it is Article 310 which governs the matter and not Article 14. It rollows that the services of a Government servant can be terminated at the pleasure of the State which means without assigning any reason. (Paras 20, 21)

Dictum : Arbitrary exercise of even administrative powers vested in the Government is bound to lead to resentment and dissatisfaction against the Government. It will be in its own self-interest and the interests of the State as a whole that the administrative directions contained in the Government's own Notifications and Rules are strictly followed. (Para 23)

†*(f) **Constitution of India, Arts. 14 and 310 — Art. 310 is not included in "law" or 'laws' mentioned in Art. 14.**

Article 14 speaks of "law" and "laws". Article 310 is a constitutional provision and is not included within the term 'law' or 'laws' as mentioned in Art. 14. The entire Constitution must be read as one whole and every part of it must be given full effect. If Article 310 were to be limited or controlled by Article 14, it can hardly be said that the Government can terminate the services of its servants at pleasure. (Para 21)

Niamatullah, H. K. Ghose and K. S. Varma, for Applicant; B. K. Dhaon and B. N. Roy, for Opposite Party (Nos. 1 and 2).

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 235: (Civil Misc. (Writ) No. 379 of 1953, D/- 1-10-53 (All) 11, 13
(B) (V24) AIR 1937 PC 27: ILR (1937) Mad 517 (PC) 12, 17
(C) (V24) AIR 1937 PC 31: ILR (1937) Mad 532 (PC) 12, 17
(D) (V35) AIR 1948 PC 121: 1948 FCR 44 (PC) 13
(E) (V38) AIR 1951 All 793: 52 Cri LJ 1450 13
(F) (V39) AIR 1952 Raj 17: ILR (1951) 1 Raj 405 13
(G) (V39) AIR 1952 Sau 49: 4 Sau LR 294 (FB) 13
(H) (V40) AIR 1953 Trav-C 140: ILR (1952) Trav-C 756 13
(I) (V40) AIR 1953 SC 250: 1953 SCR 655 (SC) 13
(J) (V39) AIR 1952 Pepsu 69: ILR (1952) Patiala 110 13
(K) (V39) AIR 1952 Pepsu 148: 1952 Cri LJ 1473 13
(L) (V39) AIR 1952 Pepsu 152: ILR (1952) Patiala 392 13
(M) (V40) AIR 1953 Pepsu 24 13
(N) (V40) AIR 1953 SC 215: 32 Pat 375 (SC) 20
(O) (1898) 1898 AC 748: 67 LJ PC 115 21

AGARWALA J.:

This is an application under Article 226 of the Constitution of India praying that a writ of mandamus, certiorari or such other writ as may be proper be issued declaring that the decision of the Government retiring the petitioner from service prematurely is illegal, void and inoperative, and directing that the petitioner be re-instated in his substantive post. The facts briefly stated are as follows:

(2) The petitioner, Raj Kishore, entered Government service in the office of the Director of Agriculture, Uttar Pradesh, in the year 1923 as an apprentice and having worked on various posts rose to the position of Head Assistant in the pay-scale of Rs. 300-20-400. The petitioner had an unblemished record of service and got honoraria and special pay getting promotions sometimes superseding his seniors. In 1951 the Government of Uttar Pradesh, opposite party No. 1, on the recommendation of the Director of Agriculture, opposite party No. 2, appointed the petitioner in a leave vacancy as a Personal Assistant to the Director of Agriculture, opposite party No. 2, in the pay-scale of Rs. 350-25-500. This was in consideration of his honest and efficient work and integrity. The work of the petitioner as Personal Assistant was found so satisfactory that in June 1952 the Director of Agriculture, opposite party No. 2, recommended to the Government for the petitioner's appointment to another ex-cadre gazetted post of Personal Assistant to the Principal of the Agriculture College of Kanpur in the same scale of pay, viz., Rs. 350-25-500.

But this was the turning point in the petitioner's career. For some mysterious reason, according to the petitioner, the said post was ordered to be held in abeyance till the petitioner was got rid of by being compulsorily retired prematurely. As soon as the petitioner was compulsorily retired the post was resurrected and one Sri J. P. Verma, a Stenographer to the Minister for Agriculture and Revenue, U. P., was appointed to the post in May 1953. What transpired in the meanwhile may now be told. Scenting some trouble the petitioner applied for leave on 15th April 1953. On 18th April 1953, a letter signed by the Director of Agriculture was received by the petitioner intimating to him that "it was the policy of the Government laid down in Government Order" noted therein to retire such officials as have completed more than 25 years of qualifying service and "advising him to proceed on leave preparatory to retirement immediately and to apply for such leave within 7 days from the receipt thereof." On April 25, 1953, a reply to this letter was sent by the petitioner pointing out that he would be completing his 30 years of service and 50 years of age on 6-11-1953 and he might, at least, be allowed to continue till that date and might be allowed to proceed on leave as already applied for on 15-4-1953, and the petitioner would then later consider whether it would be in his interest to follow the said advice.

The petitioner, thereupon, was served with an order of 29th May 1953, issued by the Director of Agriculture informing him that the Government had decided to retire him and had sanctioned him four months' leave preparatory to retirement retrospectively from 28-4-1953. Aggrieved by the said order the petitioner sought an interview with the Minister for Agriculture and Revenue, Uttar Pradesh, for securing redress, but it was not granted. Ultimately the petitioner submitted a representation on 20-7-1953 to the Government through the Director of Agriculture, pointing out that the premature compulsory retirement of the petitioner more than five years before time was not warranted by the rules of service or any rule of law or any valid recommendation made by any legal authority and the action of the opposite parties will cause great financial loss to him to the tune of Rs. 22,000/- or Rs. 23,000/- besides a recurring loss of Rs. 31/- or 32/- per month as his pension would stand reduced by that amount. But no reply was given to the petitioner. Hence he filed the present petition in this Court, on the 20th August 1953.

(3) Under Rule 56 of the Financial Handbook, Volume II issued by the authority of the Government of the United Provinces the rule or normal retirement of a Government servant is as follows:

"Except as otherwise provided in other clauses of this rule the date of compulsory retirement of a Government servant, other than a Government servant in inferior service is the date on which he attains the age of 55 years. He may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds, which must be recorded in writing but he must not be retained after the age of 60 years except in very special circumstances."

(4) The rule under which the petitioner was compulsorily retired is Rule 465 of the Civil Service Regulations as adapted in the Uttar Pradesh. The rule after its amendment in 1948 now stands as follows:

"(1) A retiring pension is granted to a Government servant who is permitted to retire after

completing qualifying service for 25 years or on attaining the age of 50 years."

(2) A retiring pension is also granted to a Government servant who is required by Government to retire after completing 25 years or more of qualifying service."

Appended to this is a note which is as follows:

"GOVERNMENT retains the right to retire any government servant after he has completed 25 years' qualifying service without giving any reasons, and no claim to special compensation on this account shall be entertained. This right shall only be exercisable by Government in the Administrative Department, where it is in the public interest to dispense with the services of a government servant who has outlived his usefulness."

Before its amendment in the year 1948, the period of qualifying service for compulsory retirement was 30 years instead of 25 years.

(5) G. O. No. O-1297/II-B-25-1948, dated May 3, 1949 provided that before passing an order of compulsory retirement under Rule 465, it was necessary in accordance with the provisions of section 240(3) of the Government of India Act, 1933, as adapted, to give the Government servant concerned 'a reasonable opportunity' of showing cause against the action proposed to be taken in regard to him. The G. O. went on to add,

"It is not, however, necessary for this purpose to adopt the elaborate procedure laid down in Rule 55 of the Civil Services (Classification Control and Appeal) Rules for formal proceedings against Government servants before removing them from service, because such compulsory retirement was conceived as a 'penalty' under rule 49 of the Civil Services (Classification Control and Appeal) Rules. Nor is any special compensation admissible to the affected official."

Procedure to be followed by the Heads of Departments and other principal Heads of offices was also laid down and this was that

"these offices will submit to the Government in the Administrative Department concerned twice a year a list of officials who will have completed 25 years or more of qualifying service or attained the age of 50 years during the six months ending June 30 and December 31. The list should be in two parts, one for gazetted officers and the other for non-gazetted subordinates and the following particulars should be stated in separate columns

(a) name of Government servant;
(b) designation,
(c) date of completion of 25 years' qualifying service,
(d) date of attaining the age of 50 years, and
(e) recommendations of the Head of Department or Office about the officials' further retention in service.

Reasons for recommending non-retention of a Government servant should be succinctly stated. In the case of officials of gazetted rank, their confidential rolls should also accompany the list. In the list of non-gazetted officials the names and other particulars of only those non-gazetted officials and inferior servants should be shown who are recommended for retirement. The scrutiny of the list of inferior servants should be done at the district or corresponding level.

In order that the Government may have a full picture of the position in regard to non-gazetted personnel, the list for them should also give the following information at the top:

(a) Number of those eligible for compulsory retirement;
(b) Number of those eligible only for voluntary retirement, and
(c) Number of those who have opted to retire during the half year.

Recommendations for retirement should be unhesitatingly made in the case of officials whose integrity has been the subject of doubt. Further, in the case of Government servants who have completed 25 years of qualifying service chronic inefficiency and dull mediocrity would also be valid ground against further continuance in service.

These lists will be scrutinized in the Administrative Department of Government and orders about the retirement or retention of the officials concerned will issue thereafter."

Subsequently, by order No. O-3251/II-B-58-52, dated December 30, 1952, it was provided that it was not necessary to give an opportunity to show cause against the proposed action to be taken in regard to a Government servant who was to be compulsorily retired after completing 25 years' of qualifying service, but that the other procedure laid down in the previous order of 1949 was still to be followed.

(6) The relevant constitutional provisions are these:

Under Art. 310 of the Constitution of India every person who is a member of a civil service of a State or holds any civil post under a State, holds office during the pleasure of the Governor or, as the case may be, the Rajpramukh of the State.

Under Art. 311 (1) "No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed;" and (2) "no such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

(7) It may be noted that the Government did not give any reasons for the compulsory retirement of the applicant beyond saying that it was the policy of the Government to retire Government servants after 25 years of qualifying service. It was not indicated to the petitioner that he was considered to have outlived his usefulness or to be inefficient or mediocre. As the facts narrated in the affidavit of the petitioner have not been controverted, we have to assume them to be correct and therefore it must be held that the applicant was retired although perfectly efficient and fit for service. On behalf of the Government it has not been stated that the procedure prescribed in Notification No. O-1298-II-B-25-1948, dated May 3, 1949, had been followed in the case of the applicant. The ordinary presumption in favour of the Government that the order of compulsory retirement made by it under Rule 465 was made because the applicant was found to have outlived his usefulness cannot be drawn in the present case because of what has been stated in the applicant's uncontroverted affidavit.

(8) The petitioner's case is that:

(1) the compulsory retirement under Rule 465 quoted above amounts to 'removal' within the meaning of Article 311 of the Constitution and as

the applicant was not given any opportunity of showing cause against his 'removal' as required by the Article his removal was 'ultra vires' and unconstitutional.

(2) that the compulsory retirement of the petitioner was contrary to Rule 465 of the Civil Service Regulations read with the later part of the note thereunder as also read with various Notifications of the Government in that behalf, because it was not stated and it was not a fact that it was "in the public interest to dispense with the services of" the applicant who has outlived his usefulness,"

(3) that the petitioner having entered service in 1923 is governed with the service rules of those days and not by the new Rule 465 as amended in the year 1948, and

(4) that Rule 465 is invalid in so far as it authorises the Government to retire a person without assigning any reasons, and is, therefore, contrary to Articles 14 and 16 of the Constitution.

(9) On behalf of the opposite parties, all these contentions are controverted.

(10) First, as to whether the compulsory retirement of the applicant under Rule 465 of the Civil Service Regulations as adapted by the State of Uttar Pradesh amounts to removal of the applicant within the meaning of that word in Article 311.

(11) A precisely similar question has recently been decided by a Bench of this Court, the judgment of which was delivered by me, in — 'Shyam Lal v. State of U. P.', AIR 1954 All 235 (A). It was held that the word 'removal' in Art. 311 is not used in its wider sense of termination of service but is used in its restricted sense of removal by way of punishment. The reasons for this view may be succinctly stated as follows:

(12) Under the Government of India Act of 1915, the services of a Government servant could be terminated at the pleasure of the Crown, unless the appointment was made under some Statute which provided otherwise. The Government of India Act was amended in 1919, whereby section 96-B was introduced in that Act. Under section 96-B the power of the Crown to dismiss Government servants at pleasure was made "subject to the provisions of the Act and rules made thereunder". The Rules made by the Secretary of State for India in Council under the Government of India Act were the Civil Service (Classification, Control and Appeal) Rules. Rule 49 of this Rule provided several kinds of punishments which could be inflicted for good and sufficient reasons on a civil servant. Three of these punishments were 'dismissal' 'removal from service' and 'reduction in rank'. There was a distinction between "dismissal" and 'removal". "Dismissal" involved loss of pension and other emoluments and a disability for further employment in Government service. "Removal" involved loss of pension to some extent but not necessarily wholly and it did not involve a disability for future employment in Government service. Under Rule 55 when the three punishments, namely removal, reduction in rank or dismissal were to be inflicted upon a Government servant, he was to be given an opportunity of meeting the charges framed against him. It was held by the Privy Council that Rule 55 did not impose a legally enforcible remedy against the Crown in favour of a Government servant and that the Government servant could be dismissed even though Rule 55 were not complied with because the phrase in section 96-B "subject to the provisions of the rules made under the Act" did not limit in any way the power of the Crown to dismiss a Government servant at pleasure, since the rules were merely administrative rules and the remedy of a Government servant dismissed contrary to the provisions of the rules was political and not legal — 'Rangachari v. Secy. of State', AIR 1937 PC 27 (B) and — 'Venkata Rao v. Secy. of State', AIR 1937 PC 31 (C).

(13) This involved a great hardship on civil servants and so when the new Government of India Act was passed in 1935, section 240(3) made it obligatory upon the Crown to give an opportunity of showing cause to a Civil servant against the action proposed to be taken against him when the servant was to be "dismissed, or reduced in rank". The word "removal" was not used and one would have thought that sub-section (3) of Sec. 240 of the Government of India Act, 1935 covered the case of two punishments only, namely dismissal and 'reduction in rank' and not that of 'removal', because the word 'removal' was not used. But the Privy Council in — 'High Commr. for India v. I. M. Lall', AIR 1948 PC 121 (D), held that removal was comprised within the word 'dismissal'. Thus the position, when the present Constitution was framed, was that there was a statutory protection to a Government servant that when any of the punishments of 'dismissal', 'removal' or 'reduction in rank' were proposed to be inflicted on him, the Crown was bound to give him an opportunity of showing cause why such action should not be taken against him. The same position was retained when the present Constitution was framed, but opportunity was taken to introduce the word "removal" also along with the words 'dismissal' and "reduction in rank" in Art. 311.

The words "dismissal" and "reduction in rank" could not but refer to punishments and from the place of the word "removal" sandwitched as it is between the words "dismissal" and "reduction in rank" the conclusion is inevitable that the word "removal" is also of the same nature as the words "dismissal" and "reduction in rank". In other words, "removal" here means removal by way of punishment as contemplated in Rules 49 and 55. The fact that Art. 311(2) made it obligatory on the State to give an opportunity of showing cause to a civil servant when he was to be dismissed, removed or reduced in rank also showed that dismissal, removal and reduction in rank must be connected with some misconduct or misbehaviour of a Government servant, so that he might explain his conduct and show cause against the action proposed to be taken against him.

The Courts in India with the exception of one Court have all taken the above view. These authorities are: — 'Jayanti Prasad v. State of Uttar Pradesh', AIR 1951 All 793 (E), — 'Kewalmal Singh v. Heta Ram', AIR 1952 Raj 17 (F), — 'State of Saurashtra v. Bholanath Jatashanker', AIR 1952 Sau 49 (FB) (G), — 'Choottor Varadaraja Iyer Narayana Iyer v. The State of Travancore Cochin', AIR 1953 Trav-Co. 140 (H). The latest decision is of the Supreme Court in — 'Satish Chandra Anand v. Union of India', AIR 1953 SC 250 (I) which also tends to support the above view though the facts in that case were different. The only Court which has taken a contrary view is the Pepsu Court. We have four decisions of that Court, viz., — 'K. R. Rama Iyer v. The State', AIR 1952 Pepsu 69 (J), — 'Ishar Das v. State of Pepsu', AIR 1952 Pepsu 148 (K), — 'Shambhu Dayal v. Patiala and East Punjab States Union', AIR 1952 Pepsu 152 (L), — 'Anup

Singh v. The State', AIR 1953 Pepsu 24 (M). These were all cases decided before the decision of the Supreme Court in 'Satish Chandra's case, (I)', and the Bench deciding 'Shyam Lal's case, (A)', did not accept them as correct.

(14) Rule 465 as amended by the Government of United Provinces in 1948 is not a rule of punishment. It is a rule providing for full pension on voluntary or compulsory retirement on the attainment of a particular period of service. It is similar in nature to the rule of compulsory retirement on attainment of a particular age called the superannuation age which, in the State of Uttar Pradesh, under Rule 56 of the Financial Handbook, Volume II, is 55 years. The only difference between the two rules is that whereas on attaining the age of 55 years, all Civil servants are liable to retirement unless the period of their service for reasons to be recorded in writing, is extended, under Rule 465, all Civil servants are liable to be compulsorily retired after they have completed 25 years of meritorious service, if the Government thinks fit to retire them. Rule 465 applies only when the Government makes an order under it in respect of a particular Government servant.

(15) For all these reasons, in my judgment, the compulsory retirement of a Government servant under 465 A (sic) is not a "removal" within the meaning of Art. 311 Consequently, the applicant was not entitled to an opportunity of showing cause as contemplated in that Article.

(16) The second point to be decided is whether the applicant has been removed in disregard of the provisions of Rule 465. Sub-rule (2) of Rule 465 provides that Government may retire any Government servant who has completed 25 years or more of qualifying service. The note appended to that rule clarifies that the Government is not bound to give any reasons for the compulsory retirement under the rule and that no claim to special compensation on this account shall be entertained. The latter part of the note that "this right shall only be exercised by Government in the Administrative Department, where it is in the public interest to dispense with the services of a Government servant who has outlived his usefulness" is a rule intended for the guidance of the Government in the Administrative Dept. and is not a rule which can be enforced against the Government in a court of law. If this portion of the rule were legally enforcible against the Government, there would be no meaning in laying down in the earlier part of the note that the Government is not bound to give any reasons for the compulsory retirement. The two parts of the note can be consistently read with each other only when the second part of the note is treated as a mere Administrative Rule and not a Statutory Rule. Though in the present case there is no proof that the applicant had outlived his usefulness or that it was in the public interest to dispense with his services, it cannot be said that the statutory part of the rule had been violated by the Government in the applicant's case. The Administrative part of the rule has been violated no doubt, more so because the instructions contained in the Government notifications of 1949 and 1952 have not been followed at all. But these instructions, again, are merely Administrative and are not legally binding on the Government. A Government servant who has been compulsorily retired under Rule 465 without giving any reasons and without following the procedure as laid down in the Government notifications of 1949 and 1952 and contrary to the latter part of the note appended to Rule 465 has no legal right to get his compulsory retirement set aside by a Court of law. His remedy is merely political.

(17) Indeed it was argued by the learned counsel for the State that Rule 465 itself is an Administrative rule and is not a statutory rule and does not affect the undoubted right of the State to terminate the services of a Government servant at pleasure, unless his case falls within the purview of Art. 311. Support for this contention was sought from the two Privy Council decisions already referred to, viz., — 'AIR 1937 PC 27 (B)', and — 'AIR 1937 PC 31 (C)'. It is not necessary for me to decide this point in the present case because I find that the compulsory retirement of the applicant in this case was under Rule 465 and the portion of it which was not followed by the Government in the applicant's case was merely an administrative direction.

(18) The third point urged by the applicant is that he was not governed by the new Rule 465 as amended in the year 1948 because he entered service in 1923. This contention has no force. Under the Government of India Act of 1919, the Secretary of State had the power to make rules for the recruitment and conditions of service etc., of the servants of the Crown. Both the parties in the present case proceeded on the assumption that Rule 465, as it existed in 1923, was validly made. The authority which could make this rule had also the power to alter or modify it from time to time. This authority is embodied in section 32(3) of the Interpretation Act, 1889 in relation to English Statutes just as in relation to Indian Statutes it is embodied in section 21 of the General Clauses Act, 10 of 1897, and in relation to Acts of the State of Uttar Pradesh it is embodied in section 27 of the U. P. General Clauses Act. Therefore the authority which made Rule 465 had also the authority to amend it. It has not been argued before us that the authority which amended Rule 465 was not the authority which was authorised by law to amend it. It follows, therefore, that every Government servant is bound by any subsequent alterations, amendments or additions made in the rules in existence when he was recruited to the service.

(19) The fourth point urged is that Rule 465 is 'ultra vires' of the Constitution, because it authorises the Government to dispense with the services of a Civil servant without assigning any reason. It is urged that the provisions of the rule vest an arbitrary power in Government to select a particular servant for unequal treatment and are, therefore, contrary to the provisions of Article 16 of the Constitution. Clause (1) of Art. 16 lays down that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State", and clause (2) lays down that "no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State." Clause (2) has no application to the present case because the applicant has not been discriminated on account of religion, race, caste or residence. Clause (1) also has no application. It applies to employment or appointment to any office under the State. There is no question of employment or appointment to any office in the present case. The question is of retirement.

(20) Rule 465 undoubtedly vests an unrestricted and arbitrary power in the hands of the Government to dismiss at its pleasure any Government servant who has put in 25 years service

without assigning any reason. There is much to be said for the view that this vesting of arbitrary power in the hands of the Government to compulsorily retire a particular public servant without assigning any reason is not to afford him the equal protection of the laws which is afforded to other Government servants who have also put in 25 years of service but who are not so retired. True, the Government has power to make a classification between Government servants who have put in 25 years of service and those who have not. But the rule does not work evenly on all members of the class of Government servants who have put in 25 years of service. The rule is not automatic. It is not that every Government servant who has put in 25 years of service is automatically retired. The Government may retire one and may not retire another. The Government may choose one particular individual for unequal treatment and retire him compulsorily at its sweet will without any reason. The object of Article 14 is to prevent any person or class of persons from being singled out as a special subject for discrimination and hostile legislation. — 'Ram Prasad Narayan Sahi v. The State', AIR 1953 SC 215 (N). In my judgment, that portion of Rule 465 which vests arbitrary power in the hands of the Government to single out from the class of Government servants who have completed 25 years of service for special treatment by compulsorily retiring him without assigning any reason, while not applying the same rule to another Government servant belonging to the same class is violative of the spirit underlying Article 14 of the Constitution. But the question is whether the rule is 'ultra vires' on that account. I have reluctantly come to the conclusion that it is not 'ultra vires' on that account because the rule is consonant with the principle embodied in Article 310 and it is Art. 310 which governs the matter and not Article 14.

(21) In the matter of termination of the services of a Government servant, the provisions to be considered are Articles 310 and 311. The combined effect of these two provisions is that except as laid down in clauses (1) and (2) of Article 311 and except as laid down in clause (2) of Article 310, there is no restraint on the power of the State to terminate the services of a Government servant at pleasure. Clause (2) of Article 310 and clause (1) of Article 311 are admittedly inapplicable to the present case. I have already held that Clause (2) of Article 311 also does not apply to the facts of the present case. Therefore, it follows that the services of the applicant could be terminated at the pleasure of the State which means without assigning any reason. Article 14, in my judgment, does not control Article 310. The reason is that Article 14 is a general provision relating to all kinds of laws and all kinds of persons, while Art. 310 deals with a special or particular matter, namely, Government servants and termination of their services. The maxim 'generalia specialibus non derogant', that is, "Special provisions will control general provisions" applies. As the Judicial Committee observed in — 'Barker v. Edgar', (1898) AC 748 at p 754 (Q) that—

> "When the Legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms".

There is all the more reason why the above rule should apply when the special provision is contained in the very same enactment in which the general provision finds place. Then, again, Art. 14 speaks of "law" and "laws". Article 310 is a constitutional provision and is not included within the term 'law' or 'laws' as mentioned in Art. 14. The entire constitution must be read as one whole and every part of it must be given full effect. If Article 310 were to be limited or controlled by Article 14, it can hardly be said that the Government can terminate the services of its servants 'at pleasure'. In my opinion, Rule 465 is not rendered void by reason of Article 14.

(22) The result, therefore, is that the application must fail and I would dismiss it.

(23) I cannot leave this case, however, without pointing out that arbitrary exercise of even administrative powers vested in the Government is bound to lead to resentment and dissatisfaction against the Government. Action such as was taken against the applicant in the present case is bound to bring the party in power holding the reins of Government into disrepute. It will be in its own self-interest and the interests of the State as a whole that the administrative directions contained in the Government's own Notifications and Rules are strictly followed.

(24) RANDHIR SINGH, J.: I agree.

A/V.S.B. Application dismissed.*

*Note— The application was dismissed without any order as to costs. The Bench by its order certified that it was a fit case for appeal to the Supreme Court.

A.I.R. 1954 ALLAHABAD 348 (Vol. 41, C.N. 155)

(LUCKNOW BENCH)

V. BHARGAVA J.

Mst. Sudama Devi and another, Plaintiffs-Appellants v. Ram Kishun Lal and another, Defendants-Respondents.

Second Appeal No. 390 of 1947, D/- 13-10-1953, against decree of Addl. Civil J., Sultanpur, D/- 24-1-1947.

Transfer of Property Act (1882), Ss. 65, 55, 68 — Benefit of contract — Rights of mortgagee or charge-holder — (Civil P. C. (1908), O. 34, R. 6) — (Contract Act (1872), Ss. 40, 42) — (Trusts Act (1882), Ss. 3, 94).

The general principle is that a stranger to a contract is not ordinarily entitled to claim rights under the contract but there are a few exceptions. One exception is that, if as a result of a contract between two persons a trust came into existence for the benefit of a third person, that third person can claim rights under the contract without being a party to that contract.

There may be special cases where a trust might come into existence but that would depend on the exact terms of the deed of transfer.

Thus where the deed of sale of mortgaged property executed by the mortgagor did not lay any obligation on the vendees to discharge the debts due to the mortgagee and all that the deed laid down was that a certain sum

of money was left in the hands of the vendees so that they might pay off the debts due to the mortgagee, upon a suit brought by the mortgagee against the vendee:

Held, that the deed did not create any obligation. Since mere retention of money for the purpose of payment could not bring into existence a trust, the vendee held the money merely as an agent of the vendor and not as a trustee. Even if a trust had come into existence, it might have been possible for the creditor to enforce his rights under the decree, which he had already obtained against the vendor, against the trustee, but in no case could the creditor bring a fresh suit against the trustee. For, no rights superior to the rights available against the vendor could be enforced against a trustee in a trust created by him, and consequently a fresh suit could not be entertained. AIR 1932 Oudh 82, Distinguished; 39 Ind App 7 (PC); AIR 1936 Oudh 313; AIR 1930 Mad 382 (FB); AIR 1945 Nag 261; AIR 1949 Nag 319, Ref.

(Paras 3, 5, 6)

Anno: T. P. Act, S. 65 N. 11; S. 55 N. 15; S. 68 N. 8; Civil P. C., O. 34, R. 6 N. 4, 5, 6; Contract Act, S. 40 N. 1; S. 42 N. 1; Trusts Act, S. 3 N. 1; S. 94 N. 5.

1949 Mulla: T. P. Act, S. 65 P. 446 N. "Benefit .....Contract" (Rangoon view to the contra and the effect of the new Section 59-A not noticed in Mulla. Points 1, 2, 4 to 6 extra in N. 11 to S. 65 in A.I.R. Com.).

1949 Mulla: T. P. Act, S. 55 (Topic discussed in N. 5 to S. 55 in A.I.R. Com. extra).

1949 Mulla: T. P. Act, S. 68 P. 467 N. "Personal .....mortgagor" (Law under old section not noticed in Mulla. Point (x) extra in Mulla).

1953 Mulla: Civil P. C., O. 34, R. 6, P. 1111, N. "Personal.....mortgagor" (Point 3, extra in N. 4 to O. 34, R. 6 in A.I.R. Com.).

1953 Mulla: Civil P. C., O. 34, R. 6, P. 1110 N. "Personal.....construction" (Point 5 extra in N. 5 to O. 34, R. 6 in A.I.R. Com.).

1953 Mulla: Civil P. C., O. 34, R. 6 (Topic discussed in para. 1 of N. 6 to O. 34, R. 6 in A.I.R. Com. extra).

Haider Husain, for Appellants; H. D. Srivastava, for Respondents.

CASES REFERRED: PARAS

(A) (V19) AIR 1932 Oudh 82 (84): 7 Luck 292 3, 5
(B) ('11) 39 Ind App 7 (9): 34 All 63 (PC) 4
(C) (V23) AIR 1936 Oudh 313 (315): 1936 Oudh WN 483 4
(D) (V17) AIR 1930 Mad 382 (389): 53 Mad 270 (FB) 4
(E) (V32) AIR 1945 Nag 261 (263): ILR (1945) Nag 581 4
(F) (V36) AIR 1949 Nag 319 (Pr 45): ILR (1949) Nag 122 4
(G) (V32) AIR 1945 Oudh 65 (67, 69): 20 Luck 179 4

JUDGMENT: This second appeal arises out of a suit for recovery of money. The plaintiff-appellant is the legal representative of one Mukta Prasad. On the 30th September, 1918, Hubdar Khan, grandfather of defendant No. 3 mortgaged certain property to Mukta Prasad. On the 18th November, 1926, Fateh Mohammad son of Habdar Khan and father of defendant No. 3 executed a deed of further charge in favour of Mukta Prasad. In 1929 the same Fateh Mohammad executed a promissory note in favour of Mukta Prasad. On the basis of this promissory note, a suit was filed by Mukta Prasad against Fateh Mohammad in the year 1932 and a simple money decree was passed on the 6th May, 1932. On the 18th September, 1933 Fateh Mohammad sold his entire property to the respondents and in the deed of sale left the money in the hands of the respondents to pay off the debts due to Mukta Prasad. The present suit was brought by Mukta Prasad on the 27th September, 1945, with a prayer that a decree be passed in his favour against the vendee respondents in respect of the sums due to him from Fateh Mohammad on the basis of the deed of further charge dated the 18th November, 1926 and the promissory note executed by Fateh Mohammad in 1929.

(2) The trial Court decreed the suit but on appeal the lower appellate Court set aside the decree holding that Mukta Prasad or after him his legal representatives had no right to obtain a decree against the respondents who were merely vendees of the property of Fateh Mohammad. It is against this dismissal of his suit that the appellant has come up to this Court.

(3) On the facts admitted and found by the lower Courts, it is perfectly clear that the appellant or his predecessor Mukta Prasad were no parties to the deed of sale executed by Fateh Mohammad on the 18th September, 1933. The question is whether in these circumstances the appellant is entitled to claim the benefit of the contract contained in that deed of sale and to obtain a decree against the respondents who retained the money for payment of the debt due to the appellant at the time of the sale.

The general principle which has been recognized by all the Courts in India is that a stranger to a contract is not ordinarily entitled to claim rights under the contract but there are a few exceptions. One exception that is relevant to the argument advanced before me is that, if as a result of a contract between two persons a trust came into existence for the benefit of a third person, that third person can claim rights under the contract without being a party to that contract.

Learned counsel for the appellant has argued that in this case Fateh Mohammad sold his property to the respondents and the respondents retained the money out of the sale consideration for paying off the debts due to Mukta Prasad, a trust came into existence for the benefit of Mukta Prasad and consequently Mukta Prasad was entitled to claim a decree against the vendees who had retained the money for the debts which were due to him from Fateh Mohammad.

In support of this proposition, learned counsel has relied on a Division Bench decision of the erstwhile Chief Court of Avadh in — 'Mt. Husaini Bandi v. Gauhar Begam', AIR 1932 Oudh 82 (A). In that case one Amir Jahan Begam was indebted to Naqi Ali Khan in the sum of Rs. 8512/12/- under a promissory note executed by her in favour of Naqi Ali Khan. She also held a decree in respect of certain zemindari property on the basis of a deed of mortgage. This decree was assigned by her in favour of one Aktar Begum and in the deed of assignment, the assignee was laid under an obligation to satisfy the debt due under the promissory note which had been executed by Amir Jahan Begam in favour of Naqi Ali Khan. It was held in these circumstances that the vendee, Akhtar Begam was in the deed of sale clearly

laid under the obligation of paying the sum of Rs. 8512/12 in discharge of the promissory note in favour of Naqi Ali Khan. She being a party to this transaction was taken to have accepted the obligation. The learned Judges, therefore, held that she was a trustee for the discharge of the liability of Amir Jahan Begam for the debt due under the promissory note and the holder of the promissory note was the beneficiary. On this view a decree against Akhtar Begam was passed in favour of the holder of the promissory note.

There is no doubt that the decision in this case is to some extent in favour of the appellant but the recitation of facts in the report of that case is indicative of one distinctive feature. In that case, the learned Judges proceeded on the view that in the deed of assignment executed by Amir Jahan Begam in respect of the decree in favour of Akhtar Begam, 'the assignee was laid under the obligation of satisfying the debt due under the promissory note' in favour of Naqi Ali Khan. It was because the learned Judges found in the deed of transfer of the decree that an obligation had been created under which the assignee was obliged to discharge the debt under the promissory note that they came to the view that a trust had come into existence, with the holder of the promissory note as the beneficiary.

In the case before me, the deed of sale executed by Fateh Mohammad on the 18th September, 1933, does not lay any obligation on the vendees to discharge the debts due to Mukta Prasad. All that the deed lays down is that a certain sum of money was left in the hands of the vendees so that they might pay off the debts due to Mukta Prasad from Fateh Mohammad. It cannot be said that when the deed does not create any obligation, mere retention of money for the purpose of payment can bring into existence a trust. That case is distinguishable and cannot apply to the case before me.

(4) On the other hand there is a series of cases where the document did not lay down that an obligation was to come into existence requiring the vendee to discharge the debt of the vendor but the deed merely left the money in the hands of the vendee to pay the debts of the vendor. It was held that no trust came into existence. In most of the cases considered, the property which was already under mortgage was transferred by the mortgagor to a third person and the vendee was allowed to retain the money to pay off the mortgagee. In every case the question arose whether the mortgagee could obtain a personal decree against the vendee on the basis of the obligation created by the deed of sale in his favour under which he had retained the money to pay off the mortgage. It was invariably held that no right to obtain a personal decree against the vendee came into existence in favour of the mortgagee.

The first of these cases that may be cited is a decision of their Lordships of the Privy Council in — 'Jamna Das v. Ram Autar Pande', 39 Ind App 7 (B). This view was followed by various High Courts as well as the erstwhile Chief Court of Avadh. The Division Bench of the Chief Court of Avadh in — 'Wali Uddin Ahmad v. Ram Rakhan Singh', AIR 1936 Oudh 313 (C), held the view that no trust came into existence where money was merely left in the hands of the vendee to discharge a debt of the vendor for the benefit of the creditor of the vendor. The same principle was laid down by a Full Bench of the Madras High Court in — 'Subbu Chetti v. Arunachalam Chettiar', AIR 1930 Mad 382 (D), in two cases by the Nagpur High Court in — 'Mt. Saraswatibai v. Haibatrao Ramji', AIR 1945 Nag 261 (E) and — 'Gajadhar Prasad v. Rishabkumar', AIR 1949 Nag 319 (F) and by a learned single Judge of the Avadh Chief Court in — 'Kali v. Ram Autar', AIR 1945 Oudh 65 (G). It appears to me that the view taken in all those cases is clearly applicable to the case before me. In all of them, when money was left in the hands of the purchaser of mortgaged property to discharge the mortgage, it was held that no trust had come into existence entitling the mortgagee to obtain a personal decree against the vendee. In my opinion, there is no difference in principle if the money left in the hands of the vendee is for discharging a simple debt due from the vendor instead of the debt due under the mortgage itself. In the case of a simple debt like the present one, the creditor seeks to obtain a personal decree against the vendee as the mortgagee sought to do in those cases and on the principle applied in those cases, this claim must fail.

(5) It appears to me that in a case like the present where the deed of transfer of the property merely leaves a part of the consideration in the hands of the vendee for discharging a debt of the vendor, the vendee held the money merely as an agent of the vendor and not as a trustee. There may be special cases where a trust might come into existence but that would depend on the exact terms of the deed of transfer. It appears that the language of the deed which came up for consideration in — 'AIR 1932 Oudh 82 (A)', was such that there was not merely a liability of the vendee or the assignee to discharge the debt of the vendor or the assignor but a legal obligation was created which was of the nature of a trust. In the present case, however, the language of the deed of sale executed by Fateh Mohammad on the 18th September, 1933 can in no way be construed as imposing any obligation on the vendee to say nothing of such an obligation as might bring into existence a trust. On this ground alone, therefore, the appeal fails.

(6) There is also another point that may be briefly mentioned. The major part of the claim of the appellant is based on the promissory note of 1929 executed by Fateh Mohammad in favour of Mukta Prasad. On that promissory note Mukta Prasad had obtained a decree on the 6th May, 1932. Any subsequent transaction entered into by Fateh Mohammad would give no fresh cause of action to Mukta Prasad to file another suit against the transferee and obtain a decree on the basis of the promissory note. Even if a trust had come into existence when Fateh Mohammad transferred his property on the 18th September, 1933, it might have been possible for Mukta Prasad to enforce his rights under the decree of the 6th May, 1932 against the trustee but in no case could Mukta Prasad bring a fresh suit against the trustee. No rights superior to the rights available against Fateh Mohammad could be enforced against a trustee in a trust created by him. In fact, the liability of the respondents was sought to be fastened through Fateh Mohammad and consequently a fresh suit in respect of the amount due under the promissory note could not be entertained. Even on this ground the major part of the claim of the appellant would fail. The appeal is consequently dismissed with costs.

B/H.G.P. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 351 (Vol. 41, C.N. 156)

(LUCKNOW BENCH)

AGARWALA AND CHATURVEDI JJ.

Chandra Datt, Applicant v. Vidya Prasad and others, Opposite Party.

Criminal Misc. No. 47 of 1953, D/- 2-9-1953.

(a) U. P. Jail Manual — Rr. 689 and 711 — Scope.

Rules 689 and 711 have nothing to do with petitions addressed to a Court of law. (Para 4)

(b) Contempt of Courts Act (1952), S. 3 — Contempt of Court — (Constitution of India, Art. 215).

Suppression of an application intended for a Court of law by a person obstructs and interferes with the due course of justice and the lawful process of the Courts and is, therefore, a contempt of Court. It is of the highest importance that applications or appeals intended for the High Court and submitted by prisoners should be forwarded to the High Court without undue delay so that the Court may do justice in the case. The mere fact that the application or appeal contains irrelevant or offensive matter is no ground for any officer who is charged with the duty of forwarding the application to the High Court to withhold the application or appeal. It is for the Court to determine whether the application contains such matter and what steps to take with regard to it. The officer concerned has no right to decide for himself whether the application is irrelevant or couched in offensive language and then to withhold it.

(Held in the present case that the High Court was prepared to take a lenient view of the matter because possibly the opposite party bona fide misjudged his duty upon a wrong interpretation of the rules of the Jail Manual, and did not propose to take any steps against him). (1876) 2 QB 36, Rel. on. (Paras 4, 5)

Applicant in Person; P. N. Chaudhri, Govt. Advocate (for Nos. 1 to 4) and P. N. Chaudhari (for No. 5), for Opposite Party.

CASE REFERRED: Para

(A) (1876) 2 QB 36: 69 LJQB 502 4

AGARWALA J.:

Criminal Miscellaneous Application No. 47 of 1953 is an application by one Chandra Dat Senani who calls himself a Congress worker of Pratapgarh, for action being taken for contempt of court against five persons namely, Vidya Prasad Shukla, the then District Magistrate of Pratapgarh, S. P. Agarwal, Sub-Divisional Magistrate Sadar Pratapgarh, Gur Prasad, Sub-Divisional Magistrate of Kunda, Pratapgarh, Kailash Narain Malviya, Inspector of Schools, Pratapgarh and Rameshwar Prasad Gupta, Jailor District Jail, Pratapgarh.

(2) The application contains much irrelevant matter. The relevant facts are very few. There were several cases pending against the applicant in the criminal courts at Pratapgarh and there were also some cases which were instituted by him against the local officials. The applicant was in jail. He applied through the Superintendent of the Jail for transfer of the cases in which he was concerned. The application for transfer is dated the 17th April, 1952, and is addressed to the Chief Justice, Allahabad High Court. In this application certain allegations were made against Sri Vidya Prasad Shukla, District Magistrate, Pratapgarh and the Sub-Divisional Magistrate, Pratapgarh, imputing to them ulterior motives in sentencing him and putting him in prison. On the various grounds mentioned in the application, the applicant prayed that the complaint by and against him be transferred to any nearby district preferably Lucknow for trial.

He also prayed that he be released on his own responsibility till his cases were decided by the High Court or the Supreme Court. This application was first handed over to the jailor, Sri Rameshwar Prasad Gupta who in turn handed it over to the Superintendent of the jail who has not been impleaded in the present proceedings. The Superintendent of the jail forwarded it to the opposite party no. 1, Sri Vidya Prasad Shukla, who received this application on the 29th April, 1953. He wrote back to the Superintendent of the jail inquiring the rule of the Jail Manual under which the application had been forwarded to him for submission to the Hon'ble Chief Justice and pointed out that under Chapter V of the Jail Manual, only petitions of appeal and petitions for mercy can be presented and that the application in question was neither a petition of appeal nor a petition for mercy.

He also mentioned that rule 689 permitted a prisoner to send a communication to Government or to any other Government Officer in his official capacity with a view to the redress of his grievance but that such communication should be to the point and should not contain any offensive or irrelevant matter, e.g., a discourse on politics. He further pointed out that the application to the Hon. Chief Justice offended against this rule and under rule 711 amounted to abuse of privilege. He added :

"Besides it is highly defamatory and refers to the Court of the Kunda in very undesirable language."

In the end he said :

"Unless you are able to throw some light on the rule under which the petition is forwarded, I regret my inability to submit to the Hon. Chief Justice at Allahabad a petition containing abusive language and containing a reference to a Court in highly derogatory language. I will await your reply before taking any further action. I can, however send a similar application if it is addressed in proper language fit enough for submission before the Chief Justice."

To this the Superintendent of the jail replied on the 16th May, 1952 as follows :

"I have the honour to state that the application of Sri C. D. Senani was thoroughly gone through by me and I also held the same opinion that such an application should not be forwarded to the Hon. Chief Justice at Allahabad. So this was sent to you for favour of perusal and orders. I never meant that it should be forwarded but was to be brought to your notice. The application which is returned herewith in original may, therefore, be withheld."

The application was then withheld by opposite party no. 1 and remained in his custody for over seven months when the applicant moved this Court for proceedings to be taken against the opposite parties on the 29th January, 1953. The applicant has not only prayed for proceedings for contempt being taken against the opposite parties but has also complained against them in respect of various other matters with which we are not concerned. It may be stated at the outset that

so far as opposite parties nos. 2 to 4 are concerned, they had nothing whatsoever to do with the application for transfer which was withheld by opposite party no. 1. Opposite party no. 5, the jailor performed his duty when he handed over the applications to the Superintendent of the jail. Opposite parties 2 to 5, therefore, have been unnecessarily impleaded in this application.

(3) The case of the opposite party no. 1 is that the transfer application contained offensive and irrelevant matters, that inter alia it made mention of the Court of the Sub-Divisional Magistrate, Kunda in a very disrespectful manner, that it was, therefore, against rule 689 of the Jail Manual and that under rule 711 of the said Manual it amounted to an abuse of privilege but that he (the opposite party no. 1) was prepared to transmit an application provided the petitioner sent it addressed in proper language fit enough for submission to the Hon'ble Chief Justice.

(4) We are of opinion that the view taken by the opposite party no. 1 was erroneous. Rules 689 and 711 have nothing to do with petitions addressed to a Court of Law. Rule 689 runs as follows :

"Prisoners may be permitted to address communications to Government, the Inspector-General of Prisons or any other Government Officer in his official capacity with a view to redress of a grievance. But such communication should be to the point and should not contain any offensive or irrelevant matter, e.g., a discourse on politics."

This rule deals with communications to the Government, the Inspector-General of Prisons or any other Government Officer.

An application for transfer addressed to the Chief Justice, or in other words, to the High Court, is not a communication to the Government which, in the rule, means the executive Government and does not include the Judicial organ of the State. Nor is it a communication to a Government officer in his official capacity. The Chief Justice is not a Government Officer within the meaning of the rule. The rule contemplates communications to the executive officials. Rule 711 deals with the privilege of a prisoner relating to interviews or letters or communications with persons outside the jail. This rule also has no reference to applications made to courts of law. As Lord Russel said in — 'R. v. Gray', (1876) 2 QB 36 (A):

"Any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Court is contempt of court."

Suppression of an application intended for a court of law by a person obstructs and interferes with the due course of justice and the lawful process of the courts and is, therefore, a contempt of court. It is of the highest importance that applications or appeals intended for the High Court and submitted by prisoners should be forwarded to the High Court without undue delay so that the Court may do justice in the case. The mere fact that the application or appeal contains irrelevant or offensive matter is no ground for any officer who is charged with the duty of forwarding the application to the High Court to withhold the application or appeal. It is for the Court to determine whether the application contains such matter and what steps to take with regard to it. The officer concerned has no right to decide for himself whether the application is irrelevant or couched in offensive language and then to withhold it.

(5) It was suggested that it was the duty of the Superintendent of the Jail in the present case to forward the application of the applicant to the High Court and that it formed no part of the duty of the opposite party no. 1 to do so. It is quite true that the Superintendent of the Jail could and should himself have forwarded the application to the High Court without sending it to the opposite party no. 1. There is nothing in the jail manual which makes it obligatory on the Superintendent of the jail to forward petitions addressed to the High Court to the District Magistrate but the Superintendent having in fact forwarded it to the opposite party, the two courses open to him were either to send the application back to the Superintendent or the Jail and direct him to forward it to the High Court or to forward the application to the High Court himself. In the present case the opposite party no. 1 was prepared to forward the application to the High Court only if it did not contain offensive or irrelevant matter.

It is clear, therefore, that he did not forward the application because he thought that he could withhold it on account of the language in which the application was couched and not because he thought that he had no power to submit the application to the High Court. In no event should the opposite party have retained the application with him after the Superintendent of the Jail had sent it back to him. He has undoubtedly committed contempt of Court. Ordinarily such an action on the part of opposite party no. 1 would have called for severe condemnation and exposed him to punishment but in the present case we are prepared to take a lenient view of the matter because we think that possibly the opposite party no. 1 bona fide misjudged his duty upon a wrong interpretation of the rules of the Jail Manual. We, therefore, do not propose to take any steps against him. The notice issued to the opposite parties is, therefore, discharged. In the circumstances of the case we make no order as to costs.

(6) The application for transfer of 469 of 1953 having been filed in the present case, we have taken cognizance of it as a petition for transfer. We asked the applicant whether he intended to press his application for transfer and were informed that the cases in respect of which transfer has been sought have now all been decided and the application has become infructuous. The application for transfer did indeed contain imputations of dishonesty against the District Magistrate of Pratapgarh and the Sub-Divisional Magistrate of Kunda Pratapgarh. These allegations amounted to a contempt of those Courts.

When asked why proceedings for contempt of Court should not be taken against him in respect of the allegations contained in the application he expressed his regret and stated that he was wholly ignorant that the allegations believed by him to be true amounted to contempt of court and that he did not know that he should not have made them. He promised that he would not make such allegations against a presiding officer of a court of law in future. In view of this assurance we do not think any proceedings for contempt should be taken against him. The application for transfer is, therefore, rejected.

(7) Leave to appeal to the Supreme Court is granted.

B/D.H.Z. Order accordingly.

A.I.R. 1954 ALL. 353 (Vol. 41, C.N. 157)

CHATURVEDI J.

Anandi Prasad, Applicant v. Pritam Singh, Opposite Party.

Civil Revn. Nos. 626 to 629 of 1952, D/- 27-11-53, against order of Munsiff, Saharanpur, D/-29-3-1952.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 (a) — Joinder of causes of action — (Civil P. C. (1908), O. 2, R. 3).

If the rent agreed between the parties and the reasonable rent fixed by the Rent Controller in proceedings under S. 3(a) of the Act are both excessive, the tenant can, in a subsequent civil suit to reduce it, assert that they are both excessive. There is nothing in the provisions of Rent Control and Eviction Act (3 of 1947) to prohibit such joinder of causes of action. (Para 3)

Anno: Civil P. C., O. 2, R. 3 N. 2.

1953 Mulla: O. 2, R. 3 P. 540 N. "Scope of the rule".

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (4) — Scope.

If there is an agreed rent between the parties then in a suit under S. 5 (4) of the U. P. Act 3 of 1947 it can only be varied if it is proved that the transaction at which the figure was agreed upon was unfair. But in the case of reasonable rent it need not be shown that the transaction was unfair, for the obvious reason that in a case of that kind there is no transaction between the parties fixing the rent, so no question of the transaction being fair or unfair arises. Therefore, in a case where there is an agreed rent, and the transaction is not proved to be unfair, there is no point in deciding the question whether the reasonable rent fixed by the Rent Controller was excessive or not, and it is obviously the agreed rent which has to be paid. (Paras 2, 7)

(c) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 5 (1) and (4) and 3(a) — Scope.

Under Section 5(1) the rent payable by the tenant is the agreed rent. If it is varied by the Court in a suit filed under S. 5(4), then it is superseded by the decree of Court, and the rent fixed by the Court would be the rent payable by the tenant. But the District Magistrate has been given no powers to vary the agreed rent. He can determine the annual reasonable rent under S. 3(a) in cases to which the section applies; but that does not have the effect of superseding the agreed rent. (Para 7)

(d) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (4) — Transaction not unfair.

The mere fact that there was dearth of accommodation and the tenants were in need of it cannot be sufficient for holding that the transaction by which the rent was fixed was unfair, especially where the tenants agreed to the rent after obtaining the allotment orders in their favour and could be in no fear of being ejected from the shops if they did not agree to pay the agreed rent. (Para 8)

Ambika Prasad, for Applicant; B. R. Avasthi, for Opposite Party.

ORDER: These four revisions arise out of four suits which were brought by the tenants, the landlord in all the cases being the same person, namely, Shri Anandi Prasad. The landlord built certain shops which were ready in October 1949. These shops were allotted to different persons by the Rent Control and Eviction Officer. After the order of allotment, it appears that two of the tenants, namely, Misri Lal and Topan Das, executed rent agreements in favour of Anandi Prasad agreeing to pay a rent of Rs. 40/- per month each, for the two shops that had been allotted to them. No such rent agreements appear in the cases of Pritam Singh and Brij Bhushan Lal, but statements were made by their counsel in the court below saying that as an alternative plea, they submitted that the agreed rent of the shops was Rs. 40/- per month and the same was unfair. In spite of the execution of the sarkhats in two of the cases, applications were made to the Rent Control and Eviction Officer for fixation of rent under section 3(a) of the Rent Control and Eviction Act in all the cases. The officer concerned considered some of the circumstances of the case and was of the opinion that annual reasonable rent of these shops was a sum of Rs. 480/-, that is, Rs. 40/- per month.

Revisions were filed against this order of the Rent Control and Eviction Officer and the learned District Magistrate modified the order, as he was of the opinion that the rent should be fixed for the shops at the sum of Rs. 30/- per month. The order of the Rent Control and Eviction Officer was passed on the 28th of March 1950 and the order of the learned District Magistrate reducing the rent was passed on the 21st of July 1951. It was after this that the present suits were brought by the tenants on the ground that the annual reasonable rent fixed by the District Magistrate was excessive and should be reduced. In the plaints, as they were originally filed the case of the plaintiffs was that the annual reasonable rent being excessive it should be reduced; and it was nowhere stated that there was any agreed rent between the parties. But during the progress of the suits in two of the cases, as already mentioned, rent agreements were filed, and in the two other suits the counsel for the plaintiffs made statements that the agreed rent may be taken to be Rs. 40/- as an alternative case.

The suits were contested by the defendant landlord and his main contention was that the order of the learned District Magistrate was ultra vires as he had no right to interfere with the order of the Rent Control and Eviction Officer. It was also stated that the agreed rent was not unfair nor were the agreed and reasonable rents excessive. The learned Munsif after going through the facts of the case came to the conclusion that it is the order of the District Magistrate that should prevail because it was not proved in the case that he had delegated his power of fixing the rent under section 3(a) to the Rent Control and Eviction Officer. The reasonable annual rent, therefore, according to the learned Munsif, was a sum of Rs. 30/- per month. He then considered whether the reasonable annual rent was excessive and came to the conclusion that even the sum of Rs. 30/- was excessive. On the question as to whether the transaction by which the rent was fixed was unfair, the learned Munsif held that there was a great dearth of accommodation in the district and the tenants are in urgent need of the shops and therefore the transaction must be taken to be unfair. He then considered what the proper rent for these shops should be and came to the conclusion that the sum of Rs. 20/- per month for each of the shops was the proper rent; he also specified the dates from which this rent was payable.

(2) The landlord has now come up in revision against this decision of the learned Munsif.

(3) The first point argued by the learned counsel for the applicant landlord was that the tenants could have brought the suits either on the ground that the annual reasonable rent was excessive or on the ground that the agreed rent was excessive, and that it was not open to them to have included both these assertions in one case. Emphasis is laid on the use of the word 'or' in sub-section (4) of Section 5 of the Rent Control and Eviction Act. I am unable to accept this contention. If the position is that the agreed rent and the reasonable rent are both excessive, there is no reason for prohibiting the tenant from asserting in one suit that they are both excessive. The two causes of action can certainly be joined together in the same suit and there is nothing in the provisions of the Rent Control and Eviction Act to prohibit such a joinder of causes of action.

(4) The next argument of the learned counsel was that the order of the learned District Magistrate reducing the rent in revision from Rs. 40/- to Rs. 30/- per mensem was without jurisdiction. I do not consider it necessary to decide this point in these revisions as they can be disposed of on the other two grounds that I shall presently consider.

(5) The third point that was argued was that there was an agreed rent in each of these cases between the landlord and the tenants and the finding of the learned Munsif that that rent was unfair is based simply on the fact that there was a great dearth of accommodation and the tenants were in need of the shops and therefore the transaction was unfair. It is urged that this circumstance by itself cannot be taken to be a circumstance proving that the transaction by which the rent was fixed was unfair.

(6) The first question that arises in connection with this point is whether there was an agreed rent between the landlord and the different tenants in these cases. I have already stated that two of the tenants who are opposite parties in civil revision Nos. 627 and 628 have actually executed rent agreements in favour of the landlord. One of them is dated the 31st of October, 1949, and the other is dated the 6th of November, 1949. So, there was clearly an agreement of rent in these two cases fixing it at a sum of Rs. 40/- per month for each of the two shops. In the cases out of which civil revisions Nos. 626 and 629 arise it was stated by the learned counsel for the tenants that as an alternative case it may be taken to be that there was an agreed rent at the sum of Rs. 40/- per mensem. The statement certainly was made in a guarded manner but during the trial of the suit it appears from the judgment of the learned Munsif that in each case it was admitted that the agreed rent was Rs. 40/- per mensem. The shops are all similar containing similar accommodation, and before the learned Munsif it was conceded that there was an agreed rent in all these cases. The defendant-landlord came into witness-box and swore to the fact that there was an agreed rent at the rate of Rs. 40/- per mensem in all these cases.

In view of the admission made before the learned Munsif, and in view of the fact that it was never contended before him that there was any case in which rent was not agreed upon, I have no hesitation in accepting the statement of the landlord that in all these cases the rent was agreed at the sum of Rs. 40/- per mensem. The position, therefore, is that there was an agreed rent fixed at Rs. 40/- per mensem and there was also a reasonable rent fixed by the Rent Control and Eviction Officer at Rs. 40/- per mensem though the District Magistrate held that Rs. 30/- per mensem was the proper rent.

(7) The argument of the learned counsel for the opposite parties is that the tenants came to court on the allegation that the reasonable rent was excessive and therefore the question whether there was an agreed rent or not and whether that agreed rent was the result of an unfair transaction or not did not arise in these cases at all. His argument is that even if there is an agreed rent but the tenant does not mention it in the plaint and just comes to court and says that the reasonable rent is excessive, the court can decide whether the reasonable rent is excessive or not; and if it holds that the reasonable rent is excessive then the agreed rent will automatically be reduced to the figure which is found to be the proper rent of the accommodation. I am afraid I do not consider it possible to accept this contention. If there is an agreed rent, then in a suit under section 5(4) it can only be varied if it is proved that the transaction at which the figure was agreed upon was unfair. It is true that in the case of reasonable rent it need not be shown that the transaction was unfair, for the obvious reason that in a case of that kind there is no transaction between the parties fixing the rent. So no question of the transaction being fair or unfair arises. If there were no agreed rent in these cases then the suits of the tenants could have been decreed according to the findings arrived at by the learned Munsif. But I have found it to be proved in all these cases that there was an agreed rent, and unless this agreed rent is reduced by a court under section 5(4), it is obviously this rent which will have to be paid, and a decision on the point of the reasonable rent being excessive or not would be infructuous. In a case where there is an agreed rent, and the transaction is not proved to be unfair, there is no point in deciding the question whether the reasonable rent is excessive or not. The learned counsel next contended that in the case of an accommodation constructed after the 30th of June 1946 the District Magistrate can fix the rent, and he says that the amount fixed by the District Magistrate will be the amount that will be payable by the tenant in spite of there being an agreed rent different from the rent fixed by the District Magistrate. This contention also does not appear to be sound. Section 5(1) says that the rent payable by the tenant is the rent which has been agreed upon between the landlord and the tenant. If it is varied by the court in a suit filed under section 5(4), then it is superseded by the decree of court, and the rent fixed by the court would be the rent payable by the tenant. But the District Magistrate has been given no powers to vary the agreed rent. He can determine the annual reasonable rent under section 3(a) in cases to which the section applies; but that does not have the effect of superseding the agreed rent. In the cases before me, however, the rent had been agreed upon, and therefore the only question is whether that agreed rent could have been reduced by the learned Munsif on the findings that he has arrived at. The question whether the rent fixed by the District Magistrate should be taken to be the annual reasonable rent or that fixed by the Rent Control Officer, does not arise for determination in these cases, as they are both unenforceable.

(8) This leads me to the question whether the agreed rent could be reduced on the ground that

the transaction under which it was fixed was an unfair transaction. On this point the learned Munsif has stated that the district of Saharanpur, from where these cases come, borders the State of Punjab and there was a great influx of displaced persons in this district. The landlord had also admitted that Topan Das and Misri Lal tenants were in great need of accommodation. On this ground alone the learned Munsif has held that the transaction fixing the rent was unfair.

On the facts found by the learned Munsif I find it difficult to agree with him in his conclusion that the transactions were proved to be unfair in these cases. It is well known that there is a dearth of accommodation in every town in this State and the bigger the town the greater the dearth of accommodation. If this fact alone were sufficient for proving that the transaction was unfair, then the rent being unfair could be presumed in every case where the agreed rent was higher than the proper or annual reasonable rent; and the imposition of the condition of the transaction being proved to be unfair would be superfluous. It would have been quite enough to say that if the agreed rent was excessive or above the annual reasonable rent, it should be reduced because there would be a presumption that the transaction was unfair in every case on account of the general prevailing conditions in the State. I, therefore, do not think that the mere fact that there was dearth of accommodation and the tenants were in need of it can be sufficient for holding that the transaction by which the rent was fixed was unfair. But I need not consider this question in any detail as in the cases before me it is not possible to say that the tenants accepted the rent for any such reason. They agreed to the rent after obtaining the allotment orders in their favour and could be in no fear of being ejected from the shops if they did not agree to pay Rs. 40/- per mensem each. The allotment orders being there, the landlord could not exercise any undue influence over them. They could easily have the rent determined under section 3(a), if they thought that the landlord was demanding a high rent. The learned Munsif therefore had no jurisdiction to reduce the agreed rents.

(9) For the reasons given above, I allow these revisions, set aside the decrees of the court below and dismiss the suit brought by the tenants. But in view of the circumstances of these cases I direct that the parties shall bear their own costs in both the courts.

B/H.G.P. Revisions allowed.

A.I.R. 1954 ALL. 355 (Vol. 41, C.N. 158)

(LUCKNOW BENCH)

KIDWAI J.

Lallu, Plaintiff-Appellant v. Bachchu Singh and others, Defendants-Respondents.

F. A. F. O. No. 37 of 1950, D/- 23-9-1953, against decree of Civil J., Unnao, D/- 2-4-1948.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 180, 44, 198 and 242 — Suit by muafidar for possession — (Civil P. C. (1908), S. 9).

Under the U. P. Tenancy Act it is only leases by tenants of Sir and by sub-tenants that are forbidden. There is nothing to prevent any other class of persons in possession of land from granting sub-leases. Thus a muafidar can grant a sub-lease. Further a muafidar, as a person in possession of a plot of land, is entitled to admit another person to occupy that plot. Therefore S. 180, which does not deal only with cases of sub-leases but also refers to a person entitled to admit another to occupy such plot, applies to a suit brought by a muafidar for possession against the defendants on the ground that they were trespassers who had taken possession of the land during his absence. The amended section which affects a question of procedure, namely, the question as to which court was to try the suit, would have immediate effect and where the suit of the muafidar was pending in a civil court on the date of the amending Act the civil Court would cease to have jurisdiction immediately and the suit has to be sent to the revenue court. 6 Oudh Cas 110; AIR 1919 Oudh 266; AIR 1925 Oudh 211, Distinguished.

(Paras 4, 5, 6)

The section being in general terms and not confined to hereditary tenants, its application to the suit will not be excluded by S. 198: AIR 1946 All 379 (FB), Distinguished.

(Para 7)

Anno: C. P. C., S. 9 N. 51.

R. B. Lal and R. B. Chaudhari, for Appellant; R. N. Shukla, for Respondent (No. 2).

CASES REFERRED: Paras

(A) ('03) 6 Oudh Cas 110 3

(B) (V6) AIR 1919 Oudh 266: 53 Ind Cas 459 3

(C) (V12) AIR 1925 Oudh 211: 1 Oudh WN 583 3

(D) (V33) AIR 1946 All 379: ILR (1946) All 692 (FB) 8

JUDGMENT: This appeal arises out of a suit instituted in the civil Court on the 23rd of July 1946 for possession over certain cultivatory plots. The plaintiff claimed that he was the muafidar and that the defendants were trespassers who had taken possession of the land during his absence from the Province and that consequently he was entitled to obtain possession. One of the issues raised in the trial Court was the issue as to the jurisdiction of the Civil Court to decide the suit. Many other pleas were also taken and decisions were given by the trial Court upon them but the only point, apart from the question of court-fee, that has been decided by the Civil Judge of Unnao in appeal, is the question of jurisdiction which is the only point that has been argued before me.

(2) It is necessary to note that while the suit was still pending in the trial Court, section 180 of the U. P. Tenancy Act was amended and the amended section was given retrospective effect in certain circumstances. We are not concerned with the retrospective effect that was given to section 180, U. P. Tenancy Act because, as I have already stated, the suit was still pending on the date on which the amending Act was passed and since it affected the question of procedure, namely the question as to which court was to try the suit, it had immediate effect, and as soon as the Act provided for the decision of such questions by the revenue court, the civil Court ceased to have jurisdiction and it was necessary that the suit be sent to the revenue court for disposal.

(3) In order to meet this position, it was contended by the learned Advocate for the appellant that even under the amending Act section 180 would not apply since the plaintiff's claim as a muafidar was not covered by section 180. It is pointed out that section 180 provides only for a suit against a person taking or retaining possession of a plot of land without the consent of the person entitled to admit him to occupy such plot.

It is contended that a muafidar is not allowed to sub-let the land and that, therefore, he was not a person authorised to admit another person to the occupation of such land. The definition of a tenant in section 3, sub-section 23 was relied upon to indicate that a muafidar is not a tenant and is, therefore, not entitled to the rights of a tenant. It was further contended that in view of the cases reported in — 'Gaya Prasad v. Tasadduk Husain', 6 Oudh Cas 110 (A); — 'Suraj Bakhsh Singh v. Baldeo Bihari', AIR 1919 Oudh 266 (B) and — 'Bala Din v. Ajudhia', AIR 1925 Oudh 211 (C) a muafidar has no right to transfer or sub-let the land in his possession.

(4) It is undoubtedly true that under the Oudh Rent Act the rule was that a muafidar could not even sub-let. The present case, however, is not covered by the Oudh Rent Act but by the U. P. Tenancy Act and there is nothing in the U. P. Tenancy Act forbidding a muafidar from sub-letting. Indeed section 3, sub-section (22) of the Act makes it clear that a sub-tenant includes a person who holds from a rent-free grantee. In this connection reference may also be made to sections 39 and 42 of the Act. Section 44 only provides as follows—

"(1) Every transfer, other than a sub-lease, made by a tenant in contravention of the provisions of this Act, and every sub-lease made by a tenant of sir, or by a sub-tenant in contravention of the provisions of sub-section (2) of section 39, shall be void.

(2) Every sub-lease made by a tenant in contravention of the provisions of this Act, other than a sub-lease which is void under sub-section (1) shall be voidable at the option of the landholder."

and sub-clause (2) of section 39 is as follows :

"(2) No tenant of sir and no sub-tenant shall sub-let the whole or any part of his holding."

(5) Thus it is only leases by tenants of sir and by sub-tenants that are forbidden. There is nothing to prevent any other class of persons in possession of land from granting sub-leases thereof. Thus a muafidar can grant a sub-lease.

(6) Moreover section 180 does not deal with a case of sub-leases only, but it refers to a person entitled to admit another to occupy such plot. Any person in possession of a plot of land is entitled to admit another person to occupy that plot and the object of section 180 was that so far as possible all matters relating to tenancy land should be disposed of by the revenue courts. Efforts should be made so to construe the enactment as to give effect to its real objective and in the present case the words used are, in view of the provisions of the enactment which I have already quoted, easily capable of being given the meaning which would bar such a suit as the present one being brought in any court other than a revenue court.

(7) It was also contended on behalf of the appellant that section 198 makes certain provisions of the Tenancy Act applicable to muafidars but that section 180 is not one of these provisions. The argument proceeded that the inclusion of certain sections meant the exclusion of others. This argument is a perfectly correct argument but it fails to notice that the word "tenant" is not used anywhere in section 180 of the U. P. Tenancy Act and that the provisions, to which effect is given by section 198, were provisions relating to hereditary tenants. Since by the definition of the word "tenant" contained in section 3, sub-section (23) a muafidar would not be deemed to be a tenant, he would not be entitled to the benefits of the sections referred to in section 198, unless such provision was made to that effect. It was for this reason that section 198 was enacted. It cannot exclude from application sections which are couched in general language like section 180 and are not confined to suits by hereditary tenants.

(8) It was also contended that in the present case there was no assertion in the plaint that any dispute as to tenancy had arisen before the suit was filed. The case of — D. N. Rege v. Muhammad Haider', AIR 1946 All 379 (FB) (D) was relied upon. That case related to an entirely different set of circumstances and has no application to the present case. That was a case based upon an earlier Full Bench decision in which it was laid down before the amendment of the U. P. Tenancy Act in 1947 that the forum depended upon the allegations contained in the plaint. If those allegations indicated that the suit was against a person who was alleged to be a tenant or who had claimed tenancy rights before the institution of the suit, the revenue court would be the proper court to decide the point. We are not concerned with the old section 180 but with the new section 180 and this has made matters quite clear. That decision, therefore, cannot help the appellant.

(9) Since the present suit is covered by section 180 of the U. P. Tenancy Act and it had not been decided by the trial Court till long after the enforcement of the amendment made to section 180 it was the revenue court that had jurisdiction to decide the case. The order of the lower appellate Court, therefore, that the plaint should be returned for presentation to the proper court is the proper order and cannot be set aside.

(10) This appeal, therefore, fails and is dismissed with costs.

B/M.K.S. Appeal dismissed.

A.I.R. 1954 ALL. 356 (Vol. 41, C.N. 159)

HARISH CHANDRA J.

Munshi and others, Applicants v. State.

Criminal Ref. No. 206 of 1952, D/- 12-11-1953, against order of S. J., D/- 5-5-1952.

(a) Criminal P. C. (1898), Ss. 263, 264 and 350 — Applicability of S. 350 to summary trials.

No doubt, a Magistrate may under the law, if not objected to by the accused, proceed with a case which has been begun by another Magistrate and take into consideration the notes of evidence recorded by that Magistrate. But in a summary trial no record of evidence is maintained. But the Magistrate may, for his own convenience jot down some notes of evidence. Obviously, such notes cannot be suitably used by another Magistrate who may subsequently be entrusted with the trial of the case, and conviction by the Magistrate based on the notes of the evidence of witnesses who were examined before his predecessor is not in order. (Para 2)

Anno: Cr. P. C., S. 263 N. 3.

1949 Mitra: S. 263 P. 865 N. 863 "Record", 864 "Evidence" and "Notes of evidence" (Conflict indicated in N. "Notes of evidence" not well brought out — Conflict in Allahabad not indicated — The fact that 49 All 131 cannot be considered as good law in view of later Bench decision in 49 All 261, not indicated in Mitra).

Cr. P. C., S. 264 N. 2.

1949 Mitra: S. 264, P. 870 N. "Sub-section (2) (4 Pts. extra in N. 2 to S. 264 in AIR Com.).

Cr. P. C., S. 350 N. 2a.

1949 Mitra: S. 350 P. 1084 N. 1012 "Application .... section", last para on P. 1086 (Madras view in AIR 1932 Mad 505 (507): 33 Cri LJ 653, not indicated in Mitra).

(b) Public Gambling Act (1867) as amended by U. P. Act (1 of 1917), S. 13 — Public place, meaning of.

No doubt, a public street, place or thoroughfare is not necessarily a street, place or thoroughfare where the public has a right to go or which the public has a right to use. If a street, place or thoroughfare is in fact used by the public, it will be a public street, place or thoroughfare within the meaning of S. 13. (Para 4)

A public place must be a place which is either open to the public or is used by the public and the publicity of its situation is not a necessary element of the offence any more than public ownership. (Para 4)

An 'arhar' field on the road side in which crop is standing cannot be said to be a public place within the meaning of S. 13. (Para 7)

G. P. Bhargava and N. D. Ojha, for Applicants; H. N. Seth for Govt. Advocate, for the State.

CASES REFERRED : Paras

(A) (V25) AIR 1938 All 209: ILR (1938) All 348: 39 Cri LJ 441 4
(B) ('95) 17 All 166: 1895 All WN 42 4
(C) (V17) AIR 1930 Oudh 394: 31 Cri LJ 1118 4
(D) (V9) AIR 1922 Oudh 275: 23 Cri LJ 581 4
(E) (V21) AIR 1934 All 17: 35 Cri LJ 564 5
(F) ('04) 1 All LJ 129 6

ORDER : This is a reference by the learned Sessions Judge of Mathura recommending that the convictions and sentences passed upon the accused persons under section 13 of the U. P. Public Gambling Act be set aside.

(2) It appears that the case was started by a Magistrate as a summary trial. He examined some witnesses but before he could finish the case he was replaced by another Magistrate. The accused did not demand a 'de novo' trial and the learned Magistrate proceeded to conclude the trial of the case. He examined the defence witnesses and, after considering the notes of evidence recorded by his predecessor, convicted the applicants and sentenced them to fines. No doubt, a Magistrate may under the law, if not objected to by the accused, proceed with a case which has been begun by another Magistrate and take into consideration the notes of evidence recorded by that Magistrate. But in a summary trial no record of evidence is maintained. But the Magistrate may, for his own convenience jot down some notes of evidence. Obviously such notes cannot be suitably used by another Magistrate who may subsequently be entrusted with the trial of the case, and in my opinion the conviction by the Magistrate based as it was on the notes of the evidence of witnesses who were examined before his predecessor was not in order.

(3) Another point taken by the learned Sessions Judge is that the place was not a public place and that, therefore, the accused could not be convicted under section 13. Section 13 makes it an offence to game in any public street, place or thoroughfare. In this case, as would appear from the charge sheet submitted by the police, the gaming was taking place in an 'arhar' field on the road side, and it also appears to be so from the notes of evidence recorded by the Magistrate.

(4) The question is whether the accused persons can be said to have committed an offence under section 13. It is argued on behalf of the applicants that the field cannot be described as a public street, place or thoroughfare. No doubt, a public street, place or thoroughfare is not necessarily a street, place or thoroughfare where the public has a right to go or which the public has a right to use. If a street, place or thoroughfare is in fact used by the public, it will be a public street, place or thoroughfare within the meaning of that section.

On behalf of the State I have been referred to the case of — 'Emperor v. Ballu Singh', AIR 1938 All 209 (A). In that case the accused persons were found gaming on the edge of a grove a few paces away from the public pathway, and there was nothing to show that the place was enclosed in any way or that the public were usually refused access to or excluded from it. The case was decided by Mr. Justice Allsop and he observes :

"I think it must be common knowledge that ordinarily these groves in Indian villages are open to anybody to sit in. There is normally no interference with anybody who wishes to have access to a grove of this kind. The accused persons themselves were in the grove and there is nothing to show that they had any connection with the owners of it or of the fruit or trees in it. They were themselves in the grove as members of the public."

The learned Judge saw no reason for interference upon that point. I have, however, been referred to a number of cases on behalf of the accused persons in regard to the interpretation put upon the words "public street, place or thoroughfare".

In the case of — 'Queen-Empress v. Sri Lal', 17 All 166 (B), a Division Bench of this Court held that a chabutra which was neither a place to which the public had a right of access nor a place to which the public were ever permitted to have access was not, though it adjoined a public road, a 'public place' within the meaning of section 13. In another case — 'Lala v. Emperor', AIR 1930 Oudh 394 (C), Mr. Justice Pullan observed that a public place was one which was in full view of the public and one to which the public had access. The verandah of a shop adjoining a public road was not a public place. The point has been clearly put, if I may say so with respect, by Mr. Justice Kanhaiya Lal in the case of —'Emperor v. Bashir', AIR 1922 Oudh 275 (D). He says:

"A public place must be a place which is either open to the public or is used by the public and the publicity of its situation is not a necessary element of the offence any more than public ownership."

(5) In another case, — 'Emperor v. Sripal', AIR 1934 All 17 (E), Mr. Justice Iqbal Ahmad says:

"The mere fact, that that spot was visible to the members of the public who used the footpath, cannot make that spot a 'public place'. In order to be a public place or a public thoroughfare within the meaning of S. 13, Gambling Act, the place or the thoroughfare must either be open to the public or actually used by the public, and the mere publicity of the gambling place or its visibility from a public place or a public thoroughfare is not sufficient."

(6) In the case of —'Ahmad Ali v. King Emperor', 1 All LJ 129 (F), Mr. Justice Aikman held that a grove was not a public place although it was found that the enclosure wall was broken in some places and a person could enter the grove through the breach.

(7) It would thus appear that if the 'arhar' field in which the accused persons were found gambling could be regarded as a place used by the public they are guilty under section 13 of the U. P. Public Gambling Act and not otherwise. If the field had been lying fallow and without any crop, it may be possible to say with a certain amount of justification that the field being near a public thoroughfare was in fact used by the public and was accordingly a public place. But we find that the arhar crop was standing in the field & although a member of the public could possibly go into the field without hindrance it cannot be said that it was a place used by the public. If the owner of the field were however present, he would presumably object to an outsider going into the field. In my opinion, section 13 of the U. P. Public Gambling Act cannot apply in the circumstances of the present case.

(8) I, accordingly, allow the reference and setting aside the convictions and the sentences passed upon the applicants, direct that they be acquitted. The fines, if paid, will be refunded.

B/K.S.B. Convictions & sentences set aside.

A.I.R. 1954 ALL. 358 (Vol. 41, C.N. 160)

AGARWALA J.

Jwala and another, Applicants v. State.

Criminal Revn. No. 669 of 1952, D/- 4-11-1953, against judgment of Addl. S. J., Kanpur, D/- 25-4-1952.

(a) Penal Code (1860), Ss. 34, 323, 325—Common intention to cause grievous hurt — Presumption of.

When several persons combine with the object of inflicting blows upon others with lathis and grievous hurt is caused as a result of the blows thus inflicted, it may safely be presumed that the common intention of all was at least to inflict grievous injury. AIR 1949 All 191, Distinguished. (Para 3)

Anno: I.P.C., S. 34 N. 1; S. 325 N. 3.

(b) Penal Code (1860), S. 34 — Common intention — Interval between act and intention.

When one person calls others to beat another, and in answer to that call others arrive on the scene and all of them beat that third person, a common intention of all of them to beat the third person must be presumed. The common intention required under Section 34, I. P. C. presupposes a pre-arranged plan which should precede the commission of the crime, but the pre-arranged plan need not precede the commission of the crime by any great length of time. All that is required is that the pre-arranged plan must have come into existence before the crime is committed.

The pre-arranged plan can come into existence the moment one person calls another for attacking a third, even though the length of time between calling and the commission of the crime was only a few seconds. And when both of them attack that third person, a common intention has come into existence before the attack is made and both of them can be held guilty for the result achieved in pursuance of the beating. AIR 1947 All 408, Distinguished. (Para 4)

Anno: I.P.C., S. 34 N. 1, 8.

B. Mukerji and A. Banerji, for Applicants; T. N. Madan, for the State.

CASES REFERRED: Paras

(A) (V36) AIR 1949 All 191: 50 Cri LJ 250 3

(B) (V34) AIR 1947 All 408: 48 Cri LJ 858 4

ORDER: This is an application in revision against an order dismissing the applicant's appeal which was directed against the order convicting the applicants under Sections 325 and 323, I.P.C. Jawala, applicant, has been sentenced to nine months' rigorous imprisonment under Section 325, I.P.C. and a fine of Rs. 50/- under Section 323, I. P. C. Badri, applicant, has been sentenced to six months' rigorous imprisonment under S. 325, I. P. C. and to a fine of Rs. 50/- under S. 323, I.P.C.

(2) Sita Ram complainant, of village Jaswanpur, and his uncle Bandi were watering their fields. After half the field had been watered they discovered that the water was not flowing normally. They suspected that it must have been stopped by somebody. Both of them proceeded up stream and found that Jawala had directed the water to his field, though it was the turn of Jaswanpur people to irrigate their fields. Sita Ram protested, and when his protest went unheeded, he tried to block the water channel which had been diverted by Jawala. Jawala then called other persons of the village to his aid including Badri, applicant, and then all of them beat Sita Ram, his uncle Bandi and one Minghani causing simple and grievous injuries to them. These facts have been found by both the Courts below, and so the applicants along with other persons were convicted under Sections 325 and 323, I. P. C. It could not be discovered as to which of the accused had inflicted injuries which resulted in grievous hurt.

(3) The only point argued before me by the learned counsel for the applicants is that since it could not be found as to who had inflicted grievous injuries none of them could be convicted under Section 325, I. P. C. and that they could be convicted under Section 323, I. P. C. alone. Reliance is placed upon a judgment of this Court delivered by me in — 'Gorey v. Rex', AIR 1949 All 191 (A). This contention is not sound. In the present case it is clear that Jawala had called Badri, applicant, and other villagers to assault Sita Ram and other complainants. Therefore all of them had a common intention of beating the complainants. When several persons combine with the object of inflicting blows upon others with lathis and grievous hurt is caused as a result of the blows thus inflicted, it may safely be presumed that the common intention of all was at least to inflict grievous injury. A case of this kind is to be distinguished from — 'Gorey's case (A)'. Although the prosecution case there was that two of the accused instigated others to give a beating to the deceased the Court found that there was no satisfactory proof on the record to show that the accused had any preconceived plan of attacking one Hoti. It was held that because of the altercation and because of the action of Hoti in untying the cattle in the face of Ghanshiam and his sons the three persons beat him in a fit of anger all of a sudden. It was further held that S. 34, Penal Code, did not apply to the facts of the case. In those circumstances, it was held that the accused could be convicted only of causing simple hurt and not under Section 325.

(4) The distinction between the two classes of cases is obvious. When one person calls others to beat another, and in answer to that call others arrive on the scene and all of them beat that third person, a common intention of all of them to beat the third person must be presumed. The common intention required under Section 34, I. P. C. presupposes a pre-arranged plan which should precede the commission of the crime, but the pre-arranged plan need not precede the commission of the crime by any great length of time. All that is required is that the pre-arranged plan must have come into existence before the crime is committed. The pre-arranged plan can come into existence the moment one person calls another for attacking a third, may be that the length of time between calling and the commission of the crime was only a few seconds. And when both of them attack that third, a common intention has come into existence before the attack is made and both of them can be held guilty for the result achieved in pursuance of the beating. Learned counsel also referred to — 'Dipa v. Emperor', AIR 1947 All 408 (B). That was also a case in which there was no common intention and it was definitely held that S. 34, I. P. C. did not apply to the facts of the case.

(5) There is no force in this revision. It is dismissed.

B/D.R.R. Revision application dismissed.

A.I.R. 1954 ALL. 359 (Vol. 41, C.N. 161)

(LUCKNOW BENCH)

RANDHIR SINGH J.

Ajodhia Singh and others, Plaintiffs-Appellants v. Ram Phal Singh and others, Defendants-Respondents.

Second Appeal No. 554 of 1947, D/- 23-9-1953, from order of Civil J., Sultanpur, D/- 13-2-1947.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss. 29, 3(23) — Trespasser — (Oudh Rent Act (22 of 1886), S. 127.)

Every person who was at the commencement of the U. P. Tenancy Act of 1939, that is on the 1st January, 1940, a tenant of land became a hereditary tenant. (Para 6)

A person taking or retaining possession of land without being entitled to such possession could become liable for rent under S. 127, Oudh Rent Act, as it stood on 1-1-1940, only after he had been treated as a tenant by the landlord. So long as that option was not exercised by the landlord that person in occupation could not be held liable for payment of rent, and so long as he was not liable under the law for payment of rent, he could not be covered by the definition of the word "tenant", in S. 3(23) of this Act. (Paras 6, 7)

The fact that the person was in possession of the land even before S. 127, Oudh Rent Act was amended in 1921 would not affect the result since even before the amendment the section, by implication, required the landlord to recognize a person as a tenant, before he could be made liable for rent, and the amendment of 1921 only amplified this implication in explicit terms. (Para 8)

R. K. Bose, for Appellants; H. D. Srivastava, for Respondents Nos. 1, 3 and 13.

JUDGMENT: This is a plaintiffs' second appeal against the concurrent findings of the Courts below.

(2) Two of the respondents Nos. 15 and 18 are dead and their legal representatives have not been brought on the record. It is contended on behalf of respondent No. 14 that the appeal has abated as a whole. It is evident from the record that respondents Nos. 15 and 18 did not claim any interest in the land in dispute and the plaintiffs also did not allege that they had any interest in the land in dispute. If their legal representatives have not been brought on the record, this would not adversely affect the merits of the appeal and the appeal has not, therefore, abated against the other parties.

(3) The plaintiffs appellants filed a suit for possession of five plots of land situate in village Bahauddinpur in the district of Sultanpur, against defendants 1 to 18 on the allegations that the plaintiffs had been in possession of the plots in dispute for a very long time and had acquired the rights of maurusi tenants under the law and that the defendants had unlawfully taken possession of the plots in July, 1943. Defendants 1 to 14 were said to be some of the proprietors of the land in dispute while defendants 15 to 18 were said to hold no rights in the land in dispute. The suit was contested by the defendants, but the main contest was by defendant No. 14. Defendants 15 and 16 disowned the plots and stated that they had no concern with the plots nor had they entered into possession of these plots. Defendant No. 16 who is the father of defendants 17 and 18 also alleged in the written statement that his sons defendants 17 and 18 had also no concern with the plots in dispute.

(4) The defence of defendant No. 14 was that the plaintiffs were not tenants of the land in dispute and had no right to maintain the suit. Pleas of jurisdiction and limitation were also raised. As a question of tenancy was raised, an issue about tenancy was referred to the revenue Court. The revenue Court came to the conclusion that the plaintiffs had been in possession for a very long time with some interruptions but they were not tenants of the land in dispute. On receipt of this finding the learned Munsif dismissed the suit. The plaintiffs then went in appeal. The District Judge concurred with the findings of the trial Court and dismissed the appeal. The plaintiffs have now come up in second appeal.

(5) The appeal raises a short but an important point of law. It has been argued on behalf of the appellants that the Revenue Court which decided the issue of the plaintiffs' tenancy failed to take notice of the provisions of section 29 of the U. P. Tenancy Act. Section 29 of the U. P. Tenancy Act is as follows:

"Every person belonging to one or another of the following classes shall be a hereditary tenant, and subject to any contract which is not contrary to the provisions of section 4 shall be entitled to all the rights conferred and be subject to all the liabilities imposed on hereditary tenants by this Act, namely,

(a) every person who is, at the commencement of this Act, a tenant of land otherwise than as a permanent tenure-holder, a fixed rate tenant, a tenant holding on special terms in Oudh, an exproprietary tenant, an occupancy tenant, or except as otherwise provided in this Act as a sub-tenant or a tenant of sir."

(6) Section 29 quoted above, therefore, shows that every person who was at the commencement of the U. P. Tenancy Act of 1939, that is on the 1st January, 1940, a tenant of land became a hereditary tenant. The word "tenant" has been defined

in section 3(23) of the U. P. Tenancy Act of 1939 as follows:

> "'Tenant' means the person by whom rent is, but for a contract express or implied would be, payable....."

It has been argued on behalf of the appellants that the plaintiffs being in possession of the land at the commencement of the U. P. Tenancy Act were liable to pay rent to the landlord under section 127 of the Oudh Rent Act and as such were tenants on that date. In order to appreciate the argument of the learned counsel for the appellants, a reference to section 127 of the Oudh Rent Act is necessary.

Section 127 of the Oudh Rent Act as it stood on the 1st January, 1940, was as follows:

> "A person taking or retaining possession of land without being entitled to such possession may, at the option of the person entitled to eject him as a trespasser, be treated as a tenant, and shall thereupon be liable for rent of that land payable in the previous year, at such rate as the Court may determine to be fair and equitable, but he shall not, in respect of that land, have any of the statutory privileges conferred by this Act."

It is now contended that in view of the provisions of section 127 of the Oudh Rent Act the plaintiffs were liable to pay rent for the land which was in their occupation and as such they were tenants within the meaning of the word as defined in section 3 of the U. P. Tenancy Act. The contention of the respondents is that a person holding land without title could only become a tenant if so treated by the landlord and his liability to pay rent did not arise till the landlord elected to treat him as a tenant.

A plain reading of section 127 of the Oudh Rent Act as it stood on the 1st January, 1940, clearly shows that a person taking or retaining possession of land without being entitled to such possession could only become liable for rent after he had been treated as a tenant by the landlord. So long as the landlord did not elect to treat him as a tenant his status would continue to be that of a trespasser. In order to clothe a person with the status of a tenant, it was necessary that an option to that effect should be exercised by the landlord. So long as that option was not exercised a person in occupation could not be held liable for payment of rent, and so long as he was not liable under the law for payment of rent, he could not be covered by the definition of the word "tenant".

(7) In the present case, the plaintiffs were shown as "bila tasfia lagan" in the last settlement which took place in the year 1343 F. corresponding to 1935-36. A parcha was issued and there is nothing on the record to show that any objection was raised on behalf of the plaintiffs to the description of their status in the settlement papers. The plaintiffs were admittedly not treated as tenants at any time by the landlords and as such they did not become liable for payment of rent under S. 127 of the Oudh Rent Act. Since they were not liable to pay rent under section 127 of the Oudh Rent Act, not having been treated as tenants by the landlord, they could not become tenants within the meaning of the U. P. Tenancy Act and as such could not become hereditary tenants under the provisions of section 29 of the U. P. Tenancy Act.

(8) Another point urged on behalf of the appellants is that S. 127 of the Oudh Rent Act as it stood before it was amended in 1921 made every person in possession of land occupied without the consent of the landlord liable for the rent of the land and as such the plaintiffs who were in possession before 1921 had become tenants under the provisions of section 127 as it stood before 1921. The logical conclusion, if the arguments of the learned counsel for the appellants are accepted, would be that every trespasser automatically became a tenant of the landlord as soon as he entered into possession of the land without the consent of the landlord. This could evidently not be the intention of section 127 of the Oudh Rent Act before it was amended.

Although it was not expressly mentioned in that section before the amendment that it was necessary for the landlord to treat a person as a tenant before making him liable for payment of rent, the implication was there & this implication was amplified in explicit terms by the amendment made in 1921. It would be difficult, therefore, to hold that the plaintiffs had acquired the status of a tenant even before the amendment in section 127 of the Oudh Rent Act was made in 1921.

(9) The plea of jurisdiction which was raised in the trial Court was given up and that plea has not been pressed in appeal.

(10) No question of limitation also arises in this case as the suit was brought well within time and nothing has been shown in support of the plea of limitation which was raised in the trial Court.

(11) In view of the findings on the point of law referred to above, it is not necessary to go into the documentary evidence filed in this suit and referred to by the learned counsel for the appellants, but a brief reference to it may be made. (His Lordship after doing so proceeded to state:) All these documents at best show that the plaintiffs and their predecessors had been in possession of the plots with some interruptions for quite a long time, but the main question was, if they had acquired the status of a tenant, which has been negatived by both the Courts below. In view of the position of law discussed above, the plaintiffs have failed to establish that they were tenants of the land in dispute and as such entitled to eject the proprietors. This finding of the two Courts below appears to me to be correct. As a result the appeal is dismissed. I make no order as to costs.

(12) Leave to appeal is granted under Chapter VIII, rule 5 of the Rules of the Court.

B/M.K.S. Appeal dismissed.

A.I.R. 1954 ALL. 360 (Vol. 41, C.N. 162)

(LUCKNOW BENCH)

KIDWAI J.

Jamuna Prasad, Applicant v. Harihar Baksh Singh, Opposite Party.

Appln. No. 68 of 1948, D/- 11-11-1953, from order of Dist. J. of Barabanki, D/- 1-3-1948.

Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 12 — Applicability and scope.

A suit for redemption is a different thing from a suit for recovery of possession. Section 12 of the Agriculturists' Relief Act does not empower any person to apply for recovery of possession. It only applies to a person entitled to institute a suit for redemption and it specifically provides that such an application can only be made before the suit for redemption is barred by time. AIR 1946 All 400, Disting. (Para 3)

Baldeo Sahai Srivastava and Jagdish Chandra, for Applicant; D. P. Khare, for Opposite Party.

CASE REFERRED: Para
(A) (V33) AIR 1946 All 400: 227 Ind Cas 541 2

ORDER: This is an application in revision against the order of the District Judge of Bara Banki dismissing an appeal in respect of an application under Section 12 of the U. P. Agriculturists' Relief Act.

(2) It appears that there existed four mortgages, the earliest being of the 4th May, 1833 and the latest being of the 4th of July, 1840. No period of redemption was specified in the deeds. An application was filed in 1947 for redemption under Section 12 of the Agriculturists' Relief Act. The trial Court held that the application was barred in view of Article 148 read with Section 28 of the Limitation Act. The lower appellate Court upheld this finding. The applicant has come up in revision. His learned Counsel has relied upon a Bench decision of the erstwhile Allahabad High Court reported in — 'Ram Prasad v. Bishambhar Singh', AIR 1946 All 400 (A). That case related to proceedings in respect of which the U. P. Debt Redemption Act applied. By virtue of the definition of loan contained in that Act it would apply also to proceedings under Section 12 of the Agriculturists' Relief Act. But the question is whether Section 12 of the Agriculturists' Relief Act justifies an application such as the present one.

(3) In that section it is laid down that the application must be made "before a suit for redemption is barred." Even according to the Bench decision upon which reliance is placed a suit for redemption is a different thing to a suit for recovery of possession. According to that decision Section 60 of the Transfer of Property Act provides for a suit for redemption and S. 62 for a suit for recovery of possession. Section 12 of the Agriculturists' Relief Act does not empower any person to apply for recovery of possession in the manner laid down in that section but only applies to a person entitled to institute a suit for redemption and it specifically provides that such an application can only be made before the suit for redemption is barred by time. In the present case, even if the decision to which reference has been made is held to have been correctly decided, the suit for redemption had become barred at the time when the application under Section 12 of the Agriculturists' Relief Act was made. The application can, therefore, not be made under that section. If the applicant has any other remedy for the recovery of possession, it is open to him to take it. There can, therefore, be no doubt that the decision of the Court below under Section 12 of the Agriculturists' Relief Act is correct. This application fails and is dismissed with costs.

B/H.G.P. Application dismissed.

A.I.R. 1954 ALL. 361 (Vol. 41, C.N. 163)

BRIJ MOHAN LALL J.

Deo Nand, Defendant-Applicant v. Achaiber Misir and others, Defendants-Opposite Party.

Civil Revn. No. 1226 of 1953, D/- 4-11-1953, against order of Munsif, Jaunpur, D/- 2-9-1953.

Civil P. C. (1908), O. 9, R. 7 — "Assigns good cause."

If a defendant wants to proceed from the stage at which he appears and does not require the Court to retrace its steps, O. 9, R. 7 will not apply and such a defendant will have an absolute right without obtaining Court's permission to take part in the proceedings from the stage they have reached. But if the stage for filing the written statement is over and the issues have already been framed and the defendant wants that he may be permitted to file a written statement, R. 7 is applicable and the defendant must assign good cause for his absence. AIR 1922 All 110; AIR 1922 All 33; AIR 1924 Cal 806 and AIR 1922 Bom 345 (1), Distinguished. (Para 2)

Anno: Civil P. C., O. 9, R. 7 N. 2 Pt. 1.

1953 Mulla: O. 9, R. 7 (Topic discussed in N. 2 to O. 9, R. 7 in A.I.R. Com. extra).

Sripati Narain Singh, for Applicant.

CASES REFERRED: Paras
(A) (V9) AIR 1922 All 110: 66 Ind Cas 392 3
(B) (V9) AIR 1922 All 33: 64 Ind Cas 958 4
(C) (V11) AIR 1924 Cal 806: 81 Ind Cas 867 5
(D) (V9) AIR 1922 Bom 345(1): 70 Ind Cas 762 6

ORDER: This is an application in revision by a defendant in a pending suit. There are three defendants in all. Summonses were issued to all of them by the trial court but only two of them put in appearance in the suit. The present applicant remained absent. The court ordered the case to proceed 'ex parte' against him. One of the defendants raised a plea of tenancy rights and an issue was remitted to the revenue court for decision. The revenue court has sent its decision. When the case was put up before the learned Munsif for hearing the present applicant put in appearance and made an application for setting aside the order directing the case to proceed 'ex parte' against him. His application was not accompanied by an affidavit and the learned Munsif was not satisfied that there were sufficient grounds for his absence on the previous dates. He rejected that petition. Against this order this revision has been filed. The learned counsel for the applicant contends that the learned Munsif had no jurisdiction to reject his petition.

(2) In this connection reference may be made to O. 9, R. 7, Civil P. C., which runs as follows:

"Where the Court has adjourned the hearing of the suit 'ex parte' and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

It appears from a mere perusal of this rule that the applicant has to show good cause for his previous non-appearance and it is only on such cause being shown that the court may allow him to put in appearance subject to payment of such costs as the Court may consider proper. Learned counsel for the applicant refers to the last portion of this rule viz. that the defendant be heard "as if he had appeared on the day fixed for his appearance" and contends that this rule applies only when a party wants the Court to go back upon some proceedings that have already taken place and requires it to go through the said proceedings over again. He argues that if a defendant wants to proceed from the stage at which he appears and does not require the Court to retrace its steps, this rule will not apply and that such a defendant will have an absolute right without obtaining Court's permission to take part in the proceedings from the stage they have reached.

I agree that this interpretation is correct. But by adopting this interpretation the applicant gains nothing because, in the present case, the stage for filing the written statement was over and the

issues had been framed long ago. What the applicant now wants is that he may be permitted to file a written statement and if new pleas are taken fresh issues may be framed. As stated above the other two defendants are already contesting the suit. Therefore, the only object of filing a fresh written statement could be to raise new pleas. This means that the proceedings that have taken place during the last two years have to be brushed aside and the parties are to be relegated to the position which they occupied two years ago. If he also raises a plea of tenancy the case will have to be sent back again to Revenue Court. Rule 7 is, therefore, applicable and unless the applicant shows good cause for his absence on previous dates he has no right to ask the Court to set aside the order directing the case to proceed 'ex parte' against him.

(3) Learned counsel has cited the case — 'Bhagwat Prasad v. Muhammad Shibli', AIR 1922 All 110 (A). From a perusal of the judgment of that case it appears that the trial court did not seem to have recorded any finding to the effect that the applicant had failed to assign a good cause for his non-appearance. In the circumstances the case is clearly distinguishable from the present one. Moreover this case contains no reference to O. 9, R. 7, Civil P. C. The headnote mentions Order 9 rule 11 although there is no reference even to Order 9, Rule 11 in the body of the judgment.

(4) Another case relied upon by the learned counsel for the applicant is that reported in — 'Mannu v. Tulsi', AIR 1922 All 33 (B). In that case one out of two defendants had put in appearance and the case was ordered to proceed 'ex parte' against the absent defendant. On the date fixed for hearing the absent defendant also put in appearance and all parties agreed to refer the dispute to arbitration. An award was delivered. It was against the plaintiff. The plaintiff challenged the award on the ground, 'inter alia', that the order of reference was bad because the defendant against whom the case had been ordered to proceed 'ex parte' had not got the said order set aside before making the reference. This contention was overruled. Once an order of reference was made at the instance of, 'inter alia', the defendant who had previously absented himself, the Court was deemed to have given him permission to take part in the proceedings and to have impliedly set aside the order directing the case to proceed 'ex parte' against him. This case also does not help the applicant.

(5) The next case cited by the learned counsel is that reported in — 'Satyendra Nath v. Narendra Nath', AIR 1924 Cal 806 (C). In that case, the defendant had filed written statement and issues had been framed. On a certain date he was absent. The case was ordered to proceed 'ex parte'. When the adjourned date arrived the defendant put in appearance and wanted to take part in the proceedings. He was allowed to do so. This case also is distinguishable from the present one inasmuch as there was no going back upon anything that had been done. The defendant took up the thread from the stage the case had reached. His written statement was already there. This, as pointed out above, cannot be done in the present case. The defendant cannot put in appearance and proceed with the case. He will have first to file a written statement and get fresh issues framed. In other words, the Court will be called upon to retrace its steps and to start fresh proceedings for which the stage has already passed.

(6) Another case relied upon by the learned counsel for the applicant is that reported in — 'Radhabai v. Anant Pandurang', AIR 1922 Bom 345(1) (D). In that case the Court passed an order directing the case to proceed 'ex parte' against defendant No. 4. The said defendant put in appearance then and there but he was not allowed to take part in the proceedings. The High Court set aside that order. That case also is distinguishable because in that case also the defendant could proceed from the stage the case had reached and had not to retrace its steps. It may be pointed out that in this case their Lordships observed as follows:

> "But if he (defendant) does not appear before the suit is heard then he has no right to be heard."

(7) This means that if the hearing has begun the defendant has no right to come and take part in the proceedings. I am, therefore, of the opinion that this authority also does not help the applicant.

(8) The Court had jurisdiction to pass the order it did and there is no good ground for interference.

(9) I have refrained from saying anything as to the merits of the learned Munsif's decision, viz., whether or not there was sufficient cause for the applicant to be absent on the date of previous hearing. This is a question of fact and I am reluctant to examine the finding of the learned Munsif on that issue. But if the ultimate decision of the suit goes against the defendant and he prefers an appeal he will certainly be able to challenge the finding of the learned Munsif before the appellate Court.

(10) The revision fails and is hereby dismissed.

B/V.R.B. Revision dismissed.

A.I.R. 1954 ALL. 362 (Vol. 41, C.N. 164)
(LUCKNOW BENCH)
(FULL BENCH)

MALIK C. J., KIDWAI, AGARWALA, V. BHARGAVA AND CHATURVEDI JJ.

Khalil Ahamad Khan, Defendant-Appellant v. Malka Mehar Nigar Begum and others, Plaintiffs-Respondents.

First Appeal No. 123 of 1944, connected with First Appeal No. 95 of 1945 and Misc. Civil Appln. No. 989 of 1952, D/- 27-10-1953, against the decree of Civil Judge, Malihabad, Lucknow, D/- 20-10-1944.

(a) Administration of Evacuee Property Act (1950), S. 46 — Appeal pending — Act coming into force — Jurisdiction to hear appeal is not barred.

There is nothing in S. 46 or any other part of the Act to make it obligatory upon the Court to hold that that section applies to pending actions. In a case where the matter has been adjudicated upon in accordance with the provisions of the Administration of Evacuee Property Act, it may not be possible for the Courts to interfere by reason of the provisions of S. 46 of the Act. But, in a case where an appeal was filed and was pending from before, and the Custodian has merely taken action on the basis of the judgment of the lower Court, without deciding the matter for himself, that judgment being subject to correction by the Court of appeal, it cannot be said that the judgment of the lower Court became final because the Custo-

dian had taken action on the basis thereof. (Paras 16, 44)

(b) **Administration of Evacuee Property Act (1950), S. 7 — Jurisdiction of Custodian — Commencement of.**

Where the Custodian has not given any notice as prescribed in S. 7, he has no jurisdiction to determine whether the property in dispute is or is not evacuee property. (Para 121)

(c) **Administration of Evacueé Property Act (1950), S. 46(a) and (d) — Vesting of property in Custodian — Dispute as to — Jurisdiction of Civil Court to resolve dispute — (Civil P. C. (1908), S. 9).**

In a case of dispute, whether the property has vested in the Custodian it is the civil Court which must determine the question as the Act does not give the Custodian the power to determine such a question. Therefore, in such a case clauses (a) and (d) of S. 46 do not bar the jurisdiction of the civil Court. (Para 121)

Anno: C. P. C., S. 9 N. 53 Pt. 10.

1953 Mulla: S. 9 P. 30 N. "Suits .... barred" (Topic discussed in N. 53 to S. 9 in AIR Com not specifically dealt with in Mulla — AIR Com note exhaustive of the particular topic).

(d) **Muhammadan Law — Wakf — By second deed wakif changing mutwalli and character of wakf — Validity of second deed.**

Per Majority: It is not open to a wakif to amend the wakf deed itself by changing its provisions and, if by the second deed he has attempted to change the nature or character of the wakf, and that portion is not separable from the portion relating to the change of the mutwalli, then the second deed must be held to be invalid. AIR 1936 Oudh 213 (FB), Ref. (Paras 17, 19, 158)

Per Kidwai J.: Once the wakf is complete, the wakif retains no right, title, or interest in the property except such as is reserved by the deed. It would be against the fundamental conception of ownership to allow the wakif still to interfere with the arrangements made in the deed itself for the management of the property. However, if the wakif has reserved a right to change the mutwalli or the scheme of management, he will be acting in accordance with the deed itself in exercising that power. The wakif, therefore, cannot change the mutwalli nominated by him while making the appropriation without having reserved that power for himself. Original texts Ref. Case law Reviewed. (Paras 87, 108)

Per Agarwala J.: Where the wakif has appointed a person other than himself as mutwalli of a wakf during his life-time and has laid down an order of succession to the mutwalli so appointed, the wakif has in fact parted with all the power of the appointment of a mutwalli which he possessed, and cannot thereafter cancel, vary or alter the provision. But where in the deed of wakf the wakif has appointed himself as a mutwalli for life and has made a provision for appointment of mutwalli after his death, he can cancel, vary or alter the provision relating to his own appointment, as well as the provision relating to the appointment after his death. (Para 126)

The distinction between the disposal of the office of mutwalli 'in praesenti' and on the wakif's death must be clearly borne in mind. It is a vital distinction. There is no controversy so far as the revocation of the disposal of the office of the mutwalli after one's death is concerned, if the disposal is by means of a separate document. Such a document is a will which can always be revoked by the testator. Case law Ref. (Paras 133, 134)

(e) **Civil P. C. (1908), S. 9 — Bar to jurisdiction of civil Court.**

Powers of the High Court in hearing an appeal from the decision of a lower Court are the same as of the lower Courts and if a law bars the jurisdiction of the civil Courts from entertaining any suit, the High Court's power to decide the appeal is also affected. (Para 125)

Anno: Civil P. C., S. 9 N. 50.

1953 Mulla: S. 9 P. 30 N. "Suits expressly barred" (General discussion confirmed in N. 50 to S. 9 in AIR Com. not found in Mulla — Matter discussed in Mulla, discussed under other appropriate notes to S. 9 in AIR Com.).

Civil P. C., S. 9 N. 53.

1953 Mulla: S. 9 P. 30 N. "Suits expressly barred" (Topic discussed in N. 53 to S. 9 in AIR Com. not specifically dealt with in Mulla — AIR Com. note exhaustive of the particular topic).

Niamatullah and Ali Hasan, for Appellant; Iqbal Ahamad, for Respondent (No. 1).

CASES REFERRED: Paras

(A) (V23) AIR 1936 Oudh 213: 11 Luck 735 (FB) 17, 25, 60, 100, 104, 106, 107, 128, 153
(B) (V38) AIR 1951 Bom 440: 53 Bom LR 621 34
(C) (V38) AIR 1951 Mad 930: 1951-2 Mad LJ 1 38
(D) (V40) AIR 1953 SC 298: 1953 SCR 691 (SC) 39
(E) ('97) 24 Ind App 196: 25 Cal 9 (PC) 52
(F) ('86) 8 All 149: 1886 All WN 53 (FB) 58
(G) ('93) 20 Cal 116 (FB) 59
(H) ('12) 15 Oudh Cas 127: 15 Ind Cas 747 61
(I) (V20) AIR 1933 All 634: 55 All 743 63
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(O) (V3) AIR 1916 Mad 116: 28 Ind Cas 934 98, 150
(P) (V20) AIR 1933 Oudh 261: 8 Luck 482 99, 152
(Q) (V19) AIR 1932 All 248: 54 All 455 101, 151
(R) (V32) AIR 1945 Cal 418: ILR (1945) 2 Cal 208 103, 105, 107, 155
(S) (V37) AIR 1950 Dacca 10: 54 Cal WN (2 DR) 250 105, 107, 156
(T) (V34) AIR 1947 All 261: ILR (1946) All 661 106, 156
(U) (1894) 1894-1 QB 725: 63 LJQB 497 120
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(X) (V28) AIR 1941 FC 16: 1940 FCR 110 (FC) 120
(Y) (V9) AIR 1922 PC 123: 48 Ind App 302 (PC 124
(Z) (V21) AIR 1934 PC 77: 61 Ind App 50 (PC) 124
(Z1) (V38) AIR 1951 Bom 406: 53 Bom LR 654 125
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(Z3) (V12) AIR 1925 Rang 71: 2 Rang 495 128
(Z4) (V16) AIR 1929 Pat 410: 8 Pat 484 128
(Z5) (V22) AIR 1935 Lah 626: 16 Lah 432 128
(Z6) (V24) AIR 1937 Lah 552: ILR (1937) Lah 276 128
(Z7) (V24) AIR 1937 Mad 731: ILR (1938) Mad 148 128
(Z8) ('12) 14 Bom LR 295: 14 Ind Cas 988 128
(Z9) (V7) AIR 1920 Bom 152: 22 Bom LR 846 128
(Z10) (V38) AIR 1951 Nag 428: ILR (1949) Nag 426 128
(Z11) ('93) 15 All 321: 1893 All WN 109 128

(Z12) (V8) AIR 1921 All 103: 43 All 487 128
(Z13) (V14) AIR 1927 All 255: 49 All 391 128
(Z14) (V17) AIR 1930 All 169: 52 All 368 128
(Z15) ('75) 8 Mad HCR 63 128
(Z16) (V14) AIR 1927 All 257: 49 All 435 128
(Z17) (V33) AIR 1946 Lah 200: ILR (1945) Lah 554 128
(Z18-19) (1900) 22 All 162: 1900 All WN 1 135
(Z20) (1846) 8 QB 714: 15 LJQB 217 135

MALIK C. J., V. BHARGAVA AND CHATURVEDI JJ.

These two appeals were referred to a bench of five Judges by a Division Bench of this Court on the 7th of February 1951.

(2) The appeals arise out of two suits relating to a 'wakf' created by Sohani Begam. A small pedigree will help in understanding the facts of this case.

SOHANI BEGAM

Malka Mehar Nigar Begam =Dr. Mahmud Ali Khan	Amdi Begam =Mohammad Husain
Maqsud Ali Khan	Khalil Ahmad, Siddiq Ahmad

On the 23rd of March, 1929, Sohani Begam executed a 'wakf alal aulad' under which she constituted herself as the first 'mutwalli' and, after her death, her daughter, Malka Mehar Nigar Begam, was to be the next 'mutwalli'. The relations, however, between the mother and the daughter grew strained and, on the 29th of November, 1938, Sohni Begam executed another document under which she purported to cancel the provision relating to the appointment of mutwalli after her.

(3) On the 14th of December, 1943, Sohani Begam died and disputes arose between Malka Mehar Nigar Begam and Khalil Ahmad about the possession of the 'wakf' property. Malka Mehar Nigar Begam filed a suit, out of which the First Civil Appeal No. 123 of 1944 has arisen, for a declaration that she was the duly appointed 'mutwalli' of the wakf property.

(4) The suit was resisted by Khalil Ahmad on the grounds, among others, that the wakif was entitled to revoke the nomination made by her in the wakf deed of 1929 and to appoint him mutwalli under the document of 1938, and that the recognition by the Sunni Central Wakf Board of Khalil Ahmad as mutwalli was conclusive and he must, therefore, be held to be the mutwalli of the property.

(5) The objections were, however, overruled and the plaintiff's suit was decreed.

(6) Malka Mehar Nigar Begam thereupon filed a second suit, out of which the First Civil Appeal No. 95 of 1945 has arisen, for possession of the wakf property on the ground that since the institution of the previous suit Khalil Ahmad had managed to get possession of the property. This suit was also decreed on the basis of the previous decree.

(7) Khalil Ahmad filed the two appeals in this Court and one of the points that was argued before the Division Bench was whether a wakif can, after the execution of a wakf deed by which he appoints a mutwalli to succeed him after his death, change the nomination by a subsequent document, when he had not reserved such power in the original deed of wakf.

(8) The learned Judges thought that the matter needed careful consideration and as there was already a decision of a bench of three Judges, they sent the case for decision to a bench of five Judges.

(9) The first suit was filed on the 29th of January, 1944 i.e. within a month and a half of Sohani Begam's death, and was decreed on the 26th of October, 1944, and the appeal was filed in this Court on the 14th of December, 1944. The second suit was instituted on the 13th of February 1945, and was decreed on the 28th of May, 1945 and an appeal against the decree was filed in this Court on the 2nd of October, 1945.

(10) On or about the 1st of August, 1948, Malka Mehr Nigar Begam migrated to Pakistan and the Deputy Custodian, Evacuee Property, Lucknow, was substituted in her place as respondent in these appeals. A preliminary objection has been raised by Sir Iqbal Ahmad, counsel for the Deputy Custodian that the hearing of these appeals is barred under section 46 of the Administration of Evacuee Property Act (31 of 1950). Before the Act there were certain Ordinances and learned counsel has referred us to those Ordinances also. The U. P. Ordinance No. I of 1949 was passed on the 24th of June, 1949, and section 5 of the Ordinance provided that all evacuee property situate in the United Provinces shall vest in the Custodian and the word "property" was defined as including any property, right or interest but not including a mere right to sue or a cash deposit in a bank. "Evacuee property" was defined as any property in which an evacuee has any right or interest, or which is held by him under any deed of trust or other instrument.

(11) The U. P. Ordinance was followed by Ordinance 27 of 1949 of the Government of India which was passed on the 18th of October, 1949. Section 5 of this Ordinance was as follows:

> "The Central Government may, by notification in the official Gazette, appoint a person to be the Custodian General of Evacuee Property in India for the purpose of discharging the duties imposed on the Custodian-General by or under this Ordinance."

"Evacuee property" under this Ordinance was defined in section 2(f) as meaning any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity). It is not necessary to give the rest of the definition. Section 11 of the Ordinance was as follows:

> '11(1) Where any evacuee property which has vested in the Custodian is property in trust for a public purpose of a religious nature, the property shall remain vested in the Custodian only until such time as fresh trustees are appointed in the manner provided by law, and pending the appointment of fresh trustees the trust property and the income thereof shall be applied by the Custodian for fulfilling as far as possible, the purpose of the trust.
>
> (2) In respect of any 'Wakf-alal-aulad—
>
> (a) Where the mutwalli is an evacuee, the property forming the subject-matter of the wakf shall vest in the Custodian subject to the rights of the beneficiaries under the 'wakf', if any, who are not evacuees,
>
> (b) Where not all the beneficiaries are evacuees, the rights and interests of such of the beneficiaries as are evacuees shall alone vest in the Custodian."

(12) Malka Mehar Nigar Begam, it is said, was declared an evacuee under section 19 of the Ordinance and no appeal was filed against that order under Section 24 or 25 of the Ordinance. The Ordinance was followed by the Act, Administration of Evacuee Property Act, 31 of 1950, which came into force on the 18th of April, 1950. In this Act, Evacuee Property was again defined as meaning any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity, and section 11(2) of this Act provided that the property forming the subject-matter of 'wakf-alal-aulad' was to vest in the Custodian subject to the rights of the beneficiaries under the 'wakf', if any, who are not evacuees; and where not all the beneficiaries are evacuees, the rights and interests of such of the beneficiaries as are evacuees are alone to vest in the Custodian.

(13) After the First Civil Appeals were filed in this Court an application was made on behalf of Khalil Ahmad that a receiver be appointed and Sri Ale Hasan was appointed a receiver of the wakf property. After Malka Mehar Nigar Begam had migrated to Pakistan the Custodian filed an application that the receiver be discharged and he be handed over possession of the property. That application was refused but the application of the Custodian that he be impleaded as a respondent to the appeals as Malka Mehar Nigar Begam had migrated to Pakistan was granted without any objection.

(14) Reference is made to section 7 of the Administration of Evacuee Property Act that it is for the Custodian to declare what property is evacuee property and appeal is provided for against such an order under sections 24 and 25 of the Act. Section 46 is then relied upon which is to the following effect :

> "46. Save as otherwise expressly provided in this Act, no civil or revenue court shall have jurisdiction :
>
> ....
>
> (d) in respect of any matter which the Custodian General or the Custodian is empowered by or under this Act to determine."

The argument is that after the Custodian has declared the property, subject-matter of the 'wakf-alal-aulad', to be property in which Malka Mehar Nigar Begam had an interest, this Court now cannot decide these appeals, as, in case it is held that Malka Mehar Nigar Begam was not the 'mutwalli', it would result in nullifying the effect of the orders passed by the Custodian.

(15) To our minds there is a great fallacy behind this argument. The Custodian was never called upon to decide whether the 'wakif' had the right to remove the 'mutwalli' appointed by her under the wakf deed and whether Malka Mehar Nigar Begam was the mutwalli or Khalil Ahmad was the mutwalli of the property. The Custodian applied that his name might be brought on the record of these appeals on the basis of the decision of the lower court which had held that Malka Mehar Nigar Begam was the 'mutwalli' of the property and the second deed was invalid. Learned counsel for the Custodian has not been able to point out to us any order passed by the Custodian that Malka Mehar Nigar Begam was the validly appointed 'mutwalli' of the property.

(16) A case might arise where, on a person becoming an evacuee the Custodian Judicial may be called upon to decide whether the property belonged to the evacuee, or it was the property of certain others. The Act provides that the Custodian can decide such a dispute and the decision of the Custodian is appealable and finally to the Custodian General. In a case where the matter has been adjudicated upon in accordance with the provisions of the Administration of Evacuee Property Act, it may not be possible for the courts to interfere by reason of the provisions of section 46 of the Act, but, in a case where an appeal was filed and was pending from before, and the Custodian has merely taken action on the basis of the judgment of the lower court, without deciding the matter for himself, that judgment being subject to correction by the court of appeal, it cannot be said that the judgment of the lower court became final because the Custodian had taken action on the basis thereof. We are, therefore, not satisfied that this preliminary objection has any force.

(17) Learned counsel for the appellant argued at some length the question whether the law was correctly laid down in — 'Mst. Rahman v. Mst. Baqridan', AIR 1936 Oudh 213 (FB) (A). Learned counsel for the appellant has urged that the correct position under the Mohammedan Law has been misunderstood by the learned Judges and, where by a subsequent deed the wakif has merely changed a testamentary provision about the appointment of a 'mutwalli', the subsequent deed is valid and the provisions of Mohammedan Law relied on in 'Mst. Rahiman's case (A)' were applicable only to cases where the wakif had removed a 'mutwalli' who had already entered upon his office and in such a case the 'wakif' may not be entitled to remove him unless he has reserved the power of such a removal. Learned counsel has, however, admitted that it is not open to a wakif to amend the 'wakf' deed itself by changing its provisions and, if by the second deed he has attempted to change the nature or character of the 'wakf', and that portion is not separable from the portion relating to the change of the 'mutwalli', then the second deed must be held to be invalid.

(18) We have carefully examined the trust deed with learned counsel and have found that the trust deed dated the 23rd of March, 1929, is divisible into three parts the 'wakif' reserved to himself much wider powers and provided how the wakf property was to be managed and its income disposed of during her lifetime. These powers were restricted to some extent during the 'mutwallishiip' of her daughter and the beneficiaries during that period are also not exactly the same. After her daughter's death, however, the restrictions imposed are stricter and the beneficiaries are also different from those in her lifetime. The wakf deed provides in the second clause that so long as Sohani Begam was alive she would be the 'mutwalli' and she would make the management in respect of it and no one would have a right to interfere with the management or ask for accounts, and the third paragraph provides the list of beneficiaries and the amounts payable to them. The fourth clause lays down that during the period that Malka Mehar Nigar Begam will be the 'mutwalli' she will have the same power of management as Sohani Begam herself and the fifth clause gives the list of beneficiaries and the amounts payable to them after Sohani Begam's death. The eighth clause gives the list of beneficiaries and the amounts payable to them after the death of Malka Mehar Nigar Begam. We have briefly indicated the scheme but a careful examination of the 'wakf' deed will show that it is divisible into three parts according as the 'mutwalli' is the

wakif herself, or her daughter Malka Mehar Nigar Begam or any third person.

(19) In the second deed dated the 29th of November, 1938, the first portion while the lady herself would remain the 'mutwalli' is the same but after her death it is provided that Malka Mehar Nigar Begam will not be the 'mutwalli' and the list of beneficiaries and the amounts payable to them during her lifetime have been altered. The whole scheme is different and it is admitted by learned counsel that it was not open to the 'wakif' to make such a fundamental change in the scheme. In the circumstances the second deed was invalid in law and it cannot have any effect. The question, therefore, whether a wakif, even if she has not reserved the right to make a change, can nominate someone else as 'mutwalli' after her death if it does not involve any change in the scheme of the 'wakf', does not arise and need not be answered. We may here point out that learned counsel for the respondent did not address full arguments on this point, as, in the view that we have taken of the interpretation of the deed, the question of law which made it necessary to refer the case to the Full Bench did not arise. In the absence of full arguments on the point, it will not be proper for us to express any opinion and to depart from the trend of authorities which seem to be all against the appellant.

(20) On the view taken by us that Khalil Ahmad was not the 'mutwalli' he cannot claim to be reimbursed for any money which might have been spent by him voluntarily and without any sanction of the Court. The Civil Miscellaneous Application No. 989 of 1952 must, therefore, also fail and is dismissed with costs.

(21) The appeals, therefore, have no force and must fail and are dismissed with costs.

KIDWAI J.:

(22) The facts of the case have been fully stated in the referring order and it is not necessary for me to repeat them, beyond giving a brief resume in order to bring out the points which call for decision.

(23) On the 22nd March 1929, Sohani Begum, a Sunni Muslim, governed by the Hanafi Law, created a wakf appointing herself the first mutwalli. During her lifetime only certain small specified allowances were to be paid and the rest of the income was to be disposed of at her discretion. After her death her sole surviving daughter, Malka Mehar Nigar Begam, was to be the mutwalli. The allowances to members of the family were liberalised and certain charities such as Fatihas, Maulud Shareef, Giarwhin Shareef, the education and maintenance of paupers, were specified but it was left to the discretion of the mutwalli as to how much of the income was to be spent on which of the charities. The mutwalli was to get a certain remuneration (haq-ul-khidmat) and she could not be called upon to account. After the death of Mehar Nigar Begum the District Judge would appoint that person from among the descendants of the wakif's two daughters Mutwalli whom he considered fit. The expenses to be incurred by such a Mutwalli were specified with precision and he was made accountable for the entire income.

(24) On 29th March 1938 Sohani Begum executed another deed, which she called a supplementary wakf deed, because, according to her, it was "necessary that a few particulars mentioned in the said wakf deed be amended." She purported to exercise this power of amendment by virtue of the fact that she was the wakif and the Mutwalli. Among the provisions of this second deed are the following :

"Secondly, that after my death, my daughter Malka Mehar Nigar Begam will not be Mutwalli. In her place my daughter's son Khalil Ahmad Khan, son of Mohammad Hosein Khan born of Ahmadi Begum deceased — whom I have adopted also like my own son will be Mutwalli like myself; and he will have all those powers which are enjoyed by me, or which would have been enjoyed by Malka Mehar Nigar Begam if she would have been allowed to remain as Mutwalli."

....

"Fourthly, that all those powers which would have been enjoyed by Malka Mehar Nigar Begam as Mutwalli after my death will now be transferred in their entirety to Khalil Ahmad Khan, e.g. rupees twenty-five per month which were given to Malka Mehar Nigar Begum by way of haq-ul-khidmat will now be given to Khalil Ahmad Khan, as a Mutwalli after my death, and not to her (Malka Mehar Nigar Begam)."

"Fifthly, that the conditions laid down in the said wakf deed about the office of the Mutwalli relating to Mehar Nigar Begam, will now be considered relating to Khalil Ahmad Khan in place of her, whether those conditions were to be acted upon during her lifetime or on her death."

(25) Sohani Begum died on the 14th December, 1943, and on 29th January, 1944, Malka Mehar Nigar Begam instituted a suit for a declaration that she was the duly appointed Mutwalli of the wakf created by her mother. Khalil Ahmad Khan resisted the suit on the basis of the second deed but the learned Civil Judge of Malihabad at Lucknow decreed it on the 20th October 1944 holding, on the authority of AIR 1936 Oudh 213 (FB) (A) that the wakif, not having reserved for herself that power in the deed, could not change the Mutwalli. First Civil Appeal No. 123 of 1944 filed by Khalil Ahmad Khan is directed against this decree.

(26) In the meanwhile Khalil Ahmad Khan had realised some rent from various tenants of the endowed property and he was occupying one of the wakf houses. Accordingly, having already established her right to the tauliat, Malka Mehar Nigar Begam instituted another suit on the 13th February 1945 against Khalil Ahmad Khan and claimed a decree for possession over the wakf properties and for money wrongfully realised by the defendant. This suit was decreed on the 28th May, 1945. First Civil Appeal No. 95 of 1945 is directed against this decree.

(27) When the appeals came up for hearing Misra and Chandiramani JJ. were of opinion, for the reasons given in their order, that the question whether the wakif can change the Mutwalli nominated in the deed of wakf without having reserved to himself the power to do so, should be considered once more and referred the two appeals to a Full Bench. Accordingly the present Full Bench was constituted.

(28) While the two appeals were pending in this Court Malka Mehar Nigar Begam emigrated to Pakistan on or about the 1st August 1948. In the meanwhile a Receiver of the properties had been appointed and he drew the attention of the court to this event. Thereupon the Deputy Custodian of Evacuee Property at Lucknow was added as a party to the appeals but his petition for the discharge of the Receiver and for delivery

of possession over the property to him was refused.

(29) At the hearing of the appeals a preliminary objection was taken on behalf of the Deputy Custodian that, Malka Mehar Nigar Begam, having become an evacuee, the civil Courts had been deprived of jurisdiction to decide questions as to her rights in property.

(30) The law governing Evacuee Property at the time that these appeals came up for hearing is to be found in the Administration of Evacuee Property Act (31 of 1950). It was contended that by section 46 there is a bar to the jurisdiction of the civil court :

"(a) to entertain or adjudicate upon any question whether property or any right to or interest in any property is not evacuee property; or

....

(d) in respect of any matter which the Custodian General or the Custodian is empowered by or under this Act to determine."

(31) It was pointed out that, in the case of a wakf-al-aulad by reason of section 11(2)(a) of the Act :

"where the Mutwalli is an evacuee the property forming the subject-matter of the wakf shall vest in the Custodian subject to the rights of the beneficiaries under the wakf, if any, who are not evacuees."

(32) It was, therefore, contended that, Mehar Nigar Begam being admittedly an "Evacuee", the question whether the property covered by Sohani Begum's wakf was evacuee property or not depended upon whether Mehar Nigar Begam was its Mutwalli or not. Though, therefore, the question whether that property is or is not evacuee property might not be directly involved in these appeals, it is nevertheless involved by necessary implication, since the result of holding that Mehar Nigar Begam is not the Mutwalli would be to hold that the property covered by the wakf cannot vest in the Custodian as evacuee property. Thus, it is contended, that the case is covered by clause (a) of section 46 or, if not, by that clause, at least by clause (d).

(33) Section 11 only provides what is to happen to the wakf property in case the Mutwalli is an evacuee. It does not make any provision for a determination of the question as to who is an evacuee or what is the property of that evacuee. In the present case it is not disputed that Malka Mehar Nigar Begam is an evacuee but it still remains to be determined whether she has any right or interest in the wakf of Sohani Begum even by the application of section 11(2)(a) of the Administration of Evacuee Property Act (31 of 1950). In order to ascertain how and by which authority this is to be determined and what the jurisdiction of the Custodian is we have to look elsewhere in the Act.

(34) In approaching this aspect of the matter it must be remembered

"that it is settled now that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure" — 'Abdul Majid v. P. R. Nayak', AIR 1951 Bom 440 at p. 446 (B).

(35) In the present case the jurisdiction of the civil Courts is sought to be ousted on the basis of the two clauses of section 46 which have already been quoted. What is forbidden by clause (a) is an adjudication as to whether any property or any right or interest in property is evacuee property. In the present case the court is not called upon to determine whether the right of Mehar Nigar Begam in the Sohani Begum wakf is evacuee property or not but whether she had any right to the office of Mutwalli of that wakf. It may be that, if her claim to be Mutwalli is upheld, one of the consequences that follow will be that the Custodian will be entitled to declare the wakf property to be evacuee property and that, by the operation of the relevant law, the property will vest in the Custodian but that is not what the civil court is called upon to adjudicate. Clause (a) of section 46, therefore, does not provide a bar to the jurisdiction of the civil court.

(36) We have now to see whether clause (d) of section 46 provides any such bar. In order that clause (d) may apply it must be shown that the question raised in these appeals is one which the Custodian General or the Custodian is empowered by the Act to determine.

(37) There is no specific provision in the Act empowering the Custodian General or the Custodian to determine the status of any individual in relation to property as distinct from the nature of the property. There is no provision in Act 31 of 1950 which would authorise either of the two officers named to determine who is the Mutwalli of a particular wakf. Under sections 7 and 8 it might be declared that a particular property is evacuee property and the reason for this declaration might be that the property is a part of a wakf of which the Mutwalli is an evacuee but that is not the same thing as determining that the evacuee has a right to be the Mutwalli of the wakf.

(38) In this connection I may refer to the following remarks of Rajamannar C. J. in — 'M. B. Namazi v. Deputy Custodian of Evacuee Property, Madras', AIR 1951 Mad 930 at p. 934 (C) :

"There is, however, one thing about which I am not quite clear. The Ordinance no doubt declares the order of the Custodian declaring any property to be evacuee property as final. That might be so in one sense, i.e. if any property belongs to a person who has been declared to be an evacuee within the meaning of the definition in the Ordinance, then the Custodian's order would be final. But, does the finality amount to an adjudication on title in case there is any dispute? Take for instance the case where a property is declared to be evacuee property on the assumption that it belongs to A who is an evacuee. Does it mean that some one else cannot say that the property really does not belong to the evacuee but belongs to himself who is not an evacuee? I am inclined to hold that the order of the Custodian or the notification under section 7 of the Ordinance is not final, in case of disputed title."

(39) Moreover in 'Ebrahim Aboobaker v. Tek Chand', AIR 1953 SC 298 (D), it has been laid down that

"the inquiry under section 7 is a condition precedent to the making of a declaration under section 8 and the right of the Custodian to exercise dominion over the property does not arise until the declaration is made."

Accordingly before the Custodian could notify the property as evacuee property he had to follow the procedure laid down in section 7 and in the rules framed under the Act.

(40) Under S. 7 and Rule 6, if the Custodian had prima facie grounds for believing that any property was evacuee property he had to issue notices to persons interested and then to hold an enquiry. It is only after notice is issued that any person claiming an interest in the property can file objections and it is only then that the Custodian can make an enquiry and give his decision. Thus the issue of a notice under section 7 is sine qua non of an enquiry by the Custodian, and until notices have been issued it cannot be said that there is any matter which the Custodian General or the Custodian is empowered by or under the Act to determine.

(41) It is admitted that in the present case no notices have been issued nor has any declaration been made. The effect of a declaration that Mehar Nigar Begam is or is not the Mutwalli will, therefore, not be to interfere with or impinge upon, the jurisdiction of the Custodian General or the Custodian and section 46(d) also cannot bar the jurisdiction of the civil Court.

(42) It was urged that in the present case Mehar Nigar had already become an evacuee under U. P. Administration of Evacuee Property Act (10 of 1948), U. P. Administration of Evacuee Property Ordinance (I of 1949), Central Administration of Evacuee Property Ordinance (27 of 1949), which Act 31 of 1950 has replaced. It was consequently urged that by reason of sub-section (2) of section 8, the property must "be deemed to be evacuee property declared as such within the meaning of this Act". Even the Acts and Ordinances referred to required an investigation to be made, however summary it might be, before the property vested in the Custodian and it is no one's case that any such enquiry was ever made by the Custodian or that he issued any declaration to the effect that the property was evacuee property.

(43) The matter might also be considered from another aspect. In the present case the civil court has already made an adjudication that Malka Mehar Nigar Begam is the Mutwalli of the wakf. The person aggrieved by this decision had a right to appeal from it. Accordingly before there was any question of any evacuee law he filed an appeal in the Chief Court of Avadh, which thus became seised of the case. Upon the amalgamation of the Chief Court of Avadh and the High Court of Allahabad this Court became seised of the matter. The question that arises is whether the Custodian General or the Custodian is or can by necessary implication be deemed, by the provisions of the various Administration of Evacuee Property Acts, to be empowered to dispose of such appeals.

(44) In a case like the present the civil court has already adjudicated upon the rights of the parties. In appeal the correctness of this decree is in question. Although under the provisions of the Code of Civil Procedure the appellate Court may pass any decree which the trial Court might have passed, the appellate decree is not an independent adjudication of rights but it will merely be substituted for the decree already passed. There is no provision in the various Evacuee Acts, and Ordinances which even impliedly prohibit a Court of appeal from determining the correctness of an adjudication already made.

(45) Again a decree having already been passed the party aggrieved had a right of appeal and has appealed. To hold that the appellate Court cannot proceed to decide the appeal would mean that the aggrieved party would be deprived by the retrospective operation of the law relating to the administration of evacuee property of a right already possessed by it. In the absence of a very clear provision to that effect in the Statute, this would be against all the canons of interpretation.

(46) I would, therefore, hold that the preliminary objection is not sustainable and should be rejected. I shall proceed now to consider the appeal on the merits.

(47) The sole question for determination in this appeal is whether the wakif can change the mutwalli nominated by him when making the appropriation without having reserved that power for himself.

(48) Mr. Niamatullah for the appellant contended :

(i) that Quazi Abu Yusuf, one of the principal disciples of Imam Abu Hanif, has clearly stated that a wakif can always change the mutwalli of a wakf without expressly reserving such a power even to the extent of removing a mutwalli to whom possession has already been delivered, and that there is no authoritative opinion to the contrary in a case such as the present in which the mutwalli nominated is to take possession after the death of the wakif;

(ii) that, even if it be assumed that Imam Mohammad, the other leading disciple of Imam Abu Hanif, has expressed a contrary view, the opinion of Abu Yusuf should prevail since the entire law relating to wakfs is based upon his rulings and also because it is more in accordance with reason;

(iii) that, according to the established principles of Islamic Law, a mutwalli is entitled to nominate his successor by will and the nomination is, like every other will, always revocable at the pleasure of the mutwalli. Indeed a mutwalli cannot nominate another person to enter into possession in his lifetime unless he be on his deathbed and the same rules apply to such a nomination as to wills.

(49) Sir Iqbal Ahmad for the respondents did not consider it necessary to refer us to any authoritative text book on this subject. He cited certain decisions of various Indian High Courts and contended that the Islamic law is such an archaic system that it is unnecessary and unprofitable to consider it in the light of rational principles. It is sufficient to find out what the decisions have established and to abide by those decisions on the principle of stare decisis.

(50) There can be no doubt that if the exact point which is now in dispute before us has already been decided by various High Courts in one particular manner over a long course of years, it would be contrary to principle to unsettle the law by adopting a new view on the subject, unless, of course, the view taken by the decisions is opposed to fundamental principles. If, however, the exact point now raised has not been decided, or even if there are only one or two such decisions of a comparatively recent date, we would not be justified in invoking the aid of the principle of stare decisis in support of any particular view.

(51) As to the contention of Sir Iqbal Ahmad that the Islamic Law is not amenable to the rational application of principles, it only shows

his ignorance of the very fundamentals of that law. Ever since the Second Khalifa, Umar, issued his directions to his Governors and Kazis, "Kiyas", which signifies the logical deductions to be drawn from established principles has been considered to be one of the principal sources of Islamic law and Imam Abu Hanifa himself attached the greatest importance to this source preferring it even to those so-called Hadith which he considered to be opposed to reason and as such of doubtful authenticity.

(52) Indeed it was obviously impossible for the law giver or the expounders of the law or the commentators to lay down the law for every possible contingency. It, therefore, became necessary, as new points arose for decision, to draw logical inferences from established principles. Thus the Islamic Law continued to develop at the hands of jurists in the same manner as the English Common Law developed at the hands of judges. Of course, as time passed and a subject was more and more thoroughly thrashed out, the law became settled and it would be fraught with mischief — on the principle of stare decisis — to depart from that settled law, particularly in such matters as marriage, divorce, legitimacy and inheritance. It was for this reason that in dealing with a question of maintenance in which a lower court had relied upon a surah of the Quran and Syed Ameer Ali's interpretation of it, which was at variance with the interpretation placed upon it by the Hidaya, a high authority on Sunni law, and the Imameea, a high authority on the Shia law, their Lordships of the Privy Council say in — 'Aga Mahomed Jaffer Bindaneem v. Koolsom Bee Bee', 24 Ind App 196 (PC) at p. 204 (E) :

"But it would be wrong for the courts on a point of this kind to put their own construction on the Kuran in opposition to the express ruling of commentators of such antiquity and such high authority."

(53) Of course with the increase of enactments touching all the fields of human activity, the scope of the Islamic personal law is being more and more curtailed. Nevertheless new points may arise, and have arisen, even during the past 25 years. The next matter that might be classified, therefore, is the preference to be given to various authorities which also clarify the position as to how far rules of logical deduction may be applied.

(54) The present case is governed by the principles enunciated by Imam Abu Hanifa and his two disciples, Imam Mohammad and Quazi Abu Yusuf the latter of whom occupied the post of Quazi-ul-qazzat (or Chief Justice) of Baghdad during the reign of Harun-ul-Rashid. In the matter of wakfs the theory propounded by the master himself has not been accepted and whenever there has been a difference of opinion which jurists have been called upon to consider it is in the opinions of Abu Yusuf and Imam Mohammad.

(55) It may be said at the outset that Abu Yusuf's objective was to facilitate the creation of wakfs and to validate them as far as possible while Imam Mohammad, though he too upheld wakfs, always attempted to reconcile the rules relating to wakfs with the principles relating to other subjects, e.g. gifts, ownership of property, etc.

(56) It is also necessary to explain that much reliance has been placed by later writers on the opinion of the contemporaries of the three great masters and their immediate successors as well on the opinions of the jurists (Sheikhs) of Balkh and Bokhara. This is so because, after the decline of the empire of Baghdad, the centre of learning shifted to the courts of Spain, Balkh and Bokhara. Spain devoted greater attention to what may be called the modern sciences, literature and art, but the learned men of Balkh and Bokhara pursued the study of the Sheriat with zeal and energy and greatly developed the original system left by Abu Hanifa, Abu Yusuf, Imam Mohammad and their immediate successors. Their reasoning and their conclusions accordingly carry great weight. Since then there have been very few such eminent jurists that their authority can displace that of the earlier lawyers.

(57) As has been stated earlier Mr. Niamatullah contended that on matters of wakf Abu Yusuf's opinions carry preponderating weight but this contention is not borne out by the authorities. In important matters there is a consensus of opinion. In many matters of secondary importance preference has been given, so far as India at least is concerned, to the opinions of Imam Mohammad and in others to those of Abu Yusuf.

(58) In — 'Abdul Kadir v. Salima', 8 All 149 (F), at p. 152 Mahmood J. expressed an opinion which was adopted by the Full Bench verbatim in the following words:

"Both Imam Abu Hanifa and Imam Mohammad were purely speculative jurisconsults, who spent their lives in extracting legal principles from the traditional sayings of the Prophet; but Quazi Abu Yusuf, whilst equally versed in traditional lore, had, in his position as Chief Justice of the Empire of the Khalifa Harun-ul-Rashid the advantage of applying legal principles to the actual conditions of human life, and his dicta (especially in temporal matters) command such high respect in the interpretation of Muhammadan law, that whenever either Imam Abu Hanifa or Imam Muhammad agrees with him, his opinion is accepted by a well-understood rule of construction."

(59) In — 'Bikani Mia v. Shuk Lal Poddar', 20 Cal 116 (G), at pages 171-173, Amir Ali J., in his dissenting judgment brings out the fact that in many matters relating to wakfs the opinion of Abu Yusuf has prevailed over that of Imam Mohammad though the point there raised was as to the validity of a wakf for the benefit of one's descendants in respect of which the learned Judge was of the opinion that it was valid.

(60) In — 'AIR 1936 Oudh 213 (FB) (A)', one of the points raised was whether delivery of possession was necessary in order to complete a wakf and the Full Bench held that, on this point, the opinion of Abu Yusuf was to be preferred and that the wakf was completed merely by a declaration that the property was wakf neither the appointment of a Mutawalli nor delivery of possession being necessary. This opinion was, however, based on a full consideration of other authorities on a marginal note in the Hidaya, Vol. II, by Moulvi Abdul Hai of Lucknow who said "on the ground that the dictum of Abu Yusuf is 'more reasonable according to the learned' and Fatwa is given in accordance with this view". It must be remembered that on the second point, namely, "whether any change in the terms of wakf or in the person of Mutawallis can be made by the wakif, where no such power has been reserved by him in the deed of wakf, after the wakf has been created", which is the very point arising in this appeal, the Full Bench did not accept the view of Abu Yusuf but preferred that of Imam Mohammad.

(61) In — 'Wajid Ali Khan v. Sakhawat Ali Khan', 15 Oudh Cas 127 (H), the question was whether the wife could refuse her person to her husband once cohabitation had taken place if the prompt dower was not paid. Lindsay, J. C. quoted from the most authoritative text books and concluded that in respect of the matters in question the opinion of Imam Abu Hanifa prevailed over that of the two disciples although the latter were agreed between themselves.

(62) Amir Ali discusses with reference to authorities the preference to be given to the opinions of Abu Hanifa, Abu Yusuf and Imam Mohammad in the case of differences of opinion between them on any point at pages 14 to 17 of Volume I of his Mohammadan Law (4th Edition): He concludes:

"But, although the respective authority of the masters is sometimes enunciated in rather wide terms, a careful study of the law shows that considerable latitude is left to the Judge to follow the rule 'which is most consistent with justice, the changed conditions of society, the requirements of particular localities and the needs of the inhabitants'. And, accordingly, although in doctrinal matters and in what may be called ecclesiastical discipline, the opinion of Abu Hanifa is supreme, there is no hard and fast rule regarding secular questions, on some his pronouncement is accepted as furnishing the governing principle, in others that of the Disciples if they agree in differing from him. Where the Disciples differ among themselves and there is no express statement of Abu Hanifa on the point to incline the balance it is open to the Judge to accept and give effect to the exposition most consistent with the requirements of justice. In some cases where even Abu Hanifa agrees with one, individual opinion of the other is accepted and enforced.

Again in certain matters the doctrine of one is regarded by consensus as of greater authority than that of the other. And when there is no general agreement with regard to a particular exposition, in some localities the views of Abu Yusuf are accepted, in others those of Mohammad."

Again, at page 258, Amir Ali says:

"The next submission is that it is a mistake to suppose that in the Hanafi system the views of Imam Abu Yusuf are more authoritative in all matters than those of Imam Mohammad.

In dealing with the Hanafi Law it should always be remembered that when there is a difference of opinion between Imam Abu Yusuf and Imam Mohammad, "the Mussulman Judge is at liberty to adopt either of the two decisions which seems to him the more consonant with reason", are consistent with the requirements of the times. And this rule applies to divergence of opinion among all the jurists.

In the Durr-ul-Mukhtar it is stated first that the Hanafi Judge is authorised to decree either according to Abu Yusuf or Mohammad; and again that when there are two "correct" doctrines in respect of any particular question it is lawful to pass a decree and give a Fatwa according to either of them. On this the comment of the Radd-ul-Mukhtar is both instructive and important. After explaining that it is allowable for a Hanafi Judge to pass a decree according to the opinion of either Abu Yusuf, Mohammad or any other Hanafi Imam, as they are all followers of the Imam (Abu Hanifa, the founder of the school)."

He then points out, on pages 259 and 260 that on the primary points relating to wakfs there is a consensus of opinion and that on the subsidiary points the decision is sometimes according to the view of Abu Yusuf and sometimes according to that of Imam Mohammed.

(63) The same view is taken by Sulaiman C. J., in — 'Mt. Anis Begam v. Muhammad Istafa Wali Khan', AIR 1933 All 634 (I) in which he followed Amir Ali's exposition of the law relating to the preference to be accorded to the opinion of one or other of the great Masters of the Hanafi school. At p. 636, he says:

"Presumably, what he meant was that ordinarily the opinion of the majority has been accepted. But it would be easy to cite instances in which the opinion of Imam Abu Hanifa alone has prevailed, particularly in matters of prayer and ritual, or of Imam Yusuf in matters of worldly affairs, or of Imam Mohammad in matters of inheritance."

(64) Again at pages 636 and 637 he says:

"Different doctors have followed different rules of preference. Those who are more orthodox and, generally speaking, more ancient in many cases preferred the solitary opinion of Abu Hanifa to even the joint opinion of his disciples. There are later text-book writers who have preferred the opinion of two as against that of one. But such rules are helpful only when there is no clear consensus. In the early days when new points arose and the decision had to depend on an inference drawn from other Fatwas or from analogy, it was open to the learned doctors to prefer one opinion over the other which they considered more correct and consonant with the other principles, inasmuch as the three Imams were not law-givers but merely interpreters of the law.

But if one finds a question well thrashed out and in later centuries a particular interpretation adopted by the leading doctors and text-book writers it would not be proper for us in the twentieth century to go behind such a consensus of opinion and decide a point contrary to such opinion, on the ground that the majority of the three Imams favoured that view in the earlier centuries. Such a course of action would unsettle the Muhammadan law. Rules of preference were for the guidance of ancient jurists, and they are of no help when there is a clear preponderance of authority in support of one view. It would be too late now to resort to such rules in support of a new conception as to how a point ought to have been decided, though contrary to accepted opinion. Maulvi Abdul Hai of Lucknow, the most renowned and learned Hanafi jurist of his time, has in his Introduction to Sharah Wiqayah dealt with this matter at considerable length.

A good deal of that matter which is to be found in Radd-ul-Mukhtar is summarised in Sir Abdur Rahim's Muhammadan Jurisprudence at pages 187-8, which can be conveniently referred to. He has rightly pointed out that there is no accepted rule that when there is a difference of opinion amongst the founders of schools and their disciples, opinion or ruling of a lawyer ought to be given according to the opinion of Abu Hanifa, even if all his disciples differ from him; and in the absence of any dictum of his in accordance with the opinion of Abu Yusuf, then Muhammad, then Zufar and then Hasan Ibn Ziyad. If the authorities were examined it will generally be found that in some matters the solitary view of Abu

Hanifa has been preferred whereas in other matters the view of Abu Yusuf, Muhammad or Zufar has been followed.

According to Al-Hawi the correct rule was that in cases of difference of opinion regard should be had to the authority and reasons in support of each view and the one which has the strongest support should be followed. "But according to the modern interpretation of Taqlid as above stated a lawyer of the present day should, in such cases, accept the view which according to the jurists of the fourth, fifth and sixth degrees is correct and has been acted upon. But if in any case the later doctors have not adopted in clear language any one of the conflicting opinions, the law is to be ascertained by proceeding on the view which is most in accord with the habits and affairs of Men."

"The Radd-ul-Mukhtar, Volume I, page 73, states that if on any matter no clear answer from any one of the early jurists were to exist, and the later doctors have one opinion, then that should be adopted; but if they differ, then the view of the majority of those on whom well known doctors like Abu Hanifa, Abu Jafar Abul Lais, Tahawi and others have relied should be accepted. And if a clear answer were not to exist from any one of these later jurists, then the Mufti should consider the question carefully and try his best to arrive at a correct conclusion so that he may be relieved of the charge of not having considered it fully."

(65) The same view has been taken by Malik J. (now C. J.) in — 'Mahomed Yasin v. Rahmat Ilahi', AIR 1947 All 201 at p. 206 (J).

(66) These doctrines are by no means new but have always been recognised under the Sunni Hanafi Law. Even the greatest of jurists was not a law-giver but only an interpreter of the law and there was nothing sacrosanct in his opinion. Thus it was open to other jurists to form an opinion of their own and if there was a certain measure of agreement between later jurists even that would be considered to be the correct exposition of the law.

(67) Thus the contention that the views of Abu Yusuf must prevail in all matters relating to wakfs cannot be said to be an established doctrine. We are thrown back in a matter of this kind upon a consideration of principles and the logical deductions to be drawn from these principles.

(68) As I have already said there are a number of points of primary importance with regard to wakfs upon which there is a consensus of opinion. Some of these points in so far as they have a bearing on the question in issue before us may be stated.

(69) The first principle is that by the creation of a wakf all the right, title and interest of the wakif, as proprietor, ceases, and the property passes to the implied ownership of the Almighty in such a manner that its profits may revert to, or be applied for the benefit of His creatures — vide Baillie's Digest of Mohammadan Law, Book IX, Chapter I, Ameer Ali's Mohammadan Law (4th Edition), Volume I, page 279, Tyabji's Mohammadan Law (3rd Edition) section 457, page 537.

(70) The second agreed principle is that the wakif may reserve the 'tauliat' for himself and in that case he possesses all the powers of a Mutwalli — vide Ameer Ali's Mohammadan Law (4th Edition), Volume II, page 440 where he collects all the authorities.

(71) It is also agreed that

"If any person appointed as a Mutwalli dies, or refuses to act in the trust, or is removed by the Court or if the office of Mutwalli otherwise becomes vacant, and there is no provision in the deed of wakf regarding succession to the office, a new Mutwalli may be appointed :

(a) by the founder of the wakf;

(b) by his executor (if any);

(c) if there be no executor, the Mutwalli for the time being may, subject to the provisions of section 205 below, appoint a successor on his death;

(d) if no such appointment is made, the Court may appoint a Mutwalli :

— vide Mulla Mohammadan Law, 13th Edition, section 204, page 190.

(72) If a Mutwalli has the right to nominate his successor, he cannot without the sanction of the Quazi, resign and appoint another person in his lifetime, though he may appoint a deputy or agent. The successor must be appointed by will or during marz-ul-maut, and like all wills the appointment so made is revocable at the pleasure of the Mutwalli : vide MacNaghtan's Principles and Precedents of Mohammadan Law, Chapter X, section 6, — 'Sayad Abdula Edrus v. Sayad Zain Sayad Hasan Edrus', 13 Bom 555 (K).

(73) Bearing these principles in mind I come now to consider the actual point raised in these appeals.

(74) Apart from the modern text book writers and the decisions of Courts, the only original authority placed before us was the Fatwai Alamgiri also known as the Fatwai Hindi which was compiled by a body of jurists acting under Sheikh Noyan in the reign of the Emperor Aurangzeb Alamgir in the 17th century of the Christian era. It has, however, been necessary to find out the opinions of other commentators.

(75) The passage in the Fatawai Alamgiri is as follows : (Here follows text which is omitted) Fatawai Alamgiri, Volume II, page 481, book on wakfs, Chapter V which has been translated by Syed Ameer Ali (at page 458, Volume I, 4th Edition of his Mohammadan law) as follows :

"A person having made a wakf of his property and having transferred it to a curator desires to take it back from his hands; if he has made a condition for himself in the wakf that he should (have the power to) discharge the curator and take back the property in that case he may do so according to Mohammad and not otherwise. But according to Abu Yusuf he may do so (in either case i.e. whether he has reserved the power or not). And the jurists of Balkh decide according to Abu Yusuf and the jurist Abu Lais has adopted the same view. The jurists of Bokhara decide according to the rule of Mohammad 'and the Fatwa is thereon': so in Muzmirat."

(76) The Radd-ul-Muhtar accepts the opinion of Mohammad on the basis of Tashik-ul-Kuduri of Allama Kasim. It explains that the reason for the difference of opinion between Abu Yusuf and Mohammad is that the former holds the Mutwalli to be the representative of the wakif who accordingly has power to discharge him while the latter holds the Mutwalli to be the representative of the beneficiaries so that the wakif has no power to remove him.

(77) At page 426 of Volume I (4th Edition) Ameer Ali quotes the following from the Radd-ul-Muhtar :

"Nor can the wakif who devotes property to any meritorious or pious uses and transfers the proprietary right therein to the Almighty, take it back at the pleasure from the Mutwalli, whom he has constituted God's proxy and give it to another person, unless on the creation of the trust he reserved to himself in express terms the right to do so."

(78) The Dùrr-ul-mukhtar basing itself on Ashbah states: (Text omitted) and it is said therein (Ashbah) that the wakif has absolute power to remove a Mutwalli and Fatwa (decision) is according to this." It, however, adds some notes which greatly detract from the opinion thus expressed.

(79) The first note is based on the opinion of Ibn Abideen Shami and is as follows : (Text omitted):

"(The wakif has absolute power to remove the Mutwalli). Whether the Mutwalli is corrupt or not and whether the Mutwalli has reserved the power of removing him or not. And this is the opinion of Abu Yusuf because according to him the Mutwalli is the representative (vakil) of the wakif and Mohammad's opinion is opposed to this as is stated in the Bahr because according to him the Mutwalli is the representative of the faquirs (the beneficiaries)."

(80) The second note is as follows : (Text omitted):

"(and what is stated in Ashbah as being the decision in respect of the removal of the Mutwalli) is not accepted in "Tajvis" which states that the fatwa (decision) is, according to the opinion of Mohammad that is that if the wakif has not made it a condition that he can remove the Mutwalli then he cannot remove him. And Allama Kasia has also accepted this in "Tasheeh-Quduri" and Ibn Nujim the author (of Ashbah) has so written it in his articles and this matter is a disputed one between the learned — some have accepted the opinion of Abu Yusuf and some of Imam Mohammad and it is also written in "Bairi" that the opinion of the learned differs in this matter. Allama Shami writes that in his opinion the difference is due to the principle that according to Imam Mohammad the property must be delivered to a Mutwalli and accordingly so long as the Mutwalli does not stipulate in the deed that he has power to remove the Mutwalli he does not retain the right to remove the Mutwalli. And according to Abu Yusuf delivery of possession to a Mutwalli is not necessary to validate a wakf and consequently he retains the supervision (vilayat) of the wakf property and can remove the Mutwalli. In this matter the difference between the learned is due to this."

(81) Another note, after detailing the differences of opinion sums up the matter thus :

"And a body of the learned has accepted the opinion of Imam Abu Yusuf and the author of the Fath-ul-Kadeer considers this to be the better opinion but many of the learned have accepted the opinion of Imam Mohammad and the Fatwa is according to that opinion."

(82) In the Hedaya it is stated — vide Hamilton's translation, Volume II, Book XV "Appropriations"—

"If a person appropriates land, with a reserve of his authority, over it, it is lawful, according to Abu Yusuf — one author remarks that Kadooree has expressly declared this. Such also is the opinion of Hillai, and it is indeed, the generally accepted opinion. Hillai mentions it in treating of appropriations. Some doctors allege that if the appropriator particularly stipulates a reservation of authority over the lands, the authority remains to him accordingly; but not unless it be particularly stipulated by him.

Our modern doctors, however, consider it very doubtful whether this be an opinion of Mohammad, because it is a tenet of his that delivery into the hands of a procurator is essential to the validity of an appropriation; and where such delivery takes place, the appropriator can no longer possess any authority over it.

According to the tenets of Aboo Yoosaf, on the other hand, the delivery to a procurator is not essential and consequently the authority remains with the appropriator, although he should not have so stipulated.

What was mentioned above concerning the opinion of Mohammad that "where delivery to the procurator takes place, the appropriator can no longer retain any authority over the appropriation" applies to a case where the appropriator had not stipulated any reservation to himself at the first; for, if he had stipulated this at the time of making the appropriation, his authority is not rendered void by delivery to a procurator; because as his authority continues where he stipulates a right of authority on behalf of author, it follows that, where he stipulates it on behalf of himself, it continues a fortiori—

"The arguments in support of the opinion of Abu Yusuf, (which is the most generally recognised doctrine) are twofold, First the procurator enjoys his authority, only on behalf of the appropriator, in consequence of his reservation: and it is impossible that the appropriator himself should not be possessed of any authority, at the same time but another person enjoys an authority held on his behalf — Secondly, the appropriator stands in a nearer relation to what he appropriates than any other person, and it is consequently proper that he possesses no authority over it; in the same manner as where a person builds a mosque, in which case the business of repairing it, as well as the appointment of all officers etc. appertain solely to him; or as where a person emancipates a slave, in which case the will appertains solely to him as he stands in a nearer relation to the slave than any other person."

(83) Ameer Ali also quotes the following passage from Surrat-ul-Fatwa — vide his Mohammadan Law, 4th Edition, Volume I, page 425 :

"In the chapter on wakf in the Khazanat-ul-Fatwa it is stated the Saheb-ul-Manah (the author of Manat-ul-Ghaffar) was asked about a deed of wakf in which there was a condition to the effect that the vilayat of the trust should appertain only to the wakif's male descendants, but now a deed has been discovered bearing a prior date, in which the tauliat was given to his male as well as his female descendants; the question was which deed should be acted upon. The Saheb-ul-Manah answered if the wakif in the first deed or at the time of the dedication reserved to himself the power of altering any of the provisions regarding the management etc. of the

wakf, in that case the second deed should be acted upon, that is the deed in which the tauliat is restricted to his male lineal descendants. But, if he reserved to himself in the original wakf no such power, in that case the first deed of wakf, viz., which there is no restriction should be acted upon."

(84) In his Principles and Precedents of Mohammadan Law in the Chapter relating to Precedents of Endowments MacNaghten quotes the following passage from the "Khazanat-ool-Mooftian."

"He who makes the appropriation has the patronage of the endowment; after him his executor unless they are excluded by being or becoming profligate in which case they will be deprived of patronage, which will be vested elsewhere; but it will revert to them should they revert to virtue, and if, after having appointed a superintendent, the founder desires to remove him, he is at liberty to do so, and assume the superintendence himself."

(85) A consideration of the original authorities thus reveals a considerable divergence of opinion. Abu Yusuf's opinion was definite and clear and according to him even a Mutwalli to whom possession had been delivered could be removed at the pleasure of the wakif. He would go to the extent of holding that, even if the wakif stipulated that he would have no power to remove the Mutwalli, the stipulation would be void and he would still have the power — see Baillie's Digest of Mohammadan Law, 1865 Edition, p. 592. This is so because according to Abu Yusuf the Mutwalli who enters into office during the lifetime of the wakif is not in reality the Mutwalli (who is the wakif himself) but is only his deputy or agent and his authority terminates with the death of wakif unless it has been expressly provided that it is also to continue afterwards — see Baillie's Digest of Mohammadan Law, 1865 Edition, page 592.

(86) The Radd-ul-Mukhtar clearly brings out the real principle in the passage which I have already quoted. It is that the property is in law vested in the Almighty but since the Almighty himself cannot appoint its superintendent or manager, the deed by which the property is conveyed to the Almighty must be looked to to determine the manager.

(87) Indeed, it being agreed on all hands that once the wakf is complete, the wakif retains no right, title, or interest in the property except such as is reserved by the deed, it would be against the fundamental conception of ownership to allow the wakif still to interfere with the arrangements made in the deed itself for the management of the property. Of course, if the wakif has reserved a right to change the Mutwalli or the scheme of management, he will be acting in accordance with the deed itself in exercising that power.

(88) Further all the authorities refer to the provisions relating to the appointment of a Mutwalli as a condition ('shart') of the wakf and it is distinctly provided that none of the conditions ('shariat') of a wakf, once it is completed, can be altered unless such a power has been reserved. There is no reason why the condition relating to the appointment of a Mutwalli should be treated on a different footing.

(89) Again if the opinion of Abu Yusuf were allowed to prevail, it would permit the wakif to change not only a particular Mutwalli but even the entire scheme of management laid down in the deed constituting the wakf. This would almost certainly affect the wakf itself at least to the extent of substituting the discretion of one person or a set of persons for another and of providing remuneration (Haq-ul-Khidmat) to one person instead of another as has happened in the present case.

(90) Of course if the deed does not provide the rules for the appointment of a Mutwalli nor does it nominate a Mutwalli, some authority must be given the power to nominate him since the owner of the property, the Almighty Himself, cannot do so. In such a case it may reasonably be presumed that the wakif who has gone so far as to deprive himself of the property, in the person best qualified to see that a proper Mutwalli is appointed and he is given the right of doing so. This is not interference with the scheme of wakf or its conditions: it only provides a means of removing a lacuna which does not affect the validity of the deed but fills up a gap. There is nothing in this which conflicts with principle and it may be noticed that the accepted view is that if the Kazi has removed a Mutwalli appointed by the wakif on the ground of misfeasance or misconduct, and appointed another in his place, the wakif no longer possesses the power of removing the Mutwalli.

(91) As has been stated earlier, Abu Yusuf was anxious to encourage persons to create wakfs and, with this end in view, he offered full facilities to wakifs but there is no reason not to accept as binding the opinion of Imam Mohammad based, as it is, on the general principles of the Islamic Law relating to the ownership of the property, particularly when it has been accepted not only by a large body of Jurists thoroughly imbued with the spirit of the Shariat but also by modern commentators who have made a particular study of the subject — vide Ameer Ali's Mohammadan Law, 4th Edition, Volume I, page 453, MacNaghten Principles and Precedents of Mohammadan Law, Chapter X, section 5; Wilson's Anglo-Mohammadan Law, 6th Edition, Notes to section 327 at page 365; and Abdur Rahim's Mohammadan Jurisprudence, page 309.

(92) No doubt the example given in the Fatawai-Alamgiri related to a case in which possession had actually been delivered to a Mutwalli nominated. Nevertheless the authorities to which I have referred — some of them older than the Fatawai Alamgiri — deal with the matter generally as a part of the subject of removal of Mutwallis and make no distinction between the removal of a Mutwalli to whom possession has already been delivered and one who will enter into possession after the death of the wakif.

(93) Further the same reasoning would apply to the Mutwalli nominated in the deed itself as the successor of the first Mutwalli.

(94) The right to appoint a successor by will is the right of the Mutwalli but this right cannot be exercised in disregard of the limitations contained in the deed of wakf. Sohani Begam, as Mutwalli, could, therefore, not disregard those provisions in appointing her successor. In her capacity as wakif too her powers are restricted as has been shown above. She could, therefore, not substitute Khalil Ahmad Khan for her daughter Mehar Nigar Begam.

(95) The older decisions upon which Sir Iqbal Ahmad relied are not really in point. The oldest case upon which reliance was placed was — 'Hidait-un-nissa v. Syed Afzal Hossein', 2 N.W. P.H.C.R. 420 (L). That was a case of a Shia under the law relating to which school the wakif

is functus officio once he has created a wakf — vide Mulla's Mohammadan Law, notes to section 204 at page 191 of 13th Edition. Although the Sunni authorities were discussed they were not applicable and the learned Judges proceeded on the analogy of English law assuming that proprietary possession is transferred to the Mutwalli as in the case of trusts, and that consequently it was in accordance with reason and justice that the wakif should not be permitted to take the endowed property into his possession. This case is thus of no assistance.

(96) 'Gulam Hussain Saib Sayad v. Ali Ajam Tadallah Saib', 4 Mad HCR 44 (M), was also a Shia case. In that case the property was in fact transferred to the ownership of the person nominated as Mutwalli and his heirs and it was directed that he should spend a part of the proceeds on certain charitable objects and keep the rest of the income for himself. In these circumstances it was held that the person designated as Mutwalli could not be removed. This case again is no authority for the proposition advanced by Sir Iqbal Ahmad.

(97) 'Advocate General v. Fatima Sultan Begam' 9 Bom HCR 19 (N) was also a case of a Shia and the remarks of the learned Judges as to the Sunni law were in the nature of obiter dicta.

(98) In 'Mohideen Saib Maghribi v. Ghulam Mahomed Ali', AIR 1916 Mad 116 (O) which was also a Madras case, no question arose as to whether the wakif could remove the Mutwalli without reserving to himself that power in the deed.

(99) The next case to which reference was made was — 'Mt. Nimatul Nissa v. Hafizul Rahman', AIR 1933 Oudh 261 (P) which was decided in 1933. In that case the real question discussed was as to the right of a wakif to alter by a subsequent deed the disposal of the profits of the wakf property for purposes other than those which he had originally designated. He did not remove any Mutwalli nor did he make any directions as to the appointment of a Mutwalli which conflicted with what was contained in the earlier deed. The learned Judges said :

> "even a casual glance at the two deeds is sufficient to show that the latter deed imposes new conditions and introduces new provisions which are in direct contravention of the provisions contained in the earlier deed."

This case again is of no assistance for a decision of the point involved in the present case.

(100) In AIR 1936 Oudh 213 (FB) (A) which was decided in 1936 one of the points raised was the exact point which we are called upon to decide. The learned Judges before whom the case originally came up for hearing noticed that the opinion of the Muslim Jurists on this question was not unanimous and that, on other point there was a conflict of opinion. They accordingly referred four questions for decision by a Full Bench, the second of which was framed as follows :

> "Whether any change in the terms of wakf or in the personnel of the mutwallis can be made by the wakif, where no such power has been reserved by him in the deed of wakf, after the wakf has been completed?"

(101) The judgment of the Full Bench was delivered by Ziaul Hasan J., who discusses this question at pages 217 and 218 of the report. He states it as his opinion that it is settled law that the terms of the deed of wakf cannot be altered after the dedication has been completed. He relies upon Amir Ali and Tayabji as well as — 'Abdul Wahab v. Sughra Begam', AIR 1932 All 248 (Q) for this purpose and concludes :

> "The learned counsel for the parties in fact agree that the terms of a deed of wakf cannot be altered without the wakif having reserved such power to himself. I must, therefore, answer this question in the negative."

(102) Thus, though this case directly decided the question now involved against the appellant's contention, it did so on the basis of the agreement between the counsel and it treated a condition relating to the appointment of a Mutwalli on exactly the same footing as other conditions of the deed. Indeed it did not deal with the question raised except in accordance with general principle. It was because of the doubts entertained by Misra and Chandiramani JJ. with regard to this decision that the present case was referred to a Full Bench.

(103) The next case to be considered is — 'Siddiq Ahmad v. Syed Ahmad', AIR 1945 Cal 418 (R). In that also the exact point raised in the appeal arose for decision. The learned Judges notice the difference of opinion on the subject between the highest authorities and lay down the principle that all that is required of modern courts is to see

> "which of the two opinions, if any, has been accepted by the later commentators who are of recognised authority in India, and if we find that they have consistently adopted one particular view to the exclusion of the other, it would be presumptuous on our part to attempt at this day to decide the point on the basis of original authorities by the application of any general rule of interpretation."

(104) The learned Judges then referred to the views of the Fatawai Alamgiri, the Radd-ul-Muhtar, the Surrat-ul-Fatawa, Baillie's Digest of Mohammadan Law and Wilson's Anglo-Mohammadan Law, without even referring to the authorities which take a contrary view, and after referring to cases to which I have already referred concluded by concurring with the view taken in AIR 1936 Oudh 213 (FB) (A).

(105) There can be no doubt that this authority is one directly in point although the discussion is not as complete as it might be, since authorities in support of the other view do not seem to have been considered. — 'Abdul Sobhan v. Wasin Bhuyia', AIR 1950 Dacca 10 (S) simply followed AIR 1945 Cal 418 (R).

(106) I have also considered the case of — 'Ali Asghar Hasan v. Fariduddin Hasan', AIR 1947 All 261 (T) but with all respect to Misra and Chandiramani JJ., I cannot find anything in this decision which might be said to take a view in the slightest degree at variance with the view taken in AIR 1936 Oudh 213 (FB) (A). The question that raised was whether a wakif who had appointed himself a Mutwalli could resign office and appoint another Mutwalli in his place and the learned Judges held that he could.

(107) Thus of all the cases to which reference has been made only the cases of AIR 1936 Oudh 213 (FB) (A)', AIR 1945 Cal 418 (R); AIR 1950 Dacca 10 (S) support the contention of Sir Iqbal Ahmad and they are all recent cases. Moreover the case of AIR 1950 Dacca 10 (S) does not discuss the matter at all. The learned Judge delivering the principal judgment in the case of AIR 1936 Oudh 213 (A) did not feel it necessary to go into the question in any detail in view of the agreement of the learned counsel for the parties and the discussion in the case of AIR

1945 Cal 418 (R) reveals that the authorities which support the contention of the appellants in the present case were not considered. Nevertheless there are no decisions to the contrary and the support which these cases give strengthen the contention of the respondents, though they would not, if they had stood alone, invite the application of the principle of stare decisis.

(108) The conclusion at which I have accordingly arrived is that it was not open to Sohani Begam to change the Mutwalli whom she had nominated in the deed to succeed herself. The appointment of Mehar Nigar Begam by the deed of wakf must, therefore be deemed to be subsisting and the appointment of Khalil Ahmad Khan by the supplementary deed of wakf is bad in law and cannot take effect. I would accordingly dismiss both these appeals.

(109) Khalil Ahmad applied C. M. An. No. 989 of 1952 for an order directing the Receiver to pay him a sum of Rs. 1265/8/11 alleged to have been spent by him in the performance of certain ceremonies prescribed by the deed of wakf for the Mutwalli. According to the petition itself these ceremonies were performed during the pendency of these appeals, i.e. after it had been held by the lower court that Khalil Ahmad Khan was not the Mutwalli. They were not performed with the sanction of the Court. Indeed the petition makes it clear that the Court had directed the Receiver to perform them. In these circumstances there was no justification for Khalil Ahmad Khan for performing the ceremonies and he is not entitled to be re-imbursed for any money which might have been spent by him on them — a matter upon which we have no evidence before us. C. M. An. No. 989 also, therefore, be dismissed.

AGARWALA J.:

(110) Appeal No. 123 of 1944 is a defendant's appeal arising out of a suit for a declaration to the effect that the plaintiff-respondent was the duly appointed mutwalli of the waqf properties given in schedule A attached to the plaint and was entitled to manage the same. The facts briefly stated are as follows :

(111) One Srimati Sohani Begum, a Sunni Muslim, executed a deed of waqf-alal-aulad on the 22nd March, 1929, in respect of the properties in dispute appointing herself the first mutwalli of the waqf for her lifetime and nominating her daughter Malka Mehar Nigar Begum, plaintiff-respondent no. 1, to be the next mutwalli after her death. The deed provided for certain maintenance allowances to be paid to certain persons. The relations between Sohani Begum and Malka Mehar Nigar Begum deteriorated and on the 29th November 1938, Sohani Begum executed a supplementary deed of waqf by which the nomination of Malka Mehar Nigar Begum as the next mutwalli under the deed of 1929 was cancelled and in her place Khalil Ahmad, son of Ahmadi Begum, another daughter of Sohani Begum was appointed as mutwalli after Sohani Begum's death. The maintenance allowances and the amounts for charities provided for in the original deed of waqf were also substantially altered. Sohani Begum died on the 14th December 1943 and Khalil Ahmad Khan entered into possession of the property as Mutawalli basing his title on the supplementary deed of waqf. Malka Mehar Nigar Begum instituted the suit which has given rise to the present appeal on the 29th January 1944 for the declaration as already mentioned.

(112) Her case was that the supplementary deed of wakf was invalid because Sohani Begum having already exhausted her power of the appointment of mutawalli in the deed of wakf of 1929 and not having retained any power to make alterations in the deed of wakf of 1929 had no right thereafter to alter the succession to the mutawallishiip and also the allowances by way of maintenance and charity which had already been made in the deed of wakf.

(113) The defence in the main was that the supplementary deed of wakf by which the defendant was nominated as the successor of Sohani Begum in the office of mutawalli was valid.

(114) The court below held that the supplementary deed of wakf was invalid and decreed the suit. Against this decree the defendant has come up in appeal to this court.

(115) After the passing of the decree by the court below Malka Mehar Nigar Begum took possession of the property and began to discharge the functions of a mutawalli till her migration to Pakistan along with her son Maqsood Ali Khan on 1st August, 1948. During the pendency of this appeal an application was made for the appointment of a Receiver. Accordingly, a Receiver of the wakf properties was appointed by the late Chief Court. On the 24th of June 1949 the Administration of Evacuee Property U. P. Ordinance No. 1 of 1949 came into force under which all the properties belonging to or vested in evacuees to Pakistan vested in the Custodian. This Ordinance was replaced by the Government of India Ordinance No. 27 of 1949 which in its turn was replaced by Act 31 of 1950.

(116) A preliminary objection has been taken by the learned counsel for the respondents that section 46 of the Administration of Evacuee Property Act, 31 of 1950, bars the hearing of the appeal. Section 46 runs as follows :

"Jurisdiction of civil courts barred in certain matters : Save as otherwise expressly provided in this Act, no civil or revenue courts shall have jurisdiction.

(a) to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property; or

(b) to entertain or adjudicate upon any question whether any person is or is not an intending evacuee; or

(c) to question the legality of any action taken by the Custodian-General or the Custodian under this Act; or

(d) in respect of any matter which the Custodian-General or the Custodian is empowered by or under this Act to determine."

(117) This has to be read with the definition of 'Evacuee Property' and section 11 of the Act, which are as follows :

"S. 2(f) "Evacuee Property" means any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity).

Section 11(1). Where any evacuee property which has vested in the Custodian is property in trust for a public purpose of a religious or charitable nature, the property shall remain vested in the Custodian only until such time as fresh trustees are appointed in the manner provided by law, and pending the appointment of fresh trustees the trust property and the income thereof shall be applied by the Custodian for fulfilling, as far as possible, the purpose of the trust.

Explanation : In this sub-section 'property in trust for a public purpose of a religious or charitable nature' includes a public waqf and the expression 'trustee' includes a mutwalli of such waqf.

(2) In respect of any Wakf-alal-aulad

(a) Where the mutwalli is an evacuee, the property forming the subject-matter of the wakf shall vest in the Custodian subject to the rights of the beneficiaries under the waqf, if any, who are not evacuees :

(b) Where not all the beneficiaries are evacuees, the rights and interests of such of the beneficiaries as are evacuees shall alone vest in the Custodian."

(118) It is urged that as Malka Mehar Nigar Begum plaintiff, is admittedly an evacuee, the question whether she is the mutwalli of the waqf property is to determine whether that property is evacuee property, and therefore clause (a) of section 46 of the Act comes into operation. Further, it is urged that the matter falls under clause (d) of that section also, inasmuch as the Custodian General or the Custodian is empowered by the Act to determine whether a certain property is evacuee property or not, and when the evacuee property consists of wakf-alal-aulad property of which the evacuee is the mutwalli, the Custodian General or Custodian will have to determine whether the evacuee is the mutwalli of such property. It is, therefore, urged that clauses (a) and (d) of sections 46 bar the hearing of the appeal.

(119) There are two answers to this objection:

(120) First, that section 46 does not apply to pending actions. When the Act came into force the present appeal was pending. It is a settled principle of interpretation of a statute that presumably it operates prospectively upon facts which come into existence after the enactment came into force. — 'Bourke v. Nutt', (1894) 1 QB 725 (U). In the absence of an intention to the contrary, a statute does not affect vested rights. — 'Lauri v. Renad', (1892) 3 Ch 402 at p. 421 (V). The right of appeal is a vested right and is not taken away by an enactment unless its retrospective operation is expressly or impliedly provided for. — 'Colonial Sugar Refining Co. v. Irving', (1905) AC 369 (W). It is further well settled that even where a statute affects vested rights, it is not construed so as to affect pending actions, unless the language is express or compellingly implicatory. — 'United Provinces v. Atiqa Begum', AIR 1941 FC 16 (X). I can see nothing in section 46 or any other part of the Act to make it obligatory upon the Court to hold that that section applies to pending actions.

(121) Secondly, the Custodian-General or the Custodian is empowered to determine whether a property is or is not evacuee property under section 7 of the Act, only when a notice has been given as prescribed in that section. There is no other provision in the Act authorising them to determine whether a certain property is evacuee property or not. Admittedly the Custodian has not given any notice as prescribed in S. 7 and consequently he has no jurisdiction to determine whether the property in dispute is or is not evacuee property. It was urged that under the U. P. Ordinance No. 1 of 1949, which in terms was replaced by Government of India Ordinance 27 of 1949, which itself was replaced by the present Act, no notice was necessary to be given and all property which was evacuee property vested in the Custodian automatically, and once such property had vested under Ordinance No. 1 of 1949, it remained vested even under the present Act by virtue of clause (2) of section 8.

But this position also does not help the respondent. It is true that under paragraph 5 of the Ordinance No. 1 of 1949, a property which was evacuee property vested in the Custodian automatically and by virtue of clause (2) of section 8 of the present Act it will be deemed to be evacuee property, declared as such, within the meaning of the Act and shall be deemed to be vested in the Custodian automatically and shall continue to so vest. But in a case of dispute who is to determine whether the property has vested in the Custodian? The Custodian cannot, because the Act does not give him the power to determine such a question. Obviously it is the civil Court which must determine that question. Therefore, in such a case also clauses (a) and (d) cannot bar the jurisdiction of the civil Court. Clause (a) in my opinion does not come into operation when notice under section 7 has not been given because before such notification is given there is no question of any authority deciding whether the property is evacuee property. The civil court in such an event decides merely whether the property can be claimed by a certain person as owner or mutwalli or in any other capacity and not whether it is an 'evacuee property'. The law could not have contemplated that even though the Custodian has acquired no jurisdiction to determine whether a certain property is evacuee property, the civil courts should not entertain suits of title with respect to such property.

(122) I should, not, however, be assumed to assent to the proposition that in a case instituted after the commencement of the Act, even after notice under section 7 of the Act has been published and the Custodian has acquired jurisdiction to decide whether the disputed property is evacuee property, or in other words. whether the evacuee is interested in such property as owner or in any other capacity as mentioned in S. 2(f) read with section 11, still the civil court can decide substantially the same matter as a question of title. If this were allowed, section 46 could always be avoided and rendered nugatory.

(123) On behalf of the appellant it was urged that even if Malka Mehar Nigar Begam was the mutwalli, the waqf property was not evacuee property under the Act. This argument is, however, not tenable.

(124) The Administration of Evacuee Property Act is a special Act and evacuee property has a special meaning. "Evacuee Property" as defined in section 2(f) means any property in which an evacuee has any right or interest (whether personally or as a trustee or as a beneficiary or in any other capacity). The words "or in any capacity" include the capacity of a mutwalli. It is true that a mutwalli is merely a manager of the waqf property and has no vested rights in the property itself. — 'Vidya Varuthi Thirthaswamigal v. Baluswami Ayyar', AIR 1922 PC 123 (Y); — 'Mt. Allah Rakhi v. Shah Mohammad Abdur Rahim', AIR 1934 PC 77 (Z). But as he has a right of management of the property, it cannot be said that he has no 'interest' in the property. This position has been made perfectly clear by the provisions of S. 11 of the Act which deal with public waqfs and waqfs-alal-aulad. The explanation to section 11 shows that in a public waqf the expression 'trustee' includes a mutwalli of such waqf and so also in respect of a waqf-alal-aulad it is clearly provided that the waqf property becomes evacuee property where the mutwalli

thereof is an evacuee. It follows, therefore, that if Malka Mehar Nigar Begum is the Mutwalli of the waqf property in dispute, the waqf property is evacuee property and vests in the Custodian under section 11 of the Act.

(125) It was further urged by learned counsel for the appellant that section 46 cannot affect the jurisdiction of the High Court, though it may affect the jurisdiction of the lower courts and in this connection reliance was placed upon a decision of the Bombay High Court in — 'P. R. Nayak v. Bejan Dadiba Bharucha', AIR 1951 Bom 403 (Z1). There is a fallacy in this argument. Section 46 does not affect the jurisdiction of a High Court to issue a writ under Art. 226 of the Constitution and Nayak's case relied upon by the learned counsel refers to the jurisdiction of the High Court under Art. 226. Powers of the High Court in hearing an appeal from the decision of a lower court are the same as of the lower courts and if a law bars the jurisdiction of the civil courts from entertaining any suit, the High Court's power to decide the appeal is also affected.

(126) This leads us to a consideration of the main point in the appeal as to the validity of the supplementary deed of waqf. It was conceded before us by the learned counsel for the appellant that a wakif has no power to vary or alter the conditions of a duly created wakf in so far as they relate to the beneficiaries. But it was strongly urged that a wakif has full power to vary or alter the order of succession to the office of mutwalli. In the alternative it was conceded that at least in cases in which the nomination of the mutwalli in the deed of waqf is by way of a testamentary bequest, that is to say, in so far as the deed of waqf provides for the nomination of a mutwalli after the wakif's death the provision can be varied or altered by the wakif during his life time in the same manner as he can alter any other testamentary disposition. I am of opinion that where the wakif has appointed a person other than himself as mutwalli of a waqf during his lifetime and has laid down an order of succession to the mutwalli so appointed, the wakif has in fact parted with all the power of the appointment of a mutwalli which he possessed, and cannot therefore cancel, vary or alter the provision. But where in the deed of waqf the wakif has appointed himself as a mutwalli for life and has made a provision for appointment of mutwalli after his death, he can cancel, vary or alter the provision relating to his own appointment, as well as the provision relating to the appointment after his death.

(127) Certain propositions of law are well settled and are beyond dispute.

(128) The term 'waqf' literally means 'detention'. According to Abu Hanifa, it is the detention of a specific thing in the ownership of the wakif or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects". According to the two disciples, Abu Yusuf and Muhammad, wakf signifies the extinction of the appropriator's ownership in the thing dedicated and the detention of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied "for the benefit of mankind". (Baillie, pages 557, 558, Hedaya, 231, 234.) Under the Mussalman Wakf Validating Act, 6 of 1913, Waqf means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable. A waqf 'inter vivos' is completed, according to Abu Yusuf, by a mere declaration of endowment by the owner. According to Muhammad, a waqf is not complete unless, besides a declaration of waqf, a mutwalli is appointed by the owner and possession of the endowed property is delivered to him. Abu Yusuf's view was followed by all the High Courts in India, — 'Doe Dem Jaun Beebee v. Abdollah Barbar', (1833) Fulton 345 (Z2); — 'Ma E Khin v. Maung Sein', AIR 1925 Rang 71 (Z3); — 'Muhammad Ibrahim v. Bibi Mariam', AIR 1929 Pat 410 (Z4); — 'Muhammad Said v. Mt. Sakina Begam,' AIR 1935 Lah 626 (Z5); — 'Zaffar Hussain v. Mahomed Ghiasuddin', AIR 1937 Lah 552 (Z6); — 'Pathu Kutti Umma v. Nedungadi Bank Ltd.', AIR 1937 Mad 731 (Z7); — 'Abdul Rajak v. Jimbabai', 14 Bom LR 295 at pp. 300-301 (Z8); — 'Husseinbhai v. Advocate General of Bombay', AIR 1920 Bom 152 (Z9); — 'AIR 1936 Oudh 213 (FB) (A); — 'Zainab Bi v. Jamalkhan', AIR 1951 Nag 428 (Z10), except the Allahabad High Court, — 'Muhammad Aziz-Ud-din v. Legal Remembrancer to Governmet', 15 All 321 (Z11); — 'Muhammad Yunus v. Muhamad Ishaq', AIR 1921 All 103 (Z12); — 'Muhammad Shafi v. Muhammad Abdul', AIR 1927 All 255 (Z13), but a recent Full Bench decision of that Court, overruling the previous decisions, has adopted Abu Yusuf's view — 'AIR 1947 All 201 (J).

This controversy is, however, immaterial for our purposes. Whether a waqf is complete when the declaration of waqf is made or when a mutwalli is appointed and possession is delivered to him, it is clear that the appointment of a mutwalli may be made either along with the declaration of waqf or subsequently. The right to appoint a mutwalli must naturally vest in the founder of the waqf. He has the power to lay down a scheme for the administration of the waqf and for the succession to the office of mutwalli. He may nominate the successors by name or indicate the class together with their qualifications, from whom the mutwalli may be appointed, and may invest the mutwalli with power to nominate a successor after his death or relinquishment of office, — 'Ghazanfar v. Mt. Ahmadi Bibi', AIR 1930 All 169 (Z14); —'Shah Gulam v. Mahommad Akbar Sahib', (1875) 8 Mad HC 63 (Z15).

If any person appointed as mutwalli dies, or refuses to act in the trust, or is removed by the Court, or if the office of mutwalli otherwise becomes vacant, and there is no provision in the deed of waqf regarding succession to the office, a new mutwalli may be appointed by the founder of the waqf — 'Rugghan v. Mt. Dhanno', AIR 1927 All 257 (Z16); or by his executor, if any. The wakif may appoint himself as the mutwalli of the waqf, or may nominate some one else as mutwalli. He may appoint a mutwalli on his death bed — 'Abdul Razak v. Ali Baksh', AIR 1946 Lah 200 (Z17), AIR 1945 All 544 (?), or by will succeed him. It cannot be disputed that where a mutwalli is appointed on death bed or by will, the appointment can be cancelled — 'Sayed Abdula Edrus v. Sayad Zain Sayad Hasan Edrus', 13 Bom 555 (K). An appointment to take effect after one's own death is testamentary and like any other bequest may be altered at any time — 'AIR 1943 Cal 13 (?)'. In short the wakif has complete power of disposal over the office of Mutwalli.

(129) Disposal of the office of mutwalli may be absolute or limited. It may be 'in presenti' i.e., during the lifetime of the wakif or it may take effect on his death.

(130) Suppose the wakif says "I appoint 'A' as mutwalli of the waqf for my lifetime." Or suppose

he says, "I appoint myself as mutwalli for my lifetime." Here the disposal of the office of mutwalli is only limited in duration i.e., up to the lifetime of the wakif. The wakif or his executor still retains the power of appointment of a mutwalli to take effect after the wakif's death.

(131) Suppose the wakif says "I appoint 'A' as mutwalli of the wakf and on his death, his eldest son shall be the mutwalli and so on for ever". Here the office of mutwalli has been disposed of 'in praesenti' and for ever.

(132) Again, suppose a wakif says, I appoint 'B' to be mutwalli of wakf on my death. Here the appointment of 'B' as mutwalli is an appointment to take effect not 'in praesenti' but on the wakif's death. This is a testamentary disposal of the office of mutwalli.

(133) The distinction between the disposal of the office of mutwalli 'in praesenti' and on the wakif's death must be clearly borne in mind. It is a vital distinction.

(134) Now there is no controversy so far as the revocation of the disposal of the office of the mutwalli after one's death is concerned, if the disposal is by means of a separate document. Such a document is a will which can always be revoked by the testator.

(135) Suppose now that in the very same deed by which the wakf is declared, wakif says, I appoint myself as mutwalli for my lifetime, and I appoint 'B' to be mutwalli on my death. What is the nature of the disposition of the office of mutwalli, which is to take effect on the wakif's death? Can it be anything else than a testamentary disposition of the office of mutwalli? Does it make any difference if this testamentary disposal of the office of mutwalli instead of being embodied in a separate document is embodied in the deed of wakf itself? The nature of a disposition or transfer of property or office has to be judged by its incidents and not by the mere circumstance that it is embodied in a particular document. One document may contain both a transfer 'inter vivos' as well as a testamentary bequest. In such a case the document in truth consists of two distinct kinds of transactions, both of which are governed by separate incidents.

In — 'Chandmal v. Lachhmi Narain', 22 All 162(Z18-19), there was a document which contained provisions which were to take effect during the lifetime of the executrix and also provisions which were to take effect on the executrix's death. Probate was applied for of the document as a will. It was contended that since the document contained provisions which were to take effect during the lifetime of the executrix, it was not a will. The court held that:

> "Such portions of the document as are a declaration of the intentions of the executrix with respect to her property which she desired to be carried into effect after her death amount to a will, notwithstanding that the same document contained other provisions which she desired should be carried into effect during her lifetime".

The court referred to the case of — 'Cross v. Cross', (1846) 8 QB 714 (Z20) where it was held that

> "there was no objection to one part of an instrument operating in presenti as a deed and another in future as a will."

No one questions the proposition that the terms of a declaration of wakf regarding the disposal of the beneficial interest in the property which is the subject-matter of the wakf cannot be altered or cancelled by the wakif unless he has reserved to himself the power to do so in the deed of wakf.

(136) There is certainly a controversy among the jurists as to whether the terms of a deed of wakf relating to the office of mutwalli can be altered or cancelled without a power to that effect being reserved in the deed of wakf. According to Abu Yusuf, since the mutwalli is a 'Deputy' of the wakif his appointment can always be cancelled by the wakif even if he has not expressly reserved that power to himself in the deed of wakf. According to Mohammad, the wakif has no such power, unless he expressly reserves to himself such power in the deed of wakf. But what is of importance is the fact that this controversy between the two disciples is confined to the disposal of the office of mutwalli by the wakif 'in presenti' and not at all to the disposal of the office to take effect on wakif's death. Mohammad never said that a nomination of a mutwalli to take effect after the wakif's death could not be cancelled. There is not a single text to this effect. We are really not concerned with this controversy in the present case, as in our case the question is not at all with regard to the disposal of the office of mutwalli during the wakif's lifetime but on her death.

(137) Let us now look into the original texts to see if the above statement is correct.

(138) The Fatawai Alamgiri (Baillie's translation, p. 602) refers to the controversy between Abu Yusuf and Mohammad.

> "A man having appropriated his estate & delivered up possession of it to the administrator, desires to take it out of his hands. If he made it a condition in the wakf that he should have the power to discharge the administrator and withdraw the wakf from his hands, he may lawfully do so; otherwise he cannot according to Mohummud; but according to Abu Yoosuf he can; the Sheikhs of Bulkh deciding with the latter and those of Bookhara with the former with whom is the Futwa."

It is clear that what is being considered here is the case when the wakif has "delivered up possession to the administrator", i.e., has appointed a mutwalli 'in praesenti' and not a case of an appointment in future on the wakif's death. Indeed the Futwa Alamgiri makes it clear that an appointment of a mutwalli to take effect after the wakif's death can be revoked by him.

> "If he should make no appointment of kuyim or administrator till the approach of death and then appoint an executor, the person appointed would be executor with regard to his property and administrator of his wakf. But if after that he should appoint another executor, the second person would only be executor for the property and not administrator of the wakf. If, however, he should say 'I have revoked every appointment of executor made by me, governance of the wakf would be to the new executor and the former mutwalli or superintendent would be discharged."

The Radd-ul-Muhtar accepts the opinion of Mohammad and explains the reason for the difference between the two views.

> "Abu Yusuf holds the mutwalli to be a deputy (wakif) of the wakif and consequently the wakif has the power at any time to discharge him. According to Mohammad the mutwalli is a deputy of the beneficiaries, and that, therefore, the wakif has the power to discharge him only when he has reserved it expressly at the time of dedication."

The Radd-ul-Muhtar adds (Amir Ali's Mohammadan Law, Vol. I, p. 458) that:

"According to the Tashih-ul-kunuri of Allamah Kasim this is the rule on which decisions are passed."

(139) But Darrul-Muhtar, on the other hand, which is also of equally high authority, accepts the view of Abu Yusuf that the wakif has absolute authority to discharge the mutwalli and the Futwa is thereon, vide Amir Ali's Mohammaddan Law, Vol. II, p. 458.

(140) The Hidaya accepts Abu Yusuf's view and gives reasons for its acceptance, vide Hamilton's translation, Vol. II, Book XV.

"The arguments in support of the opinion of Aboo Yoosuf, (which is the most generally recognised doctrine) are two-fold. First the procurator enjoys his authority, only on behalf of the appropriator, in consequence of his reservation; and it is impossible that the appropriator himself should not be possessed of any authority, at the same time but another person enjoys an authority held on his behalf. Secondly, the appropriator stands in a nearer relation to what he appropriates than any other person, and it is consequently proper that he possesses an authority over it; in the same manner as where a person builds a mosque, in which case the business of repairing it, as well as the appointment of all officers etc., appertains solely to him; or as where a person emancipates a slave, in which case the will appertains solely to him as he stands in a nearer relation to the slave than any other person."

Amir Ali quotes a passage from Surrat-ul-Fatwa as follows:

"In the chapter on wakf in the Khazanat-ul-Fatwa it is stated that the Sahab-ul-Manah (the author of Manat-ul-ghaffar) was asked about a deed of wakf in which there was a condition to the effect that the vilayat of the trust should appertain only to the wakif's male descendants but now a deed has been discovered bearing a prior date, in which the tauliat was given to his male as well as his female descendants; the question was which deed should be acted upon. The Saheb-ul-Manah answered if the wakif in the first deed or at the time of the dedication reserved to himself the power of altering any of the provisions regarding the management etc., of the wakf, in that case the second deed should be acted upon, that is the deed in which the tauliat is restricted to his male lineal descendents. But if he reserved to himself in the original wakf no such power, in that case the first deed of wakf, viz., in which there is no restriction should be acted upon."

(141) Apparently Sahab-ul-manah followed Mohammad's view, but it does not appear that Sahab-ul-manah had in mind the question whether an appointment of a mutwalli to take effect after the wakif's death could be revoked or not. The deeds referred to by him are not clear on the point.

(142) Macnaghten in his 'Principles and Precedents of Mohammadan Law accepts Abu Yusuf's view, where he quotes from "Khazanat-ool-Mooftian":

"If after having appointed a superintendent, the founder desires to remove him, he is at liberty to do so, and assume the superintendence himself."

Thus there is a great divergence of juristic opinion even on the question whether the wakif can revoke the appointment of a mutwalli 'in praesenti'. It will be noticed that in all the authorities quoted above (with the possible exception of Sahab-ul-manah) the question always was of the removal of a mutwalli appointed in praesenti by the wakif.

(143) Certain general observations are also to be found in the text books. Thus in the Asaaf it is stated that "the Wakif cannot go beyond the conditions laid down at the time of the dedication." To the same effect are statements in the text books of modern commentators, e.g., Amir Ali and Tayabji. These general observations cannot possibly refer to provisions of a deed of wakf which are in the nature of a will, because such provisions cannot be considered to be the conditions of the deed which takes effect in praesenti. They have reference to the terms of the wakf relating to the beneficiaries and may be taken to refer even to the terms of a wakf relating to the appointment of a mutwalli in praesenti. To apply them to the provisions of a wakf in the nature of a will is to take away from the wakif a right, which he undoubtedly possesses of revoking a testamentary provision.

Suppose, the deed of wakf contained a testamentary disposition about property other than that comprised in the wakf. Nobody would question that such provisions of the deed could be revoked by the wakif. Again, suppose the deed of wakf contained a provision that the mutwalli shall be the wakif himself for his life and further contained a provision that 'B' shall be the executor of the wakif's non-wakf property. Under the Mohammadan Law 'B' would be the mutwalli of the wakf property after the wakif's death. Can it be denied that the wakif could revoke the provision about the executor & thus, in effect cancel his appointment as mutwalli of the wakf property after the wakif's death? Why should, therefore, the provision of a deed of wakf that 'B' shall be the mutwalli after the wakif's death, which provision obviously is in the nature of a will, be not liable to be revoked by the wakif?

(144) That the term relating to the appointment of a mutwalli after the wakif's death partakes of the scheme relating to the appointment of mutwalli cannot alter the fact that the term is testamentary in its nature and thus revokable. In my judgment, there is no sound reason for holding that such a term cannot be revoked by the wakif.

(145) So far as the text books are concerned, therefore, there was never a question of the removal of a mutwalli to take office after the wakif's death. Even if we accept Mohammad's view, it does not affect the question at issue in the present case.

(146) Several decisions of the Indian Courts were cited before us.

(147) The oldest decision cited before us by Sir Iqbal Ahmad is the case of — '2 N. W. P. H. C. R. 420 (L)'. It was a Shia case and the law applicable was quite different. It is well known that under that law the Wakif is functus officio once he has created a wakf, vide Mulla's Mohammadan Law, section 204, at page 191 of 13th edition. Moreover, in this case it was assumed that the proprietary possession was transferred to the mutwalli and on this basis it was held that the wakif could not take back the endowed property into his own possession. This case can be of no help to the respondents.

(148) '4 Mad H. C. R. 44 (M)', was also a Shia case. Certain lands, choultries, and moveable property had been by instrument in writing given to the brother of the donor and his heirs for the

purpose, in perpetuity, for keeping in repair the choultries and affording strangers the charities of shelter, and, if circumstances permitted food also, as well as for supplying the wants of the donees with clauses restraining alienation by them. Subsequently the donor removed the donees from the possession of the property donated. It was held that in such a case the donees could not be removed from their office of mutwallishiip, unless the power to remove them were reserved at the time of endowment. This was really a case of gift rather than that of a wakf. If it was a case of waqf, the office of mutwalli was given away by the wakif 'in praesenti'. It was not a case of cancellation of the nomination which was to take effect after the wakif's death.

(149) '19 Bom HCR 19 (N)', was also a Shia case and the remarks relating to the principles of Sunni Law were 'obiter dicta'. The attention of the learned Judge in that case was not drawn to the fact that the appointment of mutwalli after one's death was in the nature of a testamentary disposition of the office of mutwalli.

(150) In — 'AIR 1916 Mad 116 (O)', the question now under consideration was not considered at all.

(151) In — 'AIR 1932 All 248 (Q)', the question was of altering the terms of the waqf in connection with the allowances reserved in the wakf for the beneficiaries. It was held that unless power was reserved in the deed of wakf such terms could not be varied. This proposition has not been disputed by any party in the present case.

(152) In — 'AIR 1933 Oudh 261 (P)', the real question for decision was whether a wakif could alter by a subsequent deed the terms of a wakf relating to the disposal of the profits of the wakf property. There was no question of removal of any mutwalli in that case. This case, therefore, is of no assistance to the respondents.

(153) The next case is of importance and it is because of this that the present case has been referred to this Full Bench. In — 'AIR 1936 Oudh 213 (FB) (A)', which was decided in 1936, a wakif had executed a deed of wakf in respect of three shops of which he was in possession as a usufructuary mortgagee. Under this deed, he constituted himself as the first mutwalli. His daughter and daughter-in-law were appointed to be joint mutwallis after his death. A few months later the wakif executed another deed of waqf revoking his first deed and making a wakf of his residential house and five shops including one shop which had formed the subject-matter of the first waqf. Under this deed he constituted his daughter-in-law as sole mutwalli and directed that her daughter was to succeed to her. There was also a change in the interests of the beneficiaries of the wakf. Several questions were raised and two of them were (1) whether the waqf was valid at all as it was in respect of a right of usufructuary mortgage, and (2) whether any change in the terms of the wakf or in the personnel of the mutwallis could be made by the wakif, where no such power had been reserved by him in the deed of wakf after the wakf had been completed.

These questions were referred to a Full Bench. The Full Bench was of opinion that the rights of the usufructuary mortgagee could not be made a waqf of and therefore the waqf was bad and must fail. On the 2nd question the Full Bench held that no such change could be made unless a power had been reserved by the wakif in the deed of wakf. It may be observed that the question of change in the terms of the waqf relating to beneficiaries and the personnel of the mutwalli was considered together as if both parts of the question were governed by the same law. Indeed, as the question was not material for the decision of the case, the counsel for the parties agreed to the answer of the Full Bench on this part of the case. The Full Bench stated that "the learned counsel for the parties in fact agree that the terms of a deed of wakf cannot be altered without the wakif having reserved such power for himself."

(154) Thus in my opinion this case is not of any great assistance to us in deciding the point under consideration.

(155) The next case cited before us is — 'AIR 1945 Cal 418 (R)'. In this case again no distinction was made between the removal of a mutwalli who has been appointed in praesenti and the removal of a mutawalli whose appointment was to take effect after the wakif's death. The distinction was not brought to their Lordships' notice.

(156) The last case cited is — 'AIR 1950 Dacca 10 (S)', which simply follows 'Abdul Wahab's case'. One case on which reliance was placed by both the parties may also be mentioned and that is — 'AIR 1947 All 261 (T)'. In this case it was held that when the wakif had appointed himself as mutwalli for his lifetime, he could resign his office and appoint another mutawalli in his place. This case does help the appellant to some extent, but not much.

(157) Thus none of the cases cited by the learned counsel for the respondents, is of much assistance to us in the decision of the point under consideration.

(158) But this opinion does not conclude the matter in favour of the appellant. In the original deed of wakf the beneficiaries during the life time of the next mutawalli, i. e. Mehar Nigar Begam and during the lives of the subsequent mutwallis were different. In the supplementary deed of wakf by substituting Khalil Ahmad Khan in place of Malka Mehar Nigar Begam, the wakif not only made a change in the office of the mutwalli but also changed the rights of the beneficiaries, at least as regards the period during which they were to enjoy those benefits. The periods of the lives of Malka Mehar Nigar Begam and of Khalil Ahmad Khan could not be one and the same. The terms relating to the beneficiaries are so inextricably woven with the rights of the mutwallis that it is not possible in the present case to separate the term relating to the appointment of the mutwalli after the wakif's death from the term relating to the beneficiaries. Consequently the supplementary deed of wakf must be held to be invalid as a whole.

(159) The appeal, therefore, must fail and I would accordingly dismiss it with costs.

(160) F. A. No. 95 of 1945 arises out of a suit filed by Malka Mehar Nigar Begam after she had established her right in the previous suit claiming a decree for possession over the wakf property and for money wrongfully realised by the defendant during the time he acted as Mutwalli. This suit was also decreed by the Court below and in this appeal also the same questions arise for decision as in apeal No. 123 of 1944. For the same reasons, this appeal must be dismissed with costs.

(161) I agree with the order proposed to be passed by my learned brother Kidwai, J. with regard to Civil Miscellaneous Application No. 989 of 1952.

A/V.S.B. Appeals and application dismissed.

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CHATURVEDI J.

Hansa and others, Appellants v. State.

Criminal Appeal No. 543 of 1951, D/- 13-11-1953, against order of S. J., Bulandshahr, D/- 29-5-51.

Cattle Trespass Act (1871), S. 10 — Right of seizure, extent of.

Under the English Law the position appears to be that the cattle can be seized only while they were actually trespassing and not afterwards. But the codified law in India is slightly different and gives the right of seizure even though the cattle have in the meantime left the field of the complainant and reached the field or grove of the accused (the owner of the cattle), provided notice of trespass was taken immediately and the complainant was pursuing the cattle in order to take them to the pound. In such a case the accused would have no right to forcibly rescue the cattle and cause injuries to the complainant who were taking the cattle to the pound and who resisted the rescue. (Para 9)

(Conviction of accused under Ss. 148, 304 and 323 upheld).

Anno: Cattle Trespass Act, S. 10 N. 3.

S. N. Mulla, for Appellants; A. G. A., for the State.

CASES REFERRED: Paras

(A) (V15) AIR 1928 Lah 692: 30 Cri LJ 627 9
(B) (V21) AIR 1934 Nag 258: 36 Cri LJ 361 9
(C) (V12) AIR 1925 Nag 50: 25 Cri LJ 1004 9
(D) (V34) AIR 1947 Lah 380 9

JUDGMENT: The five appellants before me have all been convicted for the commission of offences under Ss. 148, 304 read with Ss. 149 & 323 read with S. 149 I. P. C. and have been sentenced to one year's R. I., five years R. I. and six months R. I. respectively.

(2) The accused persons as well as Charni deceased and his nephews, Rupa and Mukhtar, resided in village Lachhoi, police station, Jahangirabad, district Bulandshar.

The prosecution story is that on the 31st of May 1950 at about 6 P. M. Sukhpal, son of Amar Singh appellant, let loose his she-buffaloes in the sugarcane field of Charni and his nephews. When Charni and his nephews saw this, they rounded up the she-buffaloes and started with them for the cattle pound. On seeing this Sukhpal went running to his hut and informed the members of his family that the she-buffaloes were being taken to the pound. On hearing this nine persons including the five appellants arrived on the scene armed with lathis and spears and wanted to rescue the cattle. Charni and his nephews resisted the rescue of the cattle and the accused persons on this started beating Charni and his nephews.

On an alarm being raised, a number of villagers arrived on the spot and the accused then left the place. As a result of the beating that were received Charni and one of the nephews, namely, Rupa became unconscious. Subsequently they were both put on a bullock-cart and taken to the police station by Mukhtar, the other nephew of Charni. While they were on their way, Charni died but Rupa subsequently recovered. A first information report of the occurrence was lodged in the police station the same day at 1.10 P. M. and the police station is at a distance of about four miles from village Lachhoi. All the facts given above are narrated in this report and all the nine assailants are also named therein. It cannot be said that there was any delay made in lodging the report because it must have taken some time to arrange for the bullock-cart and then to have travelled a distance of four miles along with the injured persons who were lying on the cart. A period of less than four hours therefore cannot, by any means, be said to be an unduly long period. All the nine persons mentioned in the report were sent up for trial under the Sections mentioned above. The learned Sessions Judge acquitted four of the accused persons, viz. Govinda, Balla, Jodha, Sheoraj and convicted the five appellants and sentenced them as mentioned above.

(3) The defence of Amar Singh appellant was that Hansraj appellant had taken the produce of a grove from Babu zamindar in the year in question. Charni and others did not like this and at 5.30 P. M. on the date of the occurrence while Amar Singh was cutting rizka grass in his field, he heard a noise and went to the mango grove. He found two baskets full of mangoes kept there and some mangoes lying about. Hansraj asked Charni and his companions not to pluck mangoes at which they abused Hansraj. They then attacked Amar Singh and Hansraj, and it was in self-defence that Amar Singh and Hansraj also took up the lathis, which the accused had put on the ground while plucking the mangoes, and tried to defend themselves. Practically to the same effect is the defence of Hansa also.

He merely added that the grove previously formed part of the ancestral holding of Charni and others but the zamindars had dispossessed them from this holding. They therefore did not like the idea of Hansa having purchased the mangoes from the zamindar. They consequently came in the evening and started cutting mangoes and when Hansa asked them not to do so they started beating Hansa and Amar Singh who had reached the place meanwhile. Hansa and Amar Singh also plied their lathis in their self-defence. Hansa also stated that he went to make the report at the police station but the police did not record his report but arrested him instead.

The defence of the other accused was that they had been falsely implicated and were not present at the scene of occurrence. The accused then set up a right of private defence of their person and property and shifted the scene to the mango grove. Besides this plea of self-defence another plea of self-defence also has been taken before me and that is based on the statement of P. W. Murad. In cross-examination this witness stated that Sukhpal was grazing the she-buffaloes in the grove. Then Mukhtar asked Sukhpal to take out the she-buffaloes from the sugar cane field. On this Sukhpal drove them from the field to the grove and Charni, Mukhtar and Rupa then drove the she-buffaloes from the grove.

It has been argued that this statement shows that Charni and others had not seized the cattle while they were in their sugar cane field, but tried to take them to the cattle pound from the grove after the she-buffaloes had left the field and had gone to the grove. Charni had a right to seize the cattle only while they were trespassing their field but had no right to seize them after they had been removed to the mango grove and the appellants had every right to rescue their cattle which had been improperly seized. I

shall consider both these points after dealing with the prosecution evidence on the record.

(4) I might now refer to the nature of the injuries received by the parties in this incident. As already stated, Charni died on the way from the village to the police station in the evening of the 31st of May, 1950. His post mortem examination was held on the 1st of June 1950 at 10-30 A.M. and the medical officer noticed four injuries on his person. Injuries Nos. 1 and 2 were two contusions on the front part of the head towards the right. Injury No. 3 was an abrasion on the left half of forehead. Injury No. 4 was an incised wound on the back of right calf. According to the Civil Surgeon death was due to the shock of the injuries i.e. fracture of the skull bones and compression of the brain.

A private medical practitioner of Jahangirabad examined Rupram on the 1st of June 1950 at 8 in the morning and found two injuries on his person, one was a lacerated wound on the left side of the head and the other was a swelling on the back of the right palm. Both injuries had been caused with some blunt weapon like a lathi and at the time of the examination Rupram was not able to speak. As far as medical evidence goes, only Charni and Rupram were injured, Charni received four injuries and Rupram two. There is oral evidence that Mukhtar Singh also received injuries, but no medical evidence has been produced to prove Mukhtar Singh's injuries. The injuries on the persons of the accused appear to be many in number though none was so serious as the first two head injuries caused to Charni. The medical officer Bulandshahr jail examined the appellants when they were admitted to jail. He examined them on the 1st of June, 1950 at about six in the evening.

On the person of Hansa appellant he noticed six injuries, three of which were contusions, two abrasions and one a swelling. One of the injuries was on the head of Hansa, one on the forehead, two abrasions above the left eye-brow and the left temple, one in the right leg and one in the thumb. Amar Singh appellant had seven injuries, two of which were on the head, one above the eye-brow, one on the left thumb, one on the right elbow, one on the right wrist and one on the shoulder blade. All the injuries of these appellants were simple. Out of the appellants, Hansa and Amar Singh were the only two who received injuries and they received altogether 13 injuries.

(5) In order to prove the prosecution case, the prosecution has produced nine eye-witnesses. (His Lordship reviewed the prosecution evidence and continued).

(6) Coming to the case of the five appellants, Hansa and Amar Singh had admittedly taken part in the fight and the other three appellants had been named by all the prosecution witnesses as having joined in the beating given to Charni and Roopa. The statements of Ganeshi, Sher Singh and Kanchan fully prove the presence of these accused also on the scene of occurrence and also the fact that these three appellants had also joined in giving the beating to Charni and Roopa. The appellants, therefore, would be clearly guilty of the commission of the offence unless there is a reasonable ground to believe that they might have acted in the exercise of their right of private defence.

The defence story that the fight took place over the plucking of mangoes in the grove is not supported by anything in the cross-examinations of the prosecution witnesses and they have all denied that there was any quarrel over the plucking of the mangoes. The defence, however, have produced one witness, namely, Narpat D. W. 2 who has deposed to this fact, but this witness does not appear to be reliable. The witness admits that he has no field towards the side of the grove and he was getting Kekar tree cut from the field of his brother. He was having it cut for his brother. The learned Sessions Judge has not relied on his statement and I agree with him that the statement of his witness is not worthy of belief.

It further appear that no blood was noticed in the sugarcane field, but the investigating officer found blood in the field of Mahesh Mahendra Gir where, according to the prosecution, the fight took place after the cattle had been driven from the sugarcane field of Charni. The presence of blood on this field entirely negatives the defence story.

I, therefore, hold that the fight did not take place in the mango grove over the plucking of the mango but it took place because Charni and others were taking the cattle to the pound which had grazed in the sugarcane field and the appellants and others forcibly rescued their cattle after beating Charni and Roopa.

(7) The next argument of self-defence is based on the statement of Murad Singh, P. W. 6, who stated as follows:

> "Sukhpal was grazing the she-buffaloes first in the grove. Mukhtar had asked Sukhpal to turn out the she-buffaloes from the sugar cane. On this Sukhpal had driven them to the grove. Charni, Mukhtar and Roopa then drove out the she-buffaloes from the grove."

Some of the other witnesses produced on behalf of the prosecution were also put this question, but they denied the fact that Sukhpal had driven the cattle from the sugar cane field, and it is this witness alone who has supported this story.

The learned Sessions Judge has disbelieved this statement on the ground that he had made it in order to help the appellants, but he has given no good reasons in support of his view. It may be that the witness is not telling the truth, but at the same time Murad Singh is a prosecution witness, and he has stated against the appellants that they had taken part in the beating of Charni and Roopa. I am not, therefore, prepared to hold that this statement is false. Even if there is a possibility of its being true, the accused should have the benefit of that doubt. I shall, therefore, proceed to decide the case, as if this part of Murad Singh's statement is true.

(8) The argument of the learned counsel is that the cattle having left the field and gone on to the grove, which was in the possession of the appellants, Charni and others had no more right left to take the cattle to the pound. After hearing the learned counsel, I think this broad proposition cannot be supported as far as the law in India is concerned.

(9) Under the English law the position appears to be clear that the cattle could be seized only while they were actually trespassing and not afterwards. The point is discussed in Salmond's Law of Torts, Tenth Edition, page 197, under the heading "Distress Damage Peasant". But in my opinion the codified law in India is slightly different and gives the right of seizure even though the cattle have in the meantime left the field of the accused, provided notice of trespass was taken immediately and the complainant was

pursuing the cattle in order to take them to the pound.

Section 10 of the Cattle Trespass Act gives a cultivator or occupier of any land a right to seize any cattle "trespassing on such land and doing damage thereto" and to take them to the cattle pound. The right given here is to seize the cattle trespassing on his land and doing damage thereto, but it is not confined to the period when the trespass was continuing. There is no reason to limit the right of seizure to the time of the actual trespass, and it appears to be somewhat unreasonable that if a person sees cattle grazing on his field and attempts to capture them but the cattle escape from the field before he is able to bring them under control he should lose his right of taking them to the pound.

This view is supported by a decision of Lahore High Court in — 'Waryami v. Emperor', AIR 1928 Lah 692 (A) and also by the decision of Nagpur Judicial Commissioner's Court, — 'Jagannath Singh v. Emperor', AIR 1934 Nag 258 (B). It has been held in these cases that the right of capture of the cattle does not extend to following them to their sheds and seizing them there; but if the owner of a field attempts to seize them while actually trespassing, he is within his rights in capturing them before they have definitely made their escape from the spot, even though they were not actually inside the field when captured. A previous Nagpur case — 'Bhagwant Rao v. Champat Rao', AIR 1925 Nag 50 (C) was distinguished on the ground that in that case no notice of the trespass was taken at the time and it was only afterwards that the owner, went to the cattle shed and attempted to take them from there.

The last case brought to my notice is the case of — 'Jiwana v. Emperor', AIR 1947 Lah 380 (D). In this case the cattle were captured after they had traversed a large distance from the damaged field and had reached the land belonging to their owners and were within a very short distance of their sheds. On these facts it was held that the owner of the field had no right to seize the cattle. The learned Judges observed as follows:

> "In order to cover the act of the owner or occupier of a field who pursues a trespassing animal and captures it outside the field which has been damaged, the words "cattle trespassing on such land" have to be given an extended meaning and such an extension must be confined within reasonable limits. I do not think that the words can be stretched to cover the circumstances of the present case. At the most, the act of seizure may be within Section 10, Cattle Trespass Act, if it is effected at a spot within easy reach of the field damaged, but in this case the distance is very great, and moreover the cattle had already come not merely constructively but actually within their owner's possession."

This case also does not help the defence much because, in the present case, even if Murad's statement is true, the cattle had just gone to the adjoining place, i.e., the grove, close to the sugarcane field. Charni and Roopa actually saw the trespass and damage and wanted to seize the cattle and they followed them to the mango grove which was close by. The cattle had not traversed any large distance and the right of seizure, in my opinion, had not come to an end. The appellants had, therefore, no right to forcibly rescue the cattle and cause injuries to Charni and Roopa who resisted the rescue.

(10) It was then urged that the statement of Murad shows that the custody of the cattle had vested in the appellants before they were driven by them from the grove, and Mukhtar at least had submitted to this transfer of custody before he and others decided ultimately to take the cattle to the pound. This further inference drawn by the learned counsel does not, however, appear to be correct. It may be that when Mukhtar saw, along with Charni and Roopa, that the cattle were grazing in their field, he asked Sukhpal to take them away, but at the same time it cannot be inferred from this statement that these three had not immediately followed the cattle with the intention of taking them to the pound.

After a careful reading of the entire prosecution evidence, I have come to the conclusion that, even though Mukhtar may have asked Sukhpal to take away the cattle, he and Roopa had immediately decided, on seeing the cattle in their field, to take them to the pound, and all the three of them immediately went after the cattle and drove them to the cattle pound. Even if the cattle had reached the grove, these three had followed them from the sugarcane field on to the grove and then taken them to the pound. It cannot be said in this case that, after having taken notice of the trespass, they had at any time given up the idea of taking the cattle to the pound or had even delayed their action in the matter. As soon as these three saw that the cattle had grazed the sugarcane crop, they decided to take them to the pound, even though a remonstrance may have been made to Sukhpal and Sukhpal may have removed them to the adjoining grove.

But the sight of the cattle in the field, the remonstrance and the following of the cattle were all one connected action, and at no stage it can be said that Charni and others had submitted to the trespass or omitted to take notice of it. In view of the facts given above, I am of the opinion that Charni, Roopa and Mukhtar had a right to take the cattle to the pound, and the rescue of the cattle by the appellants was wholly unjustified and illegal. They were, therefore, rightly convicted of the commission of the offences under Sections 143, 304 and 323, I.P.C.

(11) As regards the sentence, however, the case has to be decided on the assumption that the cattle were taken away from the grove, which was in the occupation of the appellants, and the appellants then tried to rescue the cattle. Further, the appellants' party received greater number of injuries than the complainants'. The sentence, therefore, passed against them under Sections 304/149, I. P. C. appears to be too severe. I, therefore, reduce the sentence passed against them under Sections 304/149, I. P. C. from five year's R. I. to two years' R. I. each, though their convictions under Sections 148, 304 and 323, I.P.C. are maintained. The sentences passed against them under Sections 148 and 323, I.P.C. are also maintained. But all the sentences passed under the three sections will run concurrently.

(12) All the appellants are on bail. They shall surrender and serve out the rest of the sentences passed upon them.

B/R.G.D. Order accordingly.

A.I.R. 1954 ALLAHABAD 384 (Vol. 41, C.N. 166)

HARISH CHANDRA J.

Laxmi Chand and another, Applicants v. Asa Ram and another, Opposite Party.

Criminal Revn. No. 1872 of 1951, D/- 10-11-1953, against order and Judgment of Addl. Dist. Magistrate, Saharanpur, D/- 17-10-1951.

(a) Criminal P. C. (1898), S. 476 — 'In that Court' — Includes the Court in which suit was instituted.

The words "in that Court" in S. 476 are very general and include the Court in which a suit was instituted although the case was in fact ultimately tried and decided by another Court: AIR 1926 Cal 788, Not foll. (Para 5)

Anno: Cr. P. C., S. 476 N. 5.

1949 Mitra: S. 476, P. 1404, N. 1243 "In..... Court" (3 Pts. extra in N. 5 to S. 476 in A.I.R. Com. — 1 Pt. extra in Mitra).

(b) Criminal P. C. (1898), S. 476 — Long interval between proceedings and complaint based on it — Effect.

The prosecution under S. 210, I. P. C. started by a complaint under S. 476, Criminal P. C. cannot be quashed on the mere ground that the facts upon which it is based relate to something that took place a long time ago. (Para 7)

Anno: Cr. P. C., S. 476 N. 2.

1949 Mitra: S. 476, P. 1416 N. 1252 "Limit..... action" (conflict before the amendment of the Code in 1923 between Madras, Lower Burma and Allahabad on the one hand and Bombay, Calcutta, Lahore, Patna and Sind on the other, not noticed in Mitra — Conflict after the amendment also not brought out).

Brij Lal Gupta, for Applicant, B. S. Darbari No. 1, for Opposite Party.

CASE REFERRED: Para

(A) (V13) AIR 1926 Cal 788: 27 Cri LJ 648 5

ORDER: This is a revision arising out of a complaint which has been instituted against the applicants under section 210 of the Indian Penal Code by order of a Civil Judge of Saharanpur passed on the 1st November, 1947, allowing an appeal from the order of the City Munsif dated the 12th October 1946 on an application made before it praying that a complaint be made against the applicants under section 476 of the Code of Criminal Procedure for their prosecution under S. 210 and other sections of the Indian Penal Code.

(2) There was a revision from the order of the Civil Judge before the High Court and it was dismissed on the 4th March, 1949. Thereafter a complaint was made and is now proceeding before a Magistrate. In the Magistrate's court an objection was taken on behalf of the applicants that the proceedings out of which the application under section 476 of the Code of Criminal Procedure arose had taken place before the Havali Munsif at Saharanpur and that an application under section 476 of the Code of Criminal Procedure did not lie before the City Munsif, Saharanpur, and that, therefore, the Civil Judge of Saharanpur had no jurisdiction to direct that a complaint be made against the applicants for their prosecution under section 210 of the Indian Penal Code. He rejected the objection and the revision to the Sessions Court from the order of the learned Magistrate was dismissed by that court. The applicants have now come in revision to this Court and it is urged that the proceedings that are now going on in the court of the Magistrate are without jurisdiction.

(3) It is also said that a previous application under section 476 of the Code of Criminal Procedure having been dismissed by the Munsif a second application with respect to the same facts did not lie and that the further proceedings arising therefrom were without jurisdiction.

(4) Lastly, it is urged that having regard to the length of time that has elapsed the present proceedings should not be allowed to go on. It would appear that the suit out of which these proceedings arose was instituted as far back as the year 1938 in the court of the City Munsif at Saharanpur. The number of the suit was 228 of 1938.

(5) In regard to the first point it may be mentioned that after the suit had been instituted in the court of the City Munsif at Saharanpur it was transferred to the Additional Munsif for trial. Ultimately it was tried by the Havali Munsif and he decreed it 'ex parte' on the 30th November, 1940. The argument is that as the case was tried and decided by the Havali Munsif, the city Munsif had no jurisdiction to entertain an application under Section 476 of the Code of Criminal Procedure. But the language of section 476 is very wide and according to it a court has jurisdiction to entertain an application under that section with respect to any offence referred to in section 195, sub-section (1), clause (b) or clause (c) of the Code of Criminal Procedure which appears to have been committed in, or in relation to, a proceeding in that court. The words "in that court" are very general & would in my view include in this case the City Munsif of Saharanpur in whose court the suit was instituted although the case was in fact ultimately tried and decided by the Havali Munsif. I am referred to the case of — 'Tarkeswar Mukhopadhya v. Emperor', AIR 1926 Cal 788 (A) in which a contrary view seems to have been taken in relation to a criminal case which was instituted in the court of one Magistrate but was tried by another Magistrate. But having regard to the generality of the language used in section 476 I am not inclined to follow the decision in that case. Moreover, this point could and should have been taken when the revision application was before the High Court and I do not think I can go into that matter now after a lapse of several years from the date on which the revision application was dismissed by the High Court.

(6) In regard to the second point it appears from a perusal of the judgment of the High Court dated the 4th March, 1949, in Civil Revision No. 37 of 1948 that the full facts were before that Court. But this point does not seem to have prevailed with the High Court and I do not think it proper to reconsider it at this stage.

(7) As regards the last contention I do not think that this is the stage at which it can be taken into consideration. The High Court finally upheld the decision of the Civil Judge directing that a complaint be made against the applicants under section 210 of the Indian Penal Code and thereafter the present complaint was instituted in the court of a Magistrate in accordance with those directions and is going on in that Court. There is in my view no provision of law under which I can quash the present proceedings merely on the mere ground that the facts upon which it is based relate to something that took place a long time ago and thus nullify the effect of an order previously passed by this Court on a full consideration of the whole matter.

(8) The application is accordingly dismissed.

B/D.R.R. Application dismissed.

A.I.R. 1954 ALLAHABAD 385 (Vol. 41, C.N. 167)

MALIK C. J. AND V. BHARGAVA J.

Maqsood Ali, Plaintiff-Appellant v. Zahid Ali Sabzposh, Defendant-Respondent.

Second Appeals Nos. 2273, 2274 and 2277 of 1946, Second Appeals Nos. 83 and 84 of 1947 and Second Appeal No. 2612 of 1946, D/- 13-11-1953, against decision of Dist. Judge, Gorakhpur, D/- 20-3-1946.

(a) Accounts — Period of accountability — (Civil P. C. (1908), O. 20, R. 17).

In a suit for accounts, the question as to the period for which the account is to be delivered is a matter in the discretion of the Court. (Para 14)

Anno: C. P. C., O. 20, R. 17 N. 1.

1953 Mulla: O. 20, R. 17 (No commentary in Mulla).

(b) Mahommadan Law — Waqf — Deed of — Interpretation — (Deed — Construction).

Where, according to a waqf deed, the property was to go in equal shares to the male line of each male descendant.

Held that the intention was that the income should descend per stirpes and as each line branches off the share should be divided between the various branches but in the same branch the nearer should exclude the more remote. (Para 16)

(c) Mahommedan Law — Waqf — Waqf-alal-aulad — Beneficiary's right to ask for accounts.

In a 'waqf-alal-aulad' a beneficiary has no right to ask the 'mutwalli' to render accounts to him whenever he likes. He cannot, therefore, claim merely on the refusal of the 'mutwalli' to explain the accounts to him, that he has a cause of action to bring a suit for accounts. But the Court has undoubtedly the power in a proper case to ask the trustee to explain the accounts. (Paras 20 and 22)

(d) Mahommedan Law — Waqf — Mutwalli — Accounts — Non-joinder of parties — (Civil P. C. (1908), O. 1, R. 9) — (Accounts).

In all cases, where the courts want a mutwalli or a trustee to render accounts it is better that all proper parties should be before the Court so that the accounts once rendered may be finally settled between all persons interested in the 'waqf'. It cannot, however, be laid down as a matter of law that there is any legal bar that in cases of this kind a party is not entitled to claim accounts without impleading others. (Para 24)

Anno: C. P. C., O. 1, R. 9 N. 5.

1953 Mulla: O. 1, R. 9, P. 513 N. "Non-joinder of parties."

(e) Civil P. C. (1908), O. 1, R. 9 — Non-joinder of parties.

Where there is a legal requirement that a person should be impleaded as a party the suit can fail on that ground, but where there is no such legal requirement but the absence of a party makes the decree inexecutable or infructuous, the courts may refuse to pass such a decree; but, where there is neither a legal bar nor is there any possibility of the decree becoming inexecutable or infructuous, there is no reason why a suit should be dismissed for non-joinder of parties. AIR 1935 All 110, Foll. (Para 24)

Anno: C. P. C., O. 1, R. 9 N. 5 Pt. 4.

1953 Mulla: O. 1, R. 9 P. 513 N. "Non-joinder of parties."

(f) Civil P. C. (1908), O. 7, R. 7 — Granting of larger relief than claimed.

Plaintiff claiming one-tenth share of income of waqf property — Allegation not admitted by defendant — Plaintiff found entitled to one-fourth share — Decree for one-fourth share held could be given without amendment of plaint. (Para 23)

Anno: C. P. C., O. 7, R. 7 N. 1 Pt. 13.

1953 Mulla: O. 7, R. 7, P. 610, N. "Relief" (12 Pts. extra in N. 1 to O. 7, R. 7 in AIR Com. — Privy Council decisions in ('68) 11 Moo Ind App 463 (474) and ('98) 21 All 53 (69): 25 Ind App 195 not noticed in Mulla).

M. H. Beg, for Appellant; C. S. Saran and K. L. Misra, for Respondent.

CASE REFERRED: Para

(A) (V22) AIR 1935 All 110: 1934 All LJ 1006 24

MALIK C. J.:

These six appeals arise out of three suits and the first three of them have been filed on behalf of the plaintiffs in the three suits and the other three on behalf of the defendant.

(2) Suit No. 566 of 1941 was filed by Syed Maqsood Ali, alias Arif Ali, against Syed Zahid Ali. It was decided by the Additional Civil Judge on the 27th November, 1942, and the District Judge on the 20th of March, 1946. Against the decree of the lower appellate court the plaintiff has filed the Second Appeal No. 2273 of 1946 and the defendant has filed the Second Appeal No. 84 of 1947.

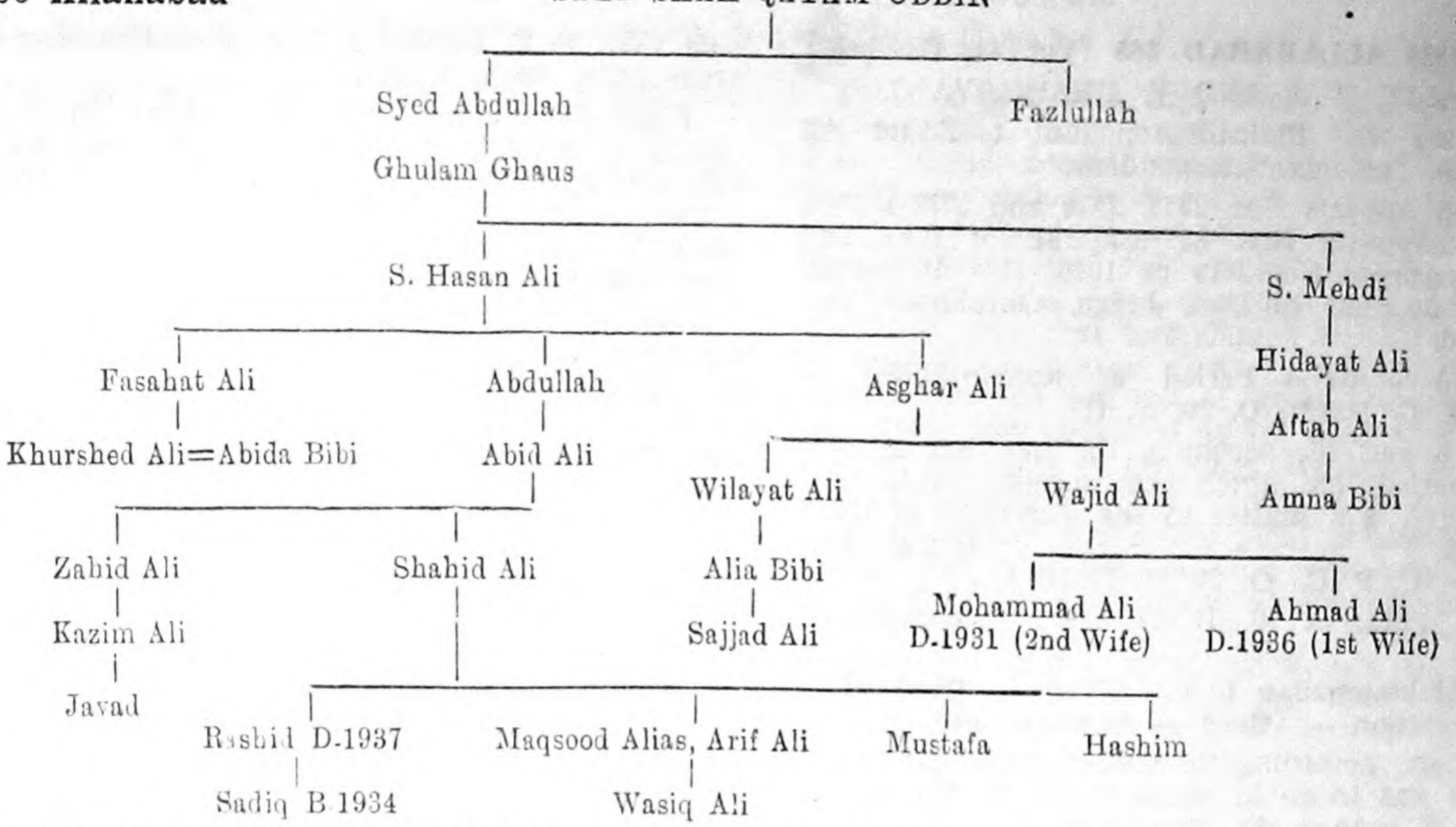
(3) Suit No. 581 of 1941 was filed by Syed Sadiq Ali against the same defendant, Syed Zahid Ali. It was decided by the Additional Civil Judge on the 27th November, 1942, and the District Judge on the 20th of March, 1946. Against the decree of the lower appellate court Second Appeal No. 2274 of 1946 has been filed on behalf of the plaintiff and Second Appeal No. 83 of 1947 on behalf of the defendant.

(4) Second Appeal No. 2277 of 1946 has been filed by the plaintiff Shahid Ali and Second Appeal No. 2612 of 1946 by the defendant Zahid Ali against the decree in Civil Appeal No. 6 of 1943, arising out of Suit No. 483 of 1942. It will probably be convenient to take up all these appeals together and dispose them of by one judgment. To explain the facts of the case it will be necessary to give the relevant portion of the pedigree of the family of Syed Shah Qayam Uddin.

(See Pedigree Table on page 386)

Amna Bibi, wife of Wajid Ali, executed two deeds of 'waqf', the first dated the 10th of December, 1920 and the second dated the 22nd of December, 1920. Under these deeds she purported to make a 'waqf' of her entire property. The 'mutwalli' appointed under these documents was Syed Zahid Ali and the beneficiaries were to be first her son Mohammad Ali and his descendants and failing them the descendants of Syed Qayam Uddin. As to who the beneficiaries are and what are their shares is a point in dispute. We will deal with this point in greater detail when we come to determine the shares of the plaintiffs.

(5) On the 2nd of December, 1921, Abida Bibi, widow of Khurshed Ali, made a waqf of her property. She again appointed Syed Zahid Ali as the mutwalli and she named the beneficiaries. So no question arises as to who the beneficiaries under this deed were. There was a fourth waqf created by Wajib Ali, husband of Amna Bibi, on



the 8th of December, 1921. He too appointed Zahid Ali as 'mutwalli' and made certain specified persons the beneficiaries under the 'waqf.' A fifth 'waqf' was created by Zahid Ali himself on the 16th of February, 1931, under which he appointed himself as the 'mutwalli'. The other 'waqfs' were created on the 20th of August, 1922, by Syed Shahid Ali, brother of Zahid Ali.

(6) It is not necessary to deal with the last two mentioned 'waqfs' of the 20th of August, 1922, executed by Syed Shahid Ali as the suit filed on the basis thereof, No. 535 of 1942, giving rise to Second Appeal No. 2061 of 1946, on behalf of the plaintiff, was disposed of by us yesterday.

(7) A large number of points were raised in the lower Court with the result that the hearing of the suits was delayed for a long period and the cases have been pending in this Court also for a number of years. We have, however, asked counsel to confine themselves to the points that they wanted to raise before us and we shall, therefore, deal with only such points as have been raised and with no others.

(8) In Suit No. 566 of 1941, out of which the two Second Appeals Nos. 2273 of 1946 and 84 of 1947 arise — one by the plaintiff and the other by the defendant — the court was concerned with four waqfs, the first two by Amna Bibi, the third by Abida Bibi and the fourth by Wajib Ali. So far as Amna Bibi's waqf deeds were concerned, only two points were raised on behalf of the plaintiff appellant: firstly, what was the share of the plaintiff Maqsood Ali, and, secondly, what was the period for which the defendant must render accounts. On behalf of the defendant it was urged in second appeal that on a correct interpretation of the deeds Maqsood Ali was not entitled to any share. The question of the period of accountability was also raised. While the plaintiff claimed that he was entitled to accounts from 1920, the defendant urged that the plaintiff was entitled to claim accounts only from 1938, after the death of Wajid Ali.

A third point was also raised that Maqsood Ali was not entitled to file a suit and, in any case, in view of the terms of the 'waqf' deeds the plaintiff had no right to claim accounts. In Abida Bibi's 'waqf', i.e. the third 'waqf', the points raised were again whether the plaintiff was entitled to claim accounts. If there was a clause in the waqf deed taking away such a right, was such a clause void and should the court direct the accounts to be taken in spite of the provision in the waqf deed that the mutwalli will not be accountable to the beneficiaries? The period for which the accounts were to be taken was the other point raised and the contentions were the same as have been indicated above.

(9) As regards Wajid Ali's 'waqf' deed, the lower courts have held that the defendant was liable to render accounts. In the appeal relating to this 'waqf' the plaintiff claimed that the accounts were to be rendered from the beginning while the defendant's contention was that the terms of the 'waqf' deed take away the right of the beneficiaries, if they had any, to claim accounts and, secondly, that the defendant should not be called upon to render accounts before October, 1938, when on Wajid Ali's death he came into effective possession of the property.

(10) In the two Second Appeals arising out of suit No. 581 of 1941, which were based on the 'waqf' deeds executed by Abida Bibi and Wajid Ali exactly similar points were raised.

(11) In the two Second Appeals arising out of suit No. 483 of 1942 three 'waqf' deeds were involved, the first two being by Amna Bibi and a third by Zahid Ali dated 16th February, 1931. In these appeals also the question of the interpretation of Amna Bibi's 'waqfs' to determine who were the beneficiaries and what were their shares was raised. It was also contended that the defendant was not liable to account in view of the provisions contained in the waqf deeds that the beneficiaries were not entitled to claim accounts.

And, lastly, the question of the period of accountability was in dispute as in the other appeals. So far as the waqf deed executed by Zahid Ali is concerned, the point raised by the plaintiff in second appeal was that he was entitled to the whole of the income and not half as given to him by the lower court. Pleas were also taken as to the period of accountability and the pleas were exactly similar to the pleas already mentioned. Two more points were raised by the defendant in his appeal: (1) that Shahid Ali had filed the suit for only one-fourth share of the profits and the lower Court had wrongly given him a one-fourth share; and (2) that the suit was defective by reason of non-joinder of parties and it must fail on that ground.

(12) Taking up first the question of the period of accountability, which is the same in all the

six second appeals, the issue can be easily disposed of. No doubt in all the five deeds of 'waqf' Zahid Ali was the 'mutwalli' under the documents but on the evidence on the record the lower courts have come to the conclusion that there had been a practice in the family for the eldest member of the family to remain in possession of the entire property and, probably to prevent the property in the name of the female members of the family being divided and going out of the family, 'waqf' deeds were got executed and Zahid Ali who was a prominent member of the family was appointed mutwalli though the person in actual possession of the property was Wilayat Ali who was the head and the eldest member of the family. So long as he was alive he was in possession and on his death Wajid Ali became the head of the family and got possession of the property.

They have also found that the property was managed by the managers Azhar and his son Shakur up to the year 1931, so that up to the year 1931 the man in actual management of the property was the manager Shakur or Azhar and the person from whom the manager obtained orders was the head of the family Wilayat Ali and then Wajid Ali. In the year 1931 Azhar was dismissed for mismanagement and misappropriation and since then Zahid Ali was put in charge. The plaintiff wanted to make Zahid Ali responsible (as has been pointed out by the lower court) merely on account of his position as official mutwalli even in spite of the admission that Shakur and Azhar managed the estate under the supervision of the head of the family and Azhar was dismissed as a result of mismanagement. In another part of the judgment the learned Judge after having carefully considered the point said that

> "at least upto the time that Mohammad Azhar remained in charge, Zahid Ali himself had nothing to do with the management of the estate beyond routine signatures on formal day to day documents and that such part of the management as required consultation between the 'de facto' managers and the person who carried out the instituted policy of the family was done over the head of any 'mutwalli' i.e. even including the plaintiff appellant himself and taken direct to the head of the family."

(13) In Suit No. 535 of 1942, as we have already held yesterday in second appeal 2061 of 1946 there was a compromise fixing the liability for account from the date of dismissal of Azhar in October, 1931. The lower appellate Court has found that in all these suits that should be the date from which the accounts should be taken as Zahid Ali was not responsible for either the management of the property or for the accounts so long as Azhar was the manager on behalf of Wajid Ali and was in charge of the property. On the finding that before October, 1931 Zahid Ali was not managing the property, and by consent of all the members of the family the head of the family was the manager and the actual work of management was done by an agent Azhar, the lower courts rightly fixed the liability for account from October, 1931.

(14) The question as to the period for which the account is to be delivered is a matter in the discretion of the court and, in the peculiar circumstances of the case, there is no reason to modify or go beyond the decree of the lower court and make Zahid Ali accountable for the period prior to October, 1931 merely because he was the nominal 'mutwalli' of the property. We are, therefore, of the opinion that the lower appellate court exercised its discretion rightly in fixing the period of accountability in all these suits from October, 1931.

Some attempt was made by learned counsel for the defendant to show that the lower court had in these suits fixed the period of accountability from 1938, the date of death of Wajid Ali. We have carefully read the judgment with learned counsel and in our opinion that dispute really related to the period before the dismissal of Azhar and it was not even contended before the lower appellate court that Zahid Ali who was the 'mutwalli' and who was put in actual possession of the property on the dismissal of Azhar, was not accountable from the date when he obtained such possession i.e. October, 1931.

(15) We, therefore, uphold the finding of the lower Court that Zahid Ali is accountable from October, 1931.

(16) The next question for consideration is the interpretation of the waqf deeds executed by Amna Bibi to determine who are the beneficiaries under that document. From the pedigree it would appear that Amna Bibi had a son Mohammad Ali. The first part of the 'waqf' deed setting out the purpose for which the 'wakf' deed was executed has been translated as follows:

> "as well as for the maintenance of my son Saiyid Mohammad Ali, son of Saiyid Wajid Ali, his male lineal descendants and the male lineal descendants of such male descendants, until the line of such descendants survives and also provision of subsistence to the grand-children (descendants from sons and daughters) and members of the family of the 'Mutwallis'; in case no such male descendant is left, then the right of benefit would revert in equal shares to the male line of each male lineal descendant of Mir Saiyid Shah Qayamuddin and in case there is no such male descendant surviving, the right of benefit would devolve upon the female descendants of Mir Saiyid Shah Qayamuddin and eventually it would go to the poor and the destitute, belonging to the Sunni Hanafi sect."

The only other portion of the 'waqf' deed which may be read in this connection is paragraph 4, the relevant portion of which is as follows:

> "It shall be incumbent upon Saiyid Zahid Ali and other subsequent 'Mutwallis' to continue to pay (provide for) Saiyid Mohammad Ali, son of Saiyid Wajid Ali, his male descendants and the male lineal descendants of such male lineal descendants regularly, generation after generation, until such generation survives, out of the balance of the income and the profits of the waqf property, left after deducting all proper and necessary expenses, the Government dues, taxes etc. and meeting the expenditure mentioned in para. 7 of this deed, and after such male lineal descendants have become extinct, such persons shall become beneficiaries, as are mentioned in the above heading (which obviously refers to the portion already quoted)".

Mohammad Ali died in 1931 and it is admitted that he had no male or female descendants. That portion of the direction, therefore, that

> "if there were no descendants of Mohammad Ali the property was to go to the descendants of Mir Saiyid Shah Qayamuddin"

came into operation. The question for decision is whether the document should be interpreted to mean that on the death of Mohammad Ali in the year 1931 all the male descendants of Shah Qayamuddin, whether remote or near, should get

the income of the property in equal shares or should descend per stirpes and should go to the nearest descendant in each line. A third interpretation has been put forward on behalf of the defendant that the income should descend per stirpes and go to the nearest heir in that line but everyone entitled to the property on the date of death of Mohammad Ali should get any equal share.

We have carefully considered the three suggestions and we agree with the view taken by the lower court that the income should descend per stirpes and as each line branches off the share should be divided between the various branches but in the same branch the nearer should exclude the more remote. Working it out it would appear that no question of division upto Hasan Ali arises. From Hasan Ali the descendants may be taken to branch off into two lines the line of Abdullah and the line of Asghar Ali. Abdullah, if he had been alive would therefore, have got a half interest in the income and Asghar Ali the other half.

Asghar Ali had two sons, Wilayat Ali and Wajid Ali, but Wilayat Ali had no male descendant and died before Mohammad Ali. So the whole of Asghar Ali's interest would be in the line of Wajid Ali who died in 1938. It would now probably go to Sajjad Ali who is the only representative in that line from this pedigree. We are expressing, however, no opinion on this point as Sajjad Ali is not a party to these proceedings. So far as Abdullah's half share is concerned, it would be divided into one-half each, i.e. Zahid Ali getting one-fourth and Shahid Ali one-fourth, and Zahid Ali would exclude his son and grandson and Shahid Ali would exclude his sons and grandsons.

(17) Great stress has been laid by learned counsel for the plaintiffs-appellants on various books of Mohammedan Law that when the first and the second generations alone are mentioned then the property is divisible between the members of the first and second generations in equal shares. If, on the other hand, the first three generations are mentioned, i.e. if the word 'walad' is repeated three times then it means the descendants. We are not concerned with these peculiar rules of interpretation of Mohammadan Law as they do not arise in this case.

The other passages relied upon by learned counsel relate to the discussion whether if a man makes a waqf and leaves the property to his sons and nephews and grand-nephews etc. are they all to get the property in equal shares or the nearer should exclude the more remote. All these rules of interpretation are not really helpful as the words used in the waqf deed in question are not the same as the words that those learned authors were called upon to interpret. We have to find out what the words in the 'waqf' deed "the property is to go in equal shares to the male line of each male descendant" mean. The Urdu words are:

> "Aulad Zakoor ke silsile aulad zakoor men bahissa masawi rujoo hojaiga."

The interpretation will turn on the meaning of the words "Aulad zakoor ke silsile aulad zakoor men". It is urged that 'Silsile' is equivalent to the word 'Nasal' and means the same thing. So far as we can see and have been able to find out from Urdu dictionaries silsile does not have the same meaning as the word 'nasal'. It conveys, to our minds, a system, i.e., one after another; one immediately following the other. The way the words were repeated "aulad zakoor ke silsile aulad zakoor men" the intention of the 'waqif', to our minds, was clear that the income should descend in the various lines and it should go in a certain order and that order must obviously be that the nearer in the same line would exclude the more distant. Working on this interpretation the only conclusion that can be arrived at is the conclusion arrived by the lower Court.

(18) On behalf of the defendant the argument was advanced that Wajid Ali was entitled to a one-third and Zahid Ali and Shahid Ali to one-third each. The learned Civil Judge repelled this contention and the lower appellate court has noted that the argument was not seriously pressed. We have heard learned counsel and we do not see how, if it is conceded that the intention of the 'waqif' was that the descendants are to be traced in the line from the common ancestor, then having traced the line through Hasan Ali and then to Abdullah and Asghar Ali, it is possible to overlook the fact that while in one line there are two descendants, in the other there is only one and divide the property in equal shares between all the three.

We are satisfied that the decision on this point of the lower court was correct and Zahid Ali and Shahid Ali were entitled to one-fourth each while Wajid Ali was entitled to the remaining half. In this view Maqsood Ali had no interest as a beneficiary in the 'waqf' deeds executed by Amna Bibi, in the lifetime of his father, Syed Shahid Ali, and his claim in Suit No. 566 of 1941 for accounts and his share of the profits in respect of these two deeds must, therefore, fail. This point evidently was overlooked by the lower appellate court and the decrees in Second Appeals Nos. 2273 of 1946 and 84 of 1947 will have to be modified to this extent that it should be made clear that Maqsood Ali's claim for accounts and his share of the profits in the income of the property made 'waqf' of by Amna Bibi under the 'waqf' deeds dated the 10th and 22nd of December, 1920, must fail and is dismissed.

(19) In suit No. 483 of 1942 Syed Shahid Ali had claimed that he was the sole beneficiary under the 'waqf' deed executed by Syed Zahid Ali on the 16th of February, 1931. The 'waqf' deed has been read and carefully considered by us and we fail to see how such an argument can be advanced. The beneficiaries mentioned are as follows:

> "The own brother of the 'waqif', i.e. Syed Shahid Ali, and his male descendants; failing such his female descendants and the 'waqif' himself and his male descendants and failing them his female descendants."

The trial court held that Syed Shahid Ali was entitled to a half share and not to the whole claimed by him. This decision was dated the 27th November, 1942. Shahid Ali filed an appeal against this decree which was numbered as Civil Appeal No. 798 of 1942. The decision of the trial court on the point was affirmed by the learned Judge but the plaintiff has filed no further appeal. So the decree passed in Civil Appeal No. 798 of 1942 has become final. Against the portion of the trial court's decree that was against him Zahid Ali filed a Civil Appeal No. 6 of 1943. The two Second Appeals. No. 2612 of 1946, on behalf of the defendant, Zahid Ali, and No. 2277 of 1946, on behalf of the plaintiff Shahid Ali, are against the same decree in Civil Appeal No. 6 of 1943. The result, therefore, is that the decision in Civil Appeal No. 798 of 1942 having become final it is not open to Syed Shahid Ali now to claim that the shares were wrongly determined by the trial court and the lower appellate court.

(20) The next question which arises in these appeals is the question of the accountability of the defendant. The lower appellate court has held that as there is a provision to the contrary in the 'waqf' deeds executed by Abida Bibi on the 2nd of December, 1921, and Zahid Ali on the 16th of February, 1931, the plaintiffs cannot claim accounts from the 'mutwalli' of the income of the property covered by these 'waqf' deeds. It has been urged by learned counsel for the plaintiffs that this view of the lower courts was wrong. The argument has been advanced that a trustee must be held accountable to the beneficiaries and that any provision in the deeds that the trustees are not so accountable must be held to be void. It has been further urged that any such clause in the documents does not bar the jurisdiction of the Court to direct the trustees to furnish accounts.

The basis of the argument is that, if the beneficiaries are held to be not entitled to claim accounts from the 'mutwalli', the mutwalli will give to them only what he pleases and they will not be in a position to know whether he was giving them their proper share. Some attempt was made to refer us to decisions relating to trustees in England but the position there is entirely different. There has been legislation governing the rights of beneficiaries to claim accounts from trustees. The cases, therefore, cited from England are not of much assistance. Learned counsel has admitted that there is no direct authority on the point but he had urged that from the position of a mutwalli, which is more or less that of a manager it must be assumed that a beneficiary is entitled to claim accounts from him.

As the lower courts have pointed out, 'waqf alal aulad' must be placed on a slightly different footing from public trusts and, while a beneficiary may be entitled to claim his share, there is no reason why he should be given a right to claim general accounts from a 'mutwalli' whenever he pleases. The lower appellate court has pointed out that the 'mutwalli' generally appointed in such 'waqfs' is the head of the family in whom the 'waqif' has trust and these 'waqfs', more often than not, are executed to defeat the rule against perpetuities and to tie up the property for the benefit of the family. It is always open to a beneficiary to claim his share of what he considers to be his share of the income and in such cases it would be for the 'mutwalli' to satisfy the court that the claim made against him is excessive and he is not entitled to pay to the plaintiff what the plaintiff has claimed.

But a suit for accounts is not exactly the same as a suit for a share of the income. In a suit for accounts the 'mutwalli' will have to explain accounts and support it by vouchers and proper account books. As a matter of fact, a relief for rendition of accounts was a special relief invented by the Courts of Equity for special type of cases and it would be hardly desirable that every beneficiary should have the right, without alleging that the 'mutwalli' had been guilty of mismanagement, to claim rendition of accounts and bring a suit for accounts and make the 'mutwalli' explain accounts to him from the beginning. Learned counsel was not able to satisfy us that in a 'waqf alal aulad' a beneficiary has a right to ask the 'mutwalli' to render accounts to him whenever he likes. He cannot, therefore, claim merely on the refusal of the 'mutwalli' to explain the accounts to him, that he has a cause of action to bring a suit for accounts.

If the plaintiffs wanted that the defendant should be made to render accounts to the court a proper suit on proper allegations should have been filed so that the accounts could be gone into and settled once for all between the beneficiaries and the 'mutwalli'. In each suit one of the beneficiaries has come forward as plaintiff and filed the suit against the 'mutwalli', without impleading the other beneficiaries as defendants with the result that it would be open, even after the decision of these suits for the other beneficiaries, if it is held that every beneficiary can, of right, bring a suit for accounts, to file separate suits for accounts.

The position of a mutwalli will in such a case become almost intolerable. The relief for accounts as we have already said, is a discretionary relief and the courts would take care to see that it is only in a proper case where all the parties are before the court and accounts can be gone into fully and effectively that such a relief is granted so that the person who is liable to render accounts may not be harassed by unnecessary litigation. It must have been with that intention that the waqifs put in a clause in these two deeds that no person will be entitled to demand rendition of accounts.

In Abida Bibi's 'waqf' deed the words are in general i.e. that no person shall have the right to claim rendition of accounts while in Zahid Ali's 'waqf' deed the words are that no beneficiary will be entitled to claim accounts from the 'mutwalli'. Both, however, more or less mean the same thing. The word 'person' to our minds is wide enough to include a beneficiary also. We have, therefore, no reason to differ from the conclusion arrived at by the lower court that the plaintiffs have no right to claim accounts from the mutwalli of the income of the property covered by the 'waqf' deeds of Abida Bibi and Zahid Ali.

(21) The position is slightly different in Amna Bibi's two 'waqf' deeds dated 10th of December and 22nd of December, 1920, and in the 'waqf' deed of Wajid Ali dated 8th of December, 1921. In the two deeds of Amna Bibi there is a provision relating to accounts. In paragraph 4 the words in Urdu are "Kisi shakhs ghair ko" which has at one place been translated as "no other person" while at another place as 'no stranger'. We think that the latter translation is more correct and, reading the whole paragraph 4 of the 'waqf' deed of Amna Bibi as also the paragraph relating to this matter in the 'waqf' deed of Wajid Ali, it is clear that the 'waqifs' intended that no stranger should be entitled to claim accounts.

The list of the beneficiaries would go to show that not only the members of the family but failing them the poor and others were also to be benefited. The idea was that so far as the persons who were strangers to the family were concerned, they should not be entitled to claim accounts. We, therefore, agree on this point also with the decision arrived at by the lower court. The general question, whether a proper case had been made out for accounts to be taken of the income of the waqf properties executed by Amna Bibi and Wajid Ali was not raised in the lower courts nor in this Court. So we need not express any opinion on the point.

(22) At the time when the suits were filed, a suit for accounts could be valued at an arbitrary figure and a fixed court-fee had to be paid while in a suit for the plaintiffs' share of the income 'ad valorem' court-fee had to be paid on the amount claimed. It was for the purpose of avoiding payment of proper court-fees that the relief claimed in all these suits was a relief merely for

accounts and for payment of amount found due after accounting. The plaintiffs deliberately avoided claiming the proper relief that a decree should be passed for what they considered was the amount due to them, leaving it to the defendant to satisfy the court that the amount claimed was excessive. However, as we have already said, no objection having been taken in these suits as regards waqf deeds of Amna Bibi and Wajid Ali that all the parties not being before the court the accounts should not be asked to be rendered, it need not now be considered.

We, therefore, affirm the decision of the lower appellate court that the defendant is not liable to account for the income from the 'waqf' property covered by the 'waqf' deeds of Abida Bibi dated the 2nd of December, 1921, and Zahid Ali dated the 16th of February, 1931. We may here make it clear that, though a beneficiary may not have a legal right, whenever, he chooses, to claim a decree for accounts, the court has undoubtedly the power in a proper case to ask the trustee to explain the accounts. But, as we have already said, no reason has been made out why the court should ask the trustee to render accounts of the income of the property included in the 'waqf' deeds of Abida Bibi and Zahid Ali.

(23) Two other points remain. In Suit No. 483 of 1942, Shahid Ali claimed that he was entitled to a one-tenth share of the income of the 'waqf' property in the two waqf deeds executed by Amna Bibi. According to the allegations in paragraph 4 of the plaint there were eight lineal descendants of Shah Qayamuddin on the date of the death of Mohammad Ali but on the date of the suit there were ten such heirs and he claimed that he was entitled to a one-tenth share. The fact that there were eight male lineal descendants on the date of the death of Mohammad Ali and ten on the date of suit was admitted by the defendant but the defendant did not admit that Shahid Ali had a one-tenth share. The lower courts took the view that on a correct interpretation of the waqf deeds Shahid Ali had a one-fourth share and not a one-tenth share. The reason why he claimed a one-tenth share is not difficult to see. He had four sons while the other members of the family had only one son each.

If his interpretation had been accepted then between him and his four sons he would have got either a half share or five-eighths share of the entire income. Learned counsel for the defendant has urged that the plaintiff having alleged that he had a one-tenth share in the income the lower courts erred in giving him a decree for a one-fourth share. The relief claimed, however, to avoid valuing the suit properly and paying the proper court-fee, was for rendition of accounts and for payment of such amount as was found due after accounting. Hence the relief was so worded that it cannot be said that the relief claimed was for only a one-tenth share of the income. The issues framed by the trial court were :

"(1) Is the plaintiff Shahid Ali entitled to any share in the income of the properties in the deeds of waqf in suit?

(2) If so, to what share is he entitled?"

If the allegations in the plaint had been admitted by the defendant, the parties having agreed, it would not be open to the Court, without having the pleadings amended, to give the plaintiff a decree for more than one-tenth. Here, however, the allegation in the plaint was not admitted. The issue was in general terms and the court, on an interpretation of the 'waqf' deed, came to the conclusion that Shahid Ali had a one-fourth share. Neither the valuation of the suit nor the amount payable as court-fee would need any change to grant the plaintiff a decree for a larger share. In the circumstances we feel that to bind the plaintiff down to a one-tenth share when, on a correct interpretation of the 'waqf' deed, he is entitled to a one-fourth share will not be just.

(24) Learned counsel for the defendant has, however, rightly pointed out that there was a non-joinder of parties. As we have already said, in all cases, where the courts want a mutwalli or a trustee to render accounts and in this case the accounts have to be rendered from October, 1931, it is better that all proper parties should be before the court so that the accounts once rendered may be finally settled between all persons interested in the 'waqf'. It cannot, however, be laid down as a matter of law that there is any legal bar that in cases of this kind a party is not entitled to claim accounts without impleading others. Reliance has been placed by learned counsel for the appellant on a decision of this Court in — 'Mt. Zabaishi Begam v. Nazir Uddin Khan', AIR 1935 All 110 (A).

We have gone through that judgment and we agree, with respect, with the observations made by the learned Judges that, where there is a legal requirement that a person should be impleaded as a party the suit can fail on that ground, but where there is no such legal requirement but the absence of a party makes the decree inexecutable or infructuous, the courts may refuse to pass such a decree; but, where there is neither a legal bar nor is there any possibility of the decree becoming inexecutable or infructuous, there is no reason why a suit should be dismissed for non-joinder of parties. Reference may be made in this connection to order I, Rule 13 of the Code of Civil Procedure that no suit shall fail for non-joinder or misjoinder of parties.

The other beneficiaries were proper parties who might well have been impleaded by the plaintiff or added as defendants by the court, but it cannot be said that no decree can be passed in plaintiff's favour in the absence of the other beneficiaries of the 'waqf'. To implead other beneficiaries at this stage in a suit of this kind which has remained pending since 1941, when those beneficiaries have not come forward, or shown any interest will not be desirable. It will mean re-opening the suit from the very beginning. We, therefore, feel reluctant to accede to the oral request that the other beneficiaries may be impleaded at this stage.

(25) The result, therefore, is that Second Appeal No. 84 of 1947 is allowed to this extent that the plaintiff's suit for accounts of the income of the properties covered by the waqf deeds executed by Amna Bibi on the 10th and 22nd of December, 1920, must fail and the decree of the lower appellate court to that extent is modified. The other Second Appeals Nos. 2273, 2274 and 2277 of 1946 and Second Appeal No. 83 of 1947 and Second Appeal No. 2612 of 1946 are dismissed.

(26) We are satisfied that in these cases no order should be made as to costs of this Court. The parties should, therefore, bear their own costs in these appeals.

B/V.R.B. Order accordingly.

A.I.R. 1954 ALLAHABAD 391 (Vol. 41, C.N. 168)

ASTHANA J.

Chivdeni Rai, Complainant, Applicant v. Bans Narain Rai and others, Opposite Parties.

Criminal Misc. Writ No. 72 of 1953, D/- 3-12-1953 for quashing the order of Sub-divisional Magistrate, Ghazipur, D/- 27-12-1952.

(a) U. P. Panchayat Raj Act (26 of 1947), Ss. 83, 85 and 110 — U. P. Panchayat Raj Rules, R. 95A — Limitation for revision — (Limitation Act (1908), Ss. 12 (2) and 29) — (Applicability).

In view of the provision contained in S. 85 that the revisional court can send for the record within sixty days only from the date of the order the period of limitation for filing the revision under S. 85 must be taken to be sixty days. (Para 4)

As S. 83 has made the Indian Limitation Act inapplicable to the proceedings under the Panchayat Raj Act, it is very doubtful if S. 12 (2) of the Limitation Act which excludes the period requisite in obtaining the copies of the judgment will be applicable. There is no doubt that there is some inconsistency in the provisions. Rule 95A framed under S. 110 requires the revision application to be accompanied with a certified copy of the order but no provision is made either in the rules or the Act to exclude the period taken in obtaining the copies; but merely on account of this inconsistency or hardship the Limitation Act will not become applicable when it has been expressly made inapplicable by S. 83: AIR 1953 All 666, Not foll. (Para 4)

Anno: Limitation Act, S. 12 N. 2; S. 29 N. 3, 4.

(b) U. P. Panchayat Raj Act (26 of 1947), S. 83 — Scope.

The words "in a Panchayati Adalat" occurring in the last sentence of S. 83 do not limit the non-applicability of the Codes and Acts mentioned therein to the stage of a suit, case or proceeding pending in the Panchayati Adalat but they are made inapplicable in whatever stage it is. In other words the provisions of S. 83 will be applicable also in revisions arising out of the proceedings in the Panchayati Adalat. (Para 6)

(c) U. P. Panchayat Raj Act (26 of 1947), Ss. 85 and 89 — Wrong decision as to limitation if can be said to be without jurisdiction — (Civil P. C. (1908), S. 9).

Section 85 only provides for the period of limitation within which an application for revision is to be filed. It has nothing to do with the jurisdiction which is conferred according to the provisions of S. 89 of the Act. Hence, the mere fact that the Sub-Divisional Magistrate entertains a revision under S. 85 beyond the period of 60 days does not mean that he has no jurisdiction. (Para 7)

Jurisdiction and limitation are two different matters. The former is not dependant on the latter but is a creature of statute. Where a court has got jurisdiction to decide a matter, it can decide it rightly as well as wrongly and the mere fact that it decided wrongly does not mean that it had no jurisdiction. (Para 8)

Anno: C.P.C., S. 9 N. 4.

1953 Mulla: S. 9 (Topic discussed in N. 4 to S. 9 in A.I.R. Com. extra — See Notes under S. 115 in Mulla).

(d) Constitution of India, Art. 226 — Other remedy open — Writ of Certiorari if can be issued — (U. P. Panchayat Raj Act (26 of 1947), S. 85).

Merely because a court entertained an application which was barred by limitation and passed certain orders on it, an application for writ under Article 226 will not lie. The applicant has further to satisfy that his fundamental rights conferred by Part III of the Constitution of India or any other legal right has been infringed and great injustice has been done to him and that he has got no other adequate legal remedy. If the law provides another legal remedy it is doubtful that an application for writ will lie under Art. 226 of the Constitution. (Para 11)

Consequently, the High Court will not grant a writ to quash the order of a sub-divisional officer under S. 85, U. P. Panchayat Raj Act, cancelling the jurisdiction of the Panchayati Adalat when the applicant has the alternative remedy under S. 85 (2) of filing a fresh complaint before a competent criminal Court and no injustice had been done to the applicant by such order. (Para 11)

B. L. Dixit, for Applicant; G. P. Bhargava and N. D. Ojha, for Opposite Parties.

CASES REFERRED: Paras

(A) (V40) AIR 1953 All 666: 1953 All LJ 317 (1): 1953 Cri LJ 1501 5

(B) (V39) AIR 1952 All 38: 1952 Cri LJ 239 6

ORDER: This is an application under Article 226 of the Constitution of India for the issue of a writ in the nature of certiorari quashing the order of the Sub-divisional Magistrate of Ghazipur, dated the 27th December, 1952, who quashed the order of the Panchayati Adalat, Reotipur, and cancelled its jurisdiction.

(2) The facts which gave rise to the case out of which this application has arisen may be stated as follows: The Applicant filed a complaint under sections 323 and 426, I. P. C. against the opposite parties 1 to 3 in the Panchayati Adalat, Reotipur. It appears that an application was made by the accused to the Panchayati Raj Inspector that they were not on good terms with the Sarpanch and that the case might be tried by another bench of which he was not a member. The Panchayati Raj Inspector stayed further proceedings. This stay order was subsequently vacated by him and a date was fixed for the hearing of the case in the Panchayati Adalat and notice was ordered to be issued to the parties.

When the case was taken up on the date so fixed the opposite parties 1 to 3 were not present at the time of the hearing of the case. The case was adjourned to several dates and ultimately it was decided ex parte on 19-12-51 against the opposite parties 1 to 3 and they were convicted and sentenced under Sections 323 and 426 I. P. C. They were sentenced to a fine of Rs. 24/- each under section 323, I. P. C. and Rs. 3/- each under section 426, I. P. C. Thereafter, the opposite parties 1 to 3 made an application on 7-3-1952 for the setting aside of the ex parte order against them and for the rehearing of the case according to the provisions of section 79 (2) of the U. P. Panchayat Raj Act. This application was presented to the Sarpanch of the Panchayati Adalat but he instead of placing this application before the Panchayati Adalat disposed it of himself on the 5th May, 1952, and rejected it.

The same day a revision was filed by the convicted persons in the court of the Sub-divisional Magistrate on the ground that they had no knowledge of the date fixed for the hearing of the case. The learned Sub-divisional Magistrate after hearing both the parties came to the conclusion

that the allegations made by the opposite parties 1 to 3 in their revision application were correct and that the case was decided behind their back without informing them of the date fixed for the hearing of the case. He also found that interpolations had been made in the order-sheet of this case in the Panchayati Adalat. He, therefore, quashed the order of the Panchayati Adalat and cancelled its jurisdiction as already stated.

(3) It was contended before me on behalf of the applicant that the Sub-divisional Magistrate could entertain the revision only within 60 days of the order as provided in section 85 of the U. P. Panchayat Raj Act and as the revision in this case was filed much beyond this period it could not have been entertained by him and his order, therefore, quashing the conviction and cancelling the jurisdiction of the Panchayati Adalat was without jurisdiction.

Section 85, no doubt, provides that a Sub-divisional Magistrate may either of his own motion or on the application of any party send for the record from the Panchayati Adalat concerned within 60 days from the date of the order. Section 89 provides the forum in which a revision will lie against the orders of the Panchayati Adalat. It confers jurisdiction on the Sub-Divisional Magistrate to revise the orders of the Panchayati Adalat in criminal matters; in civil matters the powers have been conferred on the Munsif and in revenue matters on the sub-divisional officer concerned. This section, however, does not provide for any period of limitation within which a revision is to be filed. Section 83 provides that the Code of Civil Procedure, the Code of Criminal Procedure, the Indian Evidence Act and the Indian Limitation Act shall not apply to any suit, case or proceedings in a Panchayati adalat except as provided in this Act or as may be prescribed.

(4) In view of the provision contained in section 85 that the revisional court can send for the record within sixty days only from the date of the order it appears that this is the period of limitation for filing the revision. If this section does not provide any period of limitation and the revision can be filed even beyond this period then the restriction placed by this section that the record can be summoned within 60 days only from the date of the order becomes meaningless. Rule 95-A of the U. P. Panchayat Raj Rules framed under section 110 of the U. P. Panchayat Raj Act provides that an application under section 85 shall be accompanied by a certified copy of the order against which it is made. In view of this requirement it was argued for the accused that the time requisite in obtaining the certified copy will be excluded in computing the period of 60 days.

As section 83 has made the Indian Limitation Act inapplicable to the proceedings under the Panchayat Raj Act it is very doubtful if section 12 (2) of the Limitation Act which excludes the period requisite in obtaining the copies of the judgment will be applicable. There is no doubt that there is some inconsistency in the provisions. Rule 95-A requires the revision application to be accompanied with a certified copy of the order but no provision is made either in the rules or the Act to exclude the period taken in obtaining the copies, but merely on account of this inconsistency or hardship the limitation Act will not become applicable when it has been expressly made inapplicable by section 83.

(5) Learned counsel for the opposite parties relied on the case of —'Dwarka Gorh v. Sita Ram Singh', AIR 1953 All. 666 (A). It was held in this case by Agarwala, J. that although no period of limitation was fixed for filing revision applications before the sub-divisional Magistrate under the U. P. Panchayat Raj Act, yet a period of two months was a reasonable time for filing such applications and if they were filed beyond that time, it was open to the Sub-divisional Magistrate to reject them unless the delay was explained by the applicants. It was argued on the basis of this decision that the period of two months was not the inflexible rule and if the applicant could satisfy the revisional court that he had sufficient ground for not making the application for revision within the period of two months it could still be entertained. There is no doubt that this decision supports this contention.

It was, however contended for the applicants that the attention of the learned Judge was not drawn to the provisions of section 83 which clearly laid down that the provisions of the Limitation Act were not applicable to the proceedings in a Panchayati Adalat except as provided in the Act itself or as might be prescribed and, as by means of this section the provisions of the Limitation Act were expressly not made applicable to the proceedings under the Panchayat Raj Act the period of two months could not be extended in that case. It is not clear from a perusal of the above decision whether the provisions of section 83 were brought to the notice of the learned Judge in the above case. It may also be pointed out that according to section 85 the revisional court can send for the record within 60 days of the order only and this implies that sixty days is the period within which the revision should be filed.

(6) It was also contended on behalf of the opposite parties that section 83 was applicable only in respect of the proceedings pending in a Panchayati Adalat and not in the revisional court. It was held in the case of — 'Banshi v. State', AIR 1952 All 38 (B), by Agarwala, J. that the words "in a Panchayati Adalat" occurring in the last sentence of section 83 do not limit the non-applicability of the Codes and Acts mentioned therein to the stage of a suit, case or proceeding pending in the Panchayati Adalat but that they were made inapplicable in whatever stage it was. In other words this decision lays down that the provisions of section 83 will be applicable also in revisions arising out of the proceedings in the Panchayati Adalat.

(7) It, however, appears that section 85 only provides for the period of limitation within which an application for revision is to be filed. It has nothing to do with the jurisdiction which is conferred according to the provisions of section 89 of the Act. It appears from the record that in this case no objection was taken on behalf of the applicant about the question of limitation in the lower court. The mere fact that the Sub-divisional Magistrate entertained the revision beyond the period of 60 days does not, in my opinion, mean that he had no jurisdiction. If a suit is filed beyond the prescribed period of limitation in a competent court and that court decides it one way or the other it cannot be said that that court has got no jurisdiction simply because it entertained the suit when it was barred by limitation.

(8) Jurisdiction and limitation are two different matters. The former is not dependent on the latter. It is a creature of Statute and in the present case it was conferred on the Sub-divisional Magistrate by section 89. I do not think that a court which has otherwise jurisdiction in respect of

a matter loses it because of limitation. The question of limitation when raised has got to be decided by the court having jurisdiction in the matter & merely because the court decided that the case was barred by limitation it did not mean that it had no jurisdiction. The decision has got to be given by some court and it is the court which has jurisdiction that can decide it. Where a court has got jurisdiction to decide a matter, it can decide it rightly as well as wrongly and the mere fact that it decided wrongly does not mean that it had no jurisdiction.

(9) Coming now to the facts of the case, I am not satisfied that any grave injustice has been done to the applicants. I have been taken through the record but have not been able to find in it that the notice intimating the date fixed by the Panchayati Adalat for the hearing of the case was duly served on the opposite parties and that in spite of the service of notice they deliberately absented themselves from the court and allowed the case to be decided ex parte against them. It also cannot be said that the remark of the Sub-divisional Magistrate that there were certain interpolations in the order-sheet was quite unjustified.

The conduct of the Sarpanch in not placing the application for restoration before the Panchayati Adalat for necessary orders and himself rejecting it on 5-5-1952 was also very undesirable and indicates that he was not well disposed towards the Opposite Parties. In the ordinary course it was his duty to put the application which had been made to him according to the provisions of section 79 before the Panchayati Adalat for orders; and it is possible that if this application were placed before them and the correct facts would have come to their knowledge they would have set aside the ex parte order which had been passed against the opposite parties 1 to 3 and would have reheard the case.

(10) It was also argued on behalf of the opposite parties 1 to 3 that the Sub-divisional Magistrate had merely cancelled the jurisdiction of the Panchayati Adalat and it was still open to the applicant to file a fresh complaint against them according to the provisions of section 85(2) of the Act. It is not one of those cases where the applicant had no remedy after the order of the Sub-divisional Magistrate. In my opinion the contention is not without force.

(11) I do not think that merely because a court entertained an application which was barred by limitation and passed certain orders on it, an application for writ under Article 226 will lie. The applicant has further to satisfy that his fundamental rights conferred by Part III of the Constitution of India or any other legal right has been infringed and great injustice has been done to him and that he has got no other adequate legal remedy. If the law provides another legal remedy it is doubtful that an application for writ will lie under Article 226 of the Constitution. As already stated above, the applicant has got an alternative remedy, if he is aggrieved against the order of the Sub-divisional Magistrate, to file a fresh complaint in a competent criminal court. I am also not satisfied that any injustice has been done to the applicant.

(12) Considering the above facts I am of opinion that it is not a fit case in which a writ should be granted to the applicant. The application is, therefore, rejected.

A/K.S.B. Application dismissed.

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MOOTHAM AND SAPRU JJ.

Brij Lal Suri, Petitioner v. State of Uttar Pradesh and others, Respondents.

Writ No. 7524 of 1951, D/- 8-12-1953.

(a) Civil P. C. (1908), O. 19, R. 1 — Affidavits, essentials of.

Affidavits in all matters other than such as are purely interlocutory must be restricted to matters of fact which are within the personal knowledge of the deponent. They must not contain statements based on information received or be made vehicles for the expression of opinion. (Para 6)

Anno: C. P. C., O. 19 R. 1 N. 1 Pt. 8.

1953 Mulla: O. 19 R. 1 (No commentary in Mulla).

(b) Registration Act (1908), S. 2(6) — Licence coupled with grant of minerals — (Easements Act (1882), S. 52).

A licence coupled with a grant of the minerals when quarried is a 'profit a prendre' which does not pass an estate or interest in the land itself. But it may nevertheless, in view of the wide definition of immoveable property" in S. 2(6) require registration. (Para 12)

Anno: Registration Act, S. 2(6) N. 5.

1950 Mulla: S. 2(6) P. 5 N. "Benefit .... land" (3 Pts. extra in N. 5 to S. 2(6) in AIR Com.).

Easements Act, S. 52 N. 3.

(c) Contract Act (1872), S. 2(d) — Grant of permit to extract limestone.

The grant of a permit to an association to extract limestone cannot constitute any consideration in law if it confers no right on the association which it did not already possess under its prospecting licence. (Para 13)

Anno: Contract Act, S. 2(d) N. 7.

(d) Government of India Act (1935), S. 175(3) — Non-compliance.

A contract does not comply with the provisions of S. 175(3) unless it is executed not only on behalf of the Governor but also in his name. AIR 1941 All 377, Distinguished. (Paras 16 and 99)

(e) U. P. Mining Concessions and Mineral Development Rules (1940), Rr. 31(i) and 33 — Scope — Right to mining lease.

Rules 33 and 31(i) deal with separate matters; the former with the licensee's right to the grant of a mining lease, the latter with the Collector's power to extend the period of the licence. The licensee's right to a mining lease becomes complete and unassailable in law as soon as he, within the period of his licence, applies for it in the prescribed manner. That right is not dependent on the issue of the mining lease during the period of the licence, nor can it be taken away by failure on the part of the authorities to issue the mining lease before the licence has expired. (Para 17)

(f) U. P. Mining Concessions and Mineral Development Rules (1940) — Statutory basis for Rules.

The 1940 Rules were a continuation of the 1936 Rules with adaptation and modification which in turn can be traced back to 1913 and 1894, and they have a statutory basis which is to be found in S. 1, Government of India Act, 1859. (Paras 23, 24 and 83)

(g) **Constitution of India, Preamble and Art. 226 — Retrospective effect — Enforcement of present right arising prior to 1950.**

Though the provisions of the Constitution have no retrospective effect, there exists no bar to the Court exercising its power under Art. 226 to enforce a present right which arose prior to 1950. (Paras 27 and 53)

(h) **Constitution of India, Art. 226 — Mandamus — Another remedy open.**

Mandamus is a supplementary remedy, of which use is made where a person has a legal right and no other appropriate redress to prevent a failure of justice. Mandamus will not, therefore, ordinarily issue where the petitioner has an adequate legal remedy. The matter lies however within the discretion of the Court, and unless the Court can see clearly, that there is another remedy equally convenient, beneficial, and effectual, the writ will be granted provided the circumstances are such in other respects as to warrant the granting of the writ. (Para 28)

(i) **U. P. Mining Concessions and Mineral Development Rules (1940), R. 6 — Limestone and clay.**

Because the words "limestone" and "clay" have been joined by the conjunction "and" it cannot be argued that the minor mineral referred to in the rule is a combination of limestone and clay and not pure limestone. (Paras 31 and 84)

(j) **Constitution of India, Art. 226 — Mandamus — Alternative writ of.**

Where there is a dispute of fact requiring further investigation upon further materials, the Court should direct the issue of a writ of mandamus in the alternative in order that the dispute may be determined on the return to the writ. Witnesses can if necessary be examined and advantage taken of the provisions of Civil P. C. for discovery and inspection. (Paras 35, 36, 38)

(k) **Limitation Act (1908), Art. 120 — Suit to enforce statutory liability for specific performance of contract inferable from statute or statutory rules — Article 120 would presumably govern such suit — (Obiter).** (Para 53)

Anno: Limitation Act, Art. 120 N. 2.

(l) **Evidence Act (1872), S. 114 — Non-production of material evidence.**

It is against sound legal principles for those relying upon a set of facts to withhold from the Court that best evidence in their possession which would throw light on the matter to be investigated by it. It is, therefore, not unreasonable for the Court to draw an adverse inference from the failure of a party to produce the best evidence in its possession to prove a fact the initial burden in regard to the proof of which has been discharged by the other party. (Para 88)

Anno: Evidence Act, S. 114 N. 11.

(m) **Constitution of India, Art. 226 — Scope.**

The power given by Art. 226 of the Constitution is of a very wide nature. In the exercise of this power the High Court can issue a mandamus, order or direction for the enforcement of any legal right and the performance of any legal duty. (Paras 90 and 91)

(n) **Arbitration Act (1940), S. 20 — Arbitration agreement — Recourse to another remedy.**

Where the parties have chosen under an agreement to refer their disputes to arbitration, Courts will insist that they should have recourse to arbitration before pursuing any other remedy. But in coming to the conclusion whether the arbitration suit will be a suitable remedy for the petitioner not only the plaint but the pleadings of the parties can also be looked into. (Para 92)

Anno: Arbitration Act, S. 20 N. 1.

(o) **Easements Act (1882), S. 5 — Profits a prendre — (Limitation Act (1908), S. 2(5)).**

The term 'easement' as used in the Indian law includes 'profits-a-prendre' in gross which are unappurtenant to any dominant tenement and are enjoyed solely for the benefit of an individual. (Para 94e)

Anno: Easements Act, S. 5 N. 1; Limitation Act, S. 2(5) N. 1. Pt. 8.

S. S. Dhavan, for Petitioner; Advocate-General Pt. K. L. Misra, for the State.

CASES REFERRED : Paras

(A) (1819) 2 B & Ald 724: 21 RR 469 12
(B) (V23) AIR 1936 Bom 19: 60 Bom 42 16
(C) (V28) AIR 1941 All 377: ILR (1941) All 741 16
(D) (V38) AIR 1951 SC 128: 1951 SCR 228: 52 Cri LJ 860 (SC) 27, 52
(E) (V39) AIR 1952 SC 339: 1952 SCR 744 (SC) 27, 52
(F) (V38) AIR 1951 Nag 443: 1952 Cri LJ 1 (FB) 27, 52
(G) (V37) AIR 1950 Cal 512: 54 Cal WN 793 27, 52
(H) (V37) AIR 1950 SC 163: 1950 SCR 566 (SC) 27, 53
(I) (V38) AIR 1951 Cal 430: 87 Cal LJ 109 27
(J) (V39) AIR 1952 Cal 891 27
(K) (V38) AIR 1951 All 257: ILR (1951) 1 All 269 (FB) 27, 91
(L) (1861) 30 LJ QB 271: 5 LT NS 289 28
(M) (1876) 1 AC 611: 25 WR 128 37
(N) (1912) 1912-3 KB 23: 81 LJ KB 914 38
(O) (V25) AIR 1938 Mad 749: 183 Ind Cas 839 82
(P) (V4) AIR 1917 PC 6: 44 Ind App 98 (PC) 88
(Q) (V16) AIR 1929 PC 95: 114 Ind Cas 592 (PC) 88
(R) (V37) AIR 1950 Pat 387: 51 Cri LJ 1509 (FB) 91
(S) (V38) AIR 1951 All 746: 1951 All LJ 576 (FB) 91
(T) (V33) AIR 1946 All 379: 1946 All LJ 369 (FB) 92
(U) (V39) AIR 1952 All 764: 1952 All LJ 332 93
(V) ('80) 5 Cal 945: 6 Cal LR 269 94
(W) ('91) 1 Mad LJ 47 94
(X) (V13) AIR 1926 Cal 507: 53 Cal 1016 94

MOOTHAM J. :

This is a petition under Art. 226 of the Constitution. The petitioner is the karta of a joint Hindu family firm which carries on business in the name of the Northern India Lime Marketing Association, hereinafter referred to as "the Association". The first respondent is the State of Uttar Pradesh and the other respondents are State officials. The principle relief sought by the petitioner is the issue of a writ in the nature of 'mandamus' to compel the State Government to issue to the Association a mining lease to which he claims that it has a statutory right.

(2) The circumstances giving rise to this petition are briefly these: In the Dehra Dun Dis-

trict of this State there are valuable limestone deposits, and on the 31-7-1948, the Association was granted a prospecting licence in the form prescribed by the United provinces Mining Concessions and Mineral Development Rules, 1940 (hereinafter referred to as "the 1940 Rules") and purporting to be issued in accordance with those Rules. The licence was for a period of one year in the first instance, and under it the Association was given the right subject to the royalties, covenants and agreements therein reserved & contained to enter upon the lands described in the schedule thereto, to search for and win certain specified minerals lying under such land and to carry away and dispose of the minerals so worked for the use and benefit of the Association. The minerals specified in this licence included limestone.

(3) Rule 31 of the 1940 Rules provided that every prospecting licence shall contain such conditions as may in any particular case seem necessary, and shall in all cases contain certain prescribed conditions one of which is that

> "when the licensee has, before the termination of the period of the licence, applied for the grant of a mining lease, the Collector may further extend the period of the licence until a mining lease is granted or for such time as he may deem fit."

(4) Rule 33 of these Rules further provided that on or before the determination of his licence the licensee shall have a right, in the case of minerals other than precious stones,

> "to a mining lease in accordance with the terms contained in the rules for mining leases."

These provisions are embodied (in the reverse order) in clauses (1) and (2) of Part IV of the prospecting licence granted to the Association. They read as follows:

> "(1) During the subsistence of this licence the licensee shall have the right subject to compliance with the said rules to a mining lease in accordance with the said rules in respect of over so much of the said lands as the licensee may desire and the Provincial Government shall think fit to grant and to the first offer of such mining lease in respect of precious stones within the said land as the Government may think fit to grant.
>
> (2) If during the term hereby granted, the licensee shall apply in accordance with the said rules for a mining lease on the said lands or any part thereof this licence shall on expiration by effluxion of time of the term hereby granted if the licensee shall by notice in writing to the Collector so require be extended for a further term to end either on the date on which such lease should be granted or on such other date as the Collector shall in his discretion prescribe."

On 20-9-1948, the Association applied for a mining lease for thirty years. It is not in dispute that the formalities attending the making of this application were observed by the Association. On 14-6-1949, the mining lease not having been granted and the term of the prospecting licence being about to expire, the Association applied in writing to the Collector, Dehradun, under Cl. (2) of Part IV of the licence that the period of the prospecting licence be extended to the date of the execution of the mining lease. The term of the Association's prospecting licence was not however extended and no mining lease has been granted, notwithstanding repeated requests therefor made by the Association.

(5) It is in these circumstances that the Association has now come to this Court; it claims that it has a statutory right to a mining lease and that the State Government's refusal to grant a mining lease is a violation of its fundamental right to property.

(6) The petition in this case is a long one and sets out in considerable detail the course of events during the past four years, not all of which is relevant for the determination of the questions which we have to decide. No fewer than sixteen affidavits in addition to that accompanying the petition are to be found on the record, and with regard to certain of these it is desirable to make some reference. In the case of four of them, namely the counter-affidavits filed by B. B. Lal and Gyan Prakash on 25-5-1951, by Indardatt Saklani on the 1-6-1951, and by Dharamvir Singh on 14-6-1951, it was discovered at the hearing, and is conceded by the Advocate-General who appears for the respondents, that they have been neither duly sworn nor affirmed.

The statements contained in such affidavits cannot therefore, it is common ground, be taken into consideration. These counter-affidavits having been rejected learned counsel for the petitioner contends, and in my opinion rightly, that the five affidavits filed by way of rejoinder—four by Brijlal Suri on 17-3-1952, and one by Madan Gopal Suri on 29-4-1952, should also be excluded from consideration. A supplementary rejoinder by Brijlal Suri filed on 7-7-1952, was lodged in the office and leave to file it appears neither to have been sought for nor obtained from the Court. This affidavit must, in my opinion, be disregarded. The six remaining affidavits were filed with the leave of the Court.

Before passing to other matters I am constrained to observe that several of the affidavits filed in this case, and particularly those filed by the fourth respondent and by Sri H. K. Mathur, are in a form which is most unsatisfactory. This Court has repeatedly pointed out that affidavits in all matters other than such as are purely interlocutory must be restricted to matters of fact which are within the personal knowledge of the deponent. They must not contain statements based on information received or be made vehicles for the expression of opinion. These are elementary matters, but they have been wholly disregarded by whoever was responsible for drafting the affidavits sworn on behalf of the respondents.

(7) A number of questions have been argued be fore us, but there are in my opinion four basic questions which require to be determined, namely (a) Had the Association at any time a right under the 1940 Rules to the grant of a mining lease in respect of limestone? (b) Did that right subsist at the date upon which this petition was filed? (c) Is that right a statutory right, and (d) Are the circumstances of this case such as would justify the Court, in the exercise of its discretion, in issuing a writ in the nature of 'mandamus?' It is illogical but convenient, for reasons which will appear later, to consider the last three questions before the first. This I now propose to do, the consideration of each of these questions being based on the assumption that the answer to the first question is in the affirmative, namely that the Association had under the 1940 Rules the right to the grant of a mining lease in respect of limestone.

(8) It is not in dispute, if the 1940 Rules applied to limestone, that the Association had a right, on or before the determination of its licence, to a mining lease. The question is whether that right

subsisted on the date on which this petition was filed. The State says in the first place, that whatever right the Association had to the grant of a mining lease under its prospecting licence was voluntarily surrendered at a meeting attended by representatives of the Association and of the Government held on 17-11-1948, or in other words that the original agreement was superseded by a subsequent agreement made on that date. A meeting was held on 17-11-1948, but it is not altogether easy to ascertain the circumstances in which it took place.

It appears however that the Association was complaining to the Government that other persons were quarrying or seeking to quarry limestone in the area covered by its prospecting licence and that Government officials were putting obstacles in the way of the Association exercising the right which is claimed under its licence, with the result that the Association was unlikely to be able to fulfil certain contracts it had entered into with sugar factories in the United Provinces for the supply of limestone; while the Government on its part took the view that the Association had no authority under its prospecting licence to quarry limestone (as undoubtedly it was doing) on a commercial basis, and was consequently unwilling to assist if it did not actively obstruct the activities of the Association.

The meeting was held in Lucknow and was attended by Sri A. D. Pandit, I. C. S., District Magistrate, Dehra Dun, and Sri H. K. Mathur of the Industrial Department, U. P. Government, as representatives of Government, and by Sri Brij Lal Suri and his son Sri Manohar Lal Suri representing the Association. After the discussion a memorandum of the proceedings was prepared by Sri A. D. Pandit and signed by the four persons present. This memorandum is important and is in the following terms:

"The question of supplying limestone to sugar factories in 1948-49 crushing season with reference to the prospecting licence dated 31-7-48 granted to the Northern India Lime Marketing Association by the Collector was discussed. It was found that certain factories had made arrangements for obtaining limestone from other parties, who claimed to have been working with the permission of the landlords in part of the area covered by the prospecting licence. It was felt that it would be difficult to upset these arrangements in the current working season, but at the same time the Northern India Lime Marketing Association said that if any other party were allowed to work in their area it would not be possible for them to meet their commitments of 20,000 tons.

The representatives of the Northern India Lime Marketing Association said that in order to get over these difficulties should the Government desire to abrogate the prospecting licence and grant instead a temporary mining lease for the remaining period of the sugar factory season so as to enable them to honour their commitments of 20,000 tons of limestone for quarrying which permission has already been granted by Government they would have no objection to this procedure. Their request for long term mining licence should be examined on merits with other candidates in the light of any new rules that should be framed by Government at a later date.

They however agreed to supply to (1) J. S. Oberoi 25 wagons of limestone plus a quantity equivalent to order already filed by them with Government. (2) To Harkishan Lal 100 wagons from Timli quarry for Doiwalla, the rate of supply to be settled by the Collector.

These arrangements will be subject to confirmation by Government.

A. D. Pandit,
17-11-48
Brij Lal Suri,
17-11-48

Agreed in the interests of Sugar Industry to part with our rights.

M. L. Suri
H. K. Mathur,
17-11-48".

(9) I find it a matter of some difficulty to determine exactly what was the arrangement which was arrived at. I construe this memorandum to mean that the Association was willing (a) to relinquish its rights under its prospecting licence and (b) to supply not less than 125 wagons of limestone to two named persons at such rates as would be settled by the Collector, provided that the Government (a) granted to the Association a "temporary mining lease" for the remaining period of the sugar factory season, and (b) would, when new mining concession rules were framed by the Government, examine the Association's application for a mining lease "on merits with other candidates".

It is, I think, unfortunate that the provisions of the agreement which was reached on this occasion were not stated in clearer terms; the phrases "temporary mining lease" and "on merits with other candidates", both presenting some difficulty. The former is claimed by the Association to mean what it says, a mining lease but of short duration; by the State it is said to mean a permit. The latter phrase, the Association says, means merely that priority as between the Association and other applicants, if any, will be determined according to the new rules, while the State says it means that the Government would be at liberty to refuse the Association's application if it considered another applicant more deserving.

(10) The validity of the agreement has been challenged by the Association on a number of grounds. It is claimed that it is invalid because (a) the concurrence of the representatives of the Association was obtained by some process of coercion, (b) the agreement should have, but has not, been registered, (c) it has not been implemented by the Government, and (d) the undertaking given by the Association was without consideration. It has also been challenged on the ground that it is not in the form required by S. 175, Government of India Act, 1935, and is therefore null and void.

(11) There is, in my opinion, no evidence to justify the conclusion that the Association's representatives were coerced into entering into this agreement. Brij Lal Suri says he signed because Sri A. D. Pandit said that unless he did so the Government would withdraw its protection from him as a prospector. The Government was undoubtedly anxious to reach some agreement with the Association and it is by no means improbable that Brij Lal Suri was told that unless he fell into line with the Government's wishes things would be made difficult for the Association; but Brij Lal Suri appears to be a shrewd businessman who was prepared to fight for his rights, and I am unable to believe that his will was overpowered by the two officers of Government. He may on second thoughts have concluded that he had made a bad bargain, but that is quite another matter.

(12) The argument that the agreement required registration is based on the assumption that it operated to extinguish a title or interest in immoveable property. A licence coupled with a grant of the minerals when quarried is a 'profit a prendre' which does not pass an estate or interest in the land itself: — 'Doe d. Hanley v. Wood', (1819) 2 B. & Ald. 724 at p. 738 (A), but it may nevertheless, in view of the wide definition of immoveable property" in S. 2(6), Registration Act require registration. The matter has not been fully argued before us, and as I am of opinion that the agreement is invalid on other grounds I prefer to reserve my opinion on this point.

(13) The two other submissions are more substantial, and may be conveniently considered together. It is common ground that no mining lease, temporary or otherwise, has been granted to the Association, but the Government relies on the fact that it issued on 22-11-1948, a temporary permit valid up to 31-3-1949, authorising the Association to extract twenty thousand tons of limestone, and says that it was this permit which was meant by the phrase "temporary mining lease" in the agreement. (This permit, it may be observed in parenthesis, is called a 'temporary permit' and was intended, it appears from cl. 4, to be replaced by a formal mining lease).

To this the Association replies that the grant of a permit to extract limestone could not constitute any consideration in law as it conferred no right on the Association which it did not already possess under its prospecting licence. I do not think that any real attempt has been made by the State to meet this argument. Clause (1) of Part I of the prospecting licence I have already quoted; it gives the Association the sole right and licence to "mine, quarry, bore, dig and search for, win and work all or any" of the minerals specified in the first schedule to the licence; and clause (2) of the same Part specifically empowers the Association "to carry away and dispose of the produce thereof to and for the use and benefit of the licensees." This provision is in accordance with R. 14 of the 1940 Rules which provides that

> "14. A licence to prospect for minerals, called hereinafter a prospecting licence shall confer on the licensee the sole right subject to the conditions contained in the licence, to mine, quarry, bore, dig and search for, win, work and carry away only specified minerals or, in the event of no minerals being specified, all minerals lying, or being within, under or throughout the land specified in the licence."

(14) In my opinion the Association had under its prospecting licence the right to carry away and use for its own benefit, subject to the payment of the prescribed royalty, all minerals which it was authorised to quarry, and that in consequence permission to quarry a specified number of tons of limestone conferred no benefit upon the Association which it did not then possess.

(15) It was suggested that under the Permit the Association obtained the benefit of having the exclusive right to extract limestone from the area described in its prospecting licence, but this argument appears to overlook the fact that the Association acquired under its licence the "sole right and licence" to extract limestone within this area.

(16) I entertain some doubt whether the document signed by the representatives of the Government and of the Association on the 17th November is anything more than a record of an oral agreement previously arrived at between the parties; but if it be the actual contract then it does not appear to me to comply with the mandatory provisions of sub-S. (3) of S. 175, Government of India Act, 1935. So far as is material that sub-section provides that

> "all contracts made in the exercise of the executive authority .... of a Province shall be expressed to be made by .... the Governor of the Province .... and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the .... Governor by such persons and in such manner as he may direct or authorise."

It appears to me to be clear that a contract does not comply with the provisions of this sub-section unless it is executed not only on behalf of the Governor but also in his name. A similar view was taken by the Bombay High Court in — 'Secretary of State for India v. Yadavgir', AIR 1936 Bom 19 (B). The decision of this Court in — 'Deviprasad Srikrishna Prasad Ltd. v. Secy. of State', AIR 1941 All 377 (C) is in my opinion distinguishable as it turned on S. 30(2), Government of India Act, 1915, which did not contain the provision found in the later Act that contracts intended to bind the Governor of a Province must be expressed to be made in his name. The document of 17-11-1948, does not purport to be a contract and is neither expressed to be made by the Governor nor executed on his behalf.

(17) In the second place it was argued on behalf of the State that the Association's right to a mining lease lapsed on the expiration of the term of its prospecting licence on 30-7-1949, reliance being placed on R. 33 and Cl. (1) of Part IV of the Licence, which are in substantially the same terms. Rule 33, so far as it is relevant, provides that:

> "On or before the determination of his licence, the licensee shall have a right.....to a mining lease in accordance with the terms contained in the rules for mining leases....",

while the proviso to Cl. (1) of Rule 31 provides that when the licensee has, before the termination of the period of the licence, applied for the grant of a mining lease, the Collector may further extend the period of the licence until a mining lease is granted or for such time as he may deem fit. It is contended that because the Government has not extended the period of the licence the Association's right to a mining lease, for which application was admittedly duly made during the term of the licence, has determined. In my opinion this submission is not well founded. Rules 33 and 31(i) deal with separate matters; the former with the licensee's right to the grant of a mining lease, the latter with the Collector's power to extend the period of the licence.

In my view the licensee's right to a mining lease becomes complete and unassailable in law as soon as he, within the period of his licence, applies for it in the prescribed manner. That right is not dependent on the issue of the mining lease during the period of the licence, nor can it be taken away by failure on the part of the authorities to issue the mining lease before the licence has expired. Normally the issue of a mining lease takes some time, and in the ordinary course a licensee who has applied for such a lease will seek to have the period of his licence extended in order that he may continue operations in such interval as may elapse between the end of the term of the licence and the commencement of that of the lease. He need not however do so, and his decision can in no way affect the right

to a mining lease which he has already acquired.

(18) Is the Association's right to the grant of a mining lease a statutory right?

(19) It is argued by the Advocate General that it is not so on several grounds. In the first place, it is contended that whatever rights the Association may have are contractual and not statutory in character and are insufficient therefore to support a prayer for 'mandamus'. The argument of the Advocate General was that the 1940 Rules had no statutory basis, and he pointed to the fact that the only regulation prior to 1948 with regard to mining operations was Regulation II of 1800 regulating the working of stone quarries at Chunar, Ghazipur and Mirzapur and the Indian Mines Act, 1923, which was concerned only with the regulation of labour.

(20) Rules regulating the grant of prospecting licences and mining leases have been in existence in India for nearly sixty years. Such rules appear to have been first promulgated by the Governor General in Council in 1894 (the Rules will be found in the Supplement to the Gazette of India dated 22-12-1894, p. 1887). These Rules were revised in 1899 (Supplement to the Gazette of India dated 27-5-1899, p. 996) and were superseded by a new set of Rules in 1913 (Supplement to the Gazette of India, dated 20-9-1913, p. 1687). The 1913 Rules were amended from time to time and republished by the Government of India in 1936.

All these Rules were made by the Governor General in Council and sanctioned by the Secretary of State in Council. I can entertain no doubt that they were made under statutory authority. Section 1, Government of India Act, 1859 (22 and 23 Vict. C. 41) empowered the Governor General of India in Council and a number of other administrative officials in India,

> "subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting, shall from time to time prescribe",

'inter alia', to sell and dispose of all real and personal property in India for the time being vested in Her Majesty under the Government of India Act, 1858, (21 and 22, Vict. C. 106) and to make assurance for that purpose.

(21) Sub-ss. (1) and (2) of S. 30, Government of India Act, 1915, read as follows:

> "30. (1) The Governor-General in Council and any local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribe, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective governments, for the time being vested in His Majesty for the purposes of the Government of India, or raise money on any such real estate by way of mortgage, and make proper assurances for any of those purposes, and purchases or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act.
>
> (2) Every assurance and contract made for the purposes of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and if so executed may be enforced by or against the Secretary of State in Council for the time being."

Similar provisions, in almost identical terms, are found in S. 30, Government of India Act, 1919.

(22) Section 45A of the latter Act provides for the making of rules for the classification of Central and Provincial subjects and for the devolution of authority in respect of the latter to local governments. Under the authority of this section read with S. 129A (which makes further provisions for the regulation of certain matters by rule) the Devolution Rules of 1920 were made. These Rules came into force in the United Provinces on 3-1-1921, and included among the Central Subjects enumerated in Part I of Sch. I to these Rules is item 25:

> "Control of mineral development, in so far as such control is reserved to the Governor-General in Council under rules made by or sanctioned by the Secretary of State, and regulation of mines."

(23) In my opinion the statutory basis for the rules regulating the grant of prospecting licences and mining leases made by the Governor-General in 1894 and 1913 is to be found in S. 1 of the Act of 1859, and they embody the provisions and restrictions on the Governor-General's power to dispose of property prescribed by the Secretary of State in Council. The rules so made did not cease to have effect on the coming into force of the Government of India Acts of 1915 and 1919; and the power of the Governor-General in Council to promulgate new rules sanctioned by the Secretary of State in Council is to be found in S. 30 of both Acts. The statutory nature of these rules is in my opinion recognised in Item 25 of the Devolution Rules to which I have already referred, where reference is made to existing rules "made or sanctioned by" the Secretary of State.

(24) The 1913 Rules as amended from time to time formed part of the existing Indian law upon the coming into force of the Government of India Act, 1935, and therefore continued in force until altered or repealed or amended by a competent Legislature or other competent authority (S. 292) or by order in Council (S. 293). Our attention has not been drawn to any enactment by a Legislature or other authority altering, repealing or amending the 1913 Rules as they stood in 1936, nor of any modification made to them other than such as has been effected by the general provisions of the Government of India (Adaptation of Indian Laws) order, 1937. No reference is to be found in the Schedule to this Order to these Rules.

I can in consequence find no authority for the variations from the 1913 Rules as amended and republished in 1936 found in the 1940 Rules which are not based on the Adaptation of Indian Laws Order of 1937. To the extent therefore (save as I have indicated) that the 1940 Rules do not deviate from the 1936 Rules I am of the view that they have statutory authority. So far, however, as the present petition is concerned the material portions in both Rules are substantially the same. It should be added that the 1940 Rules were themselves superseded on 18-10-1949, by the Mineral Concession Rules, 1949, made under S. 5, Mines and Minerals (Regulation and Development) Act, 1948.

(25) The second objection was that the Collector, Dehra Dun, had no authority to execute the prospecting licence in favour of the Association on behalf of the Government. The short answer to this objection is, I think, to be found in the Government of the United Provinces, Judicial (Civil) Department Notification No. 765/vii-127-1935, dated 27-4-1938, made in exercise of the

powers conferred by sub-s. (3) of S. 175, Government of India Act, 1935, which declared "that the under-mentioned contracts and assurances of property may be executed as follows:

"3 (a) Contracts and other instruments connected with .... spontaneous products and minerals	By Collectors and Deputy Commissioners...."

(26) The third objection, suggested perhaps rather than argued, was that the grant of a mining lease to the Association would in effect be creating a monopoly, because, it is said, the entire limestone deposits which are of any value are within the area covered by the Association's prospecting licence. Apart from other considerations we cannot in my opinion entertain this suggestion in the absence of evidence as to the actual extent of the deposits and of such evidence there is none.

(27) The fourth objection is that the provisions of the Constitution have no retrospective operation and that as the transactions of which complaint is now made occurred before the Constitution came into force the remedy of 'mandamus' is not open to the Association. I assume for the moment, although it is a matter which will require consideration later, that the Association had no adequate remedy by way of suit or by proceedings in arbitration. In such circumstances the Association would have been in the position, up to 26-1-1950, of having a legal right without the means of enforcing it. Under Art. 226 of the Constitution power for the first time was given to this Court to grant writs, 'inter alia' in the nature of 'mandamus', and I am unable to see why, if in its discretion it thinks proper to do so, this Court has not the power to secure the enforcement of the Association's right.

A number of cases have been cited to us. On behalf of the State, we have been referred to — 'Keshavan Madhava Menon v. State of Bombay', AIR 1951 SC 128 (D) — 'D.K. Nabhirajiah v. State of Mysore', AIR 1952 SC 339 (E). 'Rajaram Dadu v. State', AIR 1951 Nag 443 (FB) (F) and — 'Rishindra Nath v. Sakti Bhusan', AIR 1950 Cal 512 (G), in support of the proposition that the provisions of the Constitution have no retrospective effect. That proposition cannot now be challenged, but the question is whether there exists any bar to the Court exercising its power to enforce a present right which arose prior to 1950. The case of — 'Rashid Ahmad v. Municipal Board, Kairana', AIR 1950 SC 163 (H), comes closer to the point at issue, for there the petitioner had suffered a wrong for which there was no remedy until the Constitution was at a later date adopted; the Supreme Court had no hesitation in giving the petitioner relief. So also in — 'Elbridge Watson v. R. K. Das', AIR 1951 Cal 430 (I) and — 'Calcutta Pinjrapole Society v. S. Banerjee', AIR 1952 Cal 891 (J).

In the case of — 'Motilal v. Govt. of the State of Uttar Pradesh', AIR 1951 All 257 (FB) (K) a Full Bench of this Court ordered 'mandamus' to issue to compel the Regional Transport Authority to hear and determine certain applications made to it in April, 1949, for the issue of permits to operate stage carriages. In my opinion the petitioner has a right which, in the absence of a specific legal remedy, is capable of being enforced by 'mandamus'.

(28) The third question is whether the circumstances of this case are such that the Court should in the exercise of its discretion direct the issue of the writ. 'Mandamus' is a supplementary remedy, of which use is made where a person has a legal right and no other appropriate redress to prevent a failure of justice. 'Mandamus' will not, therefore, ordinarily issue where the petitioner has an adequate legal remedy. The matter lies however within the discretion of the Court, and unless the Court can see clearly, that there is another remedy equally convenient, beneficial, and effectual, the writ will be granted provided the circumstances are such in other respects as to warrant the granting of the writ: 'In re Barlow', (1861) 30 LJ QB 271 (L).

(29) Now the argument for the respondents is that the petitioner had an adequate legal remedy on the contract under which all disputes relating, 'inter alia', to the rights of the licensee were to be referred to arbitration under Part V of the Licence. That provision is in the following terms:

"V. If and whenever any dispute or question shall arise regarding the construction, meaning or effect of these presents or the rights, powers, liabilities or duties of the licensees hereunder or as to the amount or payment of any royalty or other money payable by virtue hereof or otherwise however, in relation to these presents such dispute or question shall be referred to the Governor whose decision thereon shall be binding on the parties hereto. 'Provided always that any dispute as to the price to be paid under Cl. 17(c) in head or Part II of these presents shall be determined by two arbitrators one to be nominated by the Governor and the other by the licensees or in case of disagreement between the arbitrators by an umpire to be appointed by the arbitrators by writing under their hands before proceeding with the arbitration and the decision of such arbitrators or umpire as the case may be shall be final and binding on the parties hereto".

On 26-11-1949, the Association filed an application (No. 202 of 1949 in the Court of the Civil Judge, Dehra Dun) under S. 20, Arbitration Act, 1940. In this application the Association enumerated the disputes which, it is contended, should be referred to arbitration under Part V of the prospecting licence. The particulars of the disputes set out in para. 8 of the application were the following:

"(i) Whether the applicant is entitled to hold, exercise and enjoy the land and all the rights and powers under the licence as he has been doing so far till the grant of the mining lease without any hindrance or interference by the opposite party;

(ii) Whether the opposite party can directly or indirectly alienate any rights or interests in the property to a third party in violation of the contract or impose any conditions, limitations and restrictions over the rights, possessory or otherwise, of the applicant under the licence as the opposite party threatens to do;

(iii) Whether the applicant is entitled to a fair and reasonable price of the minerals, including gypsum, which latter has been attached and taken away by the Collector, Dehra Dun;

(iv) Whether the opposite party has any right to charge royalty in excess of that agreed to according to the terms of the licence;

(v) Whether the opposite party can withhold the grant of a mining lease to the applicant indefinitely as is being done by them;

(vi) Whether the orders passed by the opposite party in contravention of the terms of the agreement are 'ultra vires' and not binding upon the applicant."

The hearing of this application, notice of which was issued to the respondent, was stayed in circumstances to which I shall refer later. On 19-12-1949, a written objection was filed on the respondents' behalf against an order which had been made by the Court granting the Association an interim injunction. This objection is of importance as indicating the attitude of the State towards the proposed arbitration proceedings. The State's contentions, as set out in these objections included the following:

(a) that the Association's prospecting licence in so far as minor minerals, including limestone, were concerned was not governed by the 1940 Rules (b) that the Collector, Dehra Dun, was not competent to issue the prospecting licence the terms of which were not in consequence binding on the State Government;

(c) the prospecting licence was never acted upon and was superseded by permits dated 22nd November and 24-11-1949;

(d) that the prospecting licence was bad for want of registration;

(e) that the period of the prospecting licence not having been extended no agreement subsisted at the time the application was filed.

The State Government, in short, contended that no question of the enforcement of the arbitration clause arose. At some other date which is not known to us, the State Government raised the following additional objection in the suit:

"That the aforesaid agreement dated 31-7-1948 between the petitioner and the Governor of U. P. was superseded by a subsequent agreement dated 17-11-1948 under which the petitioner accepted a limited permit in lieu of the agreement dated 31-7-1948, and that as a result of the alleged new agreement dated 17-11-1948, the prospecting licence ceased to have any binding effect on the opposite party."

Thereafter on 19-9-1951, the petitioner filed an application in this Court under Article 228 of the Constitution which contained two prayers: the first that proceedings in the arbitration suit be stayed pending the disposal of the writ petition, the second that the suit be withdrawn to this Court on the ground that the objections to which I have last referred raised a substantial question of law as to the interpretation of the Constitution.

(30) Upon the filing of this application, this Court directed notice to issue and at the same time made an interim order staying further proceedings in the District Court. So matters have remained: it appears that the interim order has not been confirmed nor has the State Government raised any objection to the order of stay. It must therefore, I think, be assumed that the Government is, in effect, a consenting party to the stay of the arbitration suit. In these circumstances it is in my view somewhat difficult for the respondents to contend successfully that the petitioner should now be relegated to his arbitration suit. There are however other factors which I consider this Court is entitled to take into consideration in determining whether it should exercise its discretion in issuing a writ. The dispute between the Association and the Government began in the year 1948. We are now nearing the end of 1953, and it is apparent that there has been constant friction between these parties in the intervening years.

If we relegate the petitioner to his suit the questions which have been argued before us at length will have to be reargued before another court and it is unfortunately not improbable that several years may elapse before a final decision is reached. An early disposal of the matters at issue between the Association and Government is in the interest of both. Taking all the circumstances into consideration I find it difficult to hold that the arbitration suit constitutes, in November 1953, a remedy equally convenient, beneficial and effectual, and I would not reject the petition on the ground that it does.

(31) I now turn to the first question, namely whether the Association had at any time a right under the 1940 Rules to the grant of a mining lease in respect of limestone. Rule 6 of the 1940 Rules provides that

"Nothing in these Rules shall apply to minor minerals, such as slate, building stone, limestone and clay. the extraction of which may be regulated by such separate orders as the provincial Government may pass in the matter, having regard to the merits of each individual case."

and it is the contention of the Association that the Provincial Government had by order applied the 1940 Rules to the extraction of limestone. This is denied by the State on whose behalf it is said that neither were the 1940 Rules applied to limestone generally nor was any separate order made in the case of the Association. A subsidiary submission made on behalf of the Association is that it is only limestone used for lime burning which is a minor mineral under these Rules, and that limestone used for other purposes is by implication a major mineral. This contention is based on the fact that in Rule 6 the words 'limestone' and 'clay' are not separated by a comma but joined by the word 'and' from which it is argued that the minor mineral referred to is a combination of limestone and clay and not pure limestone. It is however a well known rule of grammar that where reference is made to a series of items repetition of the word 'and' or 'or' as the case may be, is avoided by the use of a comma except in the case of the last pair of words when the appropriate conjunction is inserted. The submission in my opinion is without foundation.

(32) The main contention involves a question of fact. The Association, there can be no doubt, was primarily interested in the commercial possibilities of exploiting the limestone resources of the Dehra Dun district, and when it applied for a prospecting licence the mineral in which it was most interested, although others were also mentioned, was limestone. The licence which was granted to it on 31-7-1948, was in the Standard Form prescribed by the 1940 Rules. It was purported to be made between the Governor of the United Provinces of the one part and the Association of the other part, and after reciting that the Association had applied

'for a licence to prospect for sulphates, carbonates, phosphates and sulphides such as gypsum, alabaster, limestone, calcite marble, dolomite, magnecites, apatite, rock sulphates, phyrites'

granted and demised to the Association the sole right and licence

'to enter upon the lands described in the said schedule and to mine, quarry, bore, dig, search for win and work all or any of the above mentioned minerals lying or being within, under or throughout the said lands.'

Eighteen days later, on 18-8-1948, the Collector wrote to the Association a letter (Appendix J 1 to Brij Lal Suri's first affidavit) stating that as

under the 1940 Rules a licence cannot be granted for minor minerals, the entry relating to limestone in the Association's licence is deleted and that the Association should present the licence at his office for correction. The Association protested, and drew the Collector's attention to two earlier communications from the Deputy Secretary to the United Provinces Government to the Superintendent, Dehra Dun: G. O. No. 1296 WP/XVIII-W32/1942 dated 12-4-1943, and D. O. No. 2419 (L) XVIII dated 27-7-1943. Copies of these letters have by consent been made part of the record. In the first of these letters occurs the following sentence:

> 'Notwithstanding any previous orders, any application for the grant of a lease in respect of these deposits' — that is, limestone — 'should be referred to Government for sanction',

and in the second is to be found the following:

> 'You will observe from Rule 6 of the U. P. Mining Concession and Mineral Development Rules that those rules do not apply to Limestone, but in view of the importance of these deposits near Mussoorie Government consider that it will be desirable to apply to them the same rules as for major minerals.'

On 23-8-1948, the Collector wrote to the Association a further letter (Appendix LI) in which he said

> "It is therefore within the powers of Government to give you a prospecting licence for minor minerals such as Limestone under R. 6 of the U. P. Mining Concessions and Mineral Development Rules 1940. The entry regarding limestone in your Licence is therefore in order."

A little later the Collector appears to have again had doubts about the matter and on 6th September following he informed the Association that he had referred the whole question to Government and that in the meantime the quarrying of limestone was to be stopped. No further letter appears to have been sent to the Association prior to the meeting of representatives of Government and the Association held on 17-11-1948, to which I have already referred, but on 16-10-1948, Sri L. M. Bhatia, the Under Secretary, Industries Department, United Provinces Government wrote a letter, No. G. O. 3805 (5)—XVIII-245 (Appendix O. 1) to the Collector, Dehra Dun, which contained the following sentences:

> "No party can be allowed to use it" — that is, a prospecting licence — "for purposes other than those contemplated under the rules. It is true that the 1940 Rules, as they stand, are not clear cut on this point and leave much room for doubt. Government have, therefore, taken up a detailed examination of the rules, which are now equally applicable to Limestone, with a view to fill up these gaps and suitable instructions in the matter will issue in due course".

On 30-12-1948, the Collector informed the Association in writing (Appendix T. 1) that its licence "is hereby cancelled".

(33) The Association's case is that the statement in the letter of 16-10-1948, that the 1940 Rules "are now equally applicable to Limestone" taken in conjunction with the subsequent conduct of the representatives of Government at the meeting held on the 17th November, which it is said proceeded on the assumption that the Association's licence covered limestone, and in the absence of any evidence to the contrary, is sufficient to enable this Court to infer that an order had in fact been made by the Government applying the 1940 Rules to limestone.

(34) It was also said in the course of argument on behalf of the Association that the latter had no reason to foresee that the State would raise the point that the 1940 Rules did not apply to limestone, and that it was unable to obtain inspection of certain files in the custody of the District Magistrate, Dehra Dun. These are matters of dispute, and in the view I take it is not necessary for me to express an opinion on them.

(35) The contention of the State is that the Association has failed to discharge the burden of proving the existence of any such order. Its attitude is a purely negative one: a denial that the statement in Sri L. M. Bhatia's letter of the 16th October is correct, or that it means what its words imply. It has produced no evidence to show that the statement in that letter is wrong or is based on some misunderstanding; but it must be noted that there is on the record a letter from this same officer, Sri L. M. Bhatia (to which our attention was not drawn by the respondents during the argument) dated 27-5-1949, (Annexure W. 1) which it is very difficult, if not impossible, to reconcile with the statement in his earlier letter that the 1940 Rules are applicable to limestone.

In my opinion this Court has not got before it material sufficient for it to determine satisfactorily whether any general order was made by the Provincial Government applying the 1940 Rules to limestone or whether any separate order to that effect was passed in the case of the licence issued to the Association. I hold that the right in respect of which the writ is applied for in this petition is not free from doubt, and I am of opinion that we should direct the issue of a writ of 'mandamus' in the alternative in order that the existence of the right may be determined on the return to the writ.

(36) No rules have yet been framed by this Court prescribing the procedure to be followed on the issue of a writ of 'mandamus;' and it has so far, I think, been the practice of the Court to issue a peremptory writ requiring unconditional compliance by the person to whom it is directed. Prior to 1938, when by Section 7, Administration of Justice (Miscellaneous Provisions) Act of that year the prerogative writs were abolished, the writ of 'mandamus', except where the writ was peremptory, commanded the person to whom it was directed to perform a stated duty or to show cause to the contrary within the time commanded for the return of the writ. It is upon the return that a disputed question of fact can be fully investigated, the proceedings taking the form of an action. Witnesses can if necessary be examined and advantage taken of the provisions of Civil P. C. for discovery and inspection.

(37) In — 'The Queen v. Churchwardens of All Saints, Wigan', (1876) 1 AC 611 at p. 620 (M) Lord Chelmsford said—

> "So in cases where the right, in respect of which a rule for a mandamus has been granted, upon showing cause appears to be doubtful, the Court frequently grants a mandamus in order that the right may be tried upon the return; this is also a matter of discretion."

(38) In — 'The King v. Registrar of Companies', (1912) 3 K B 23 (N) a rule had been issued calling upon the Registrar of Companies to show cause why a writ of 'mandamus' should not issue directed to him commanding him to retain and register the memorandum and articles of association of a certain company. The Registrar had

declined to do so on the ground that the name of the company so nearly resembled that of another company as to be calculated to deceive. In discharging the rule Lord Alverstone, C. J., said that the Court could not make the rule for a 'mandamus' absolute unless it came to the conclusion either that the name was not calculated tc deceive, or

> "that there was so much doubt in the matter or such dispute of fact that we thought it desirable to allow the writ to issue that a return might be made in order to have further investigation upon further materials."

There is in my judgment in the present case such a dispute of fact that 'further investigation upon further materials' is eminently desirable.

(39) I would therefore direct the issue of a writ in the nature of 'mandamus' to the first respondent commanding it to execute in favour of the Association a mining lease, in respect of the minerals specified in the prospecting licence dated 31-7-1948, for a term of 30 years over an area to be determined in accordance with the provisions of R. 35 of the Mineral Concession Rules, 1949, within one month or to show cause to the contrary.

(40) The petition also contained other prayers, the second of which was for a writ in the nature of 'certiorari' to quash an order made on 15-2-1951, by the second respondent suspending the petitioner's licence for explosives. That licence has now expired and the petition so far as that relief is concerned has become infructuous. If, on an application being made to him for a fresh licence the second respondent declines to grant it for reasons which would entitle the petitioner to move this Court for relief the present petition is no bar to his doing so. The Advocate General has given the Court an undertaking that the first respondent will, without further delay, consider and dispose of two applications made by the petitioner for mining leases in respect of other areas dated respectively 27-10-1949, and 28-10-1949. This was the subject of the seventh prayer. The remaining reliefs sought by the petitioner were not pressed before us.

(41) The question of costs will be considered on the return to the writ. Further proceedings are not tied to this Bench.

P. N. SAPRU J.:

(42) This is a petition under Art. 226 of the Constitution. The main reliefs sought by the petitioner are:

> "(a) a writ of certiorari or such other order or direction commanding respondent No. 1 to execute in favour of the petitioner the long term mining lease applied for by him on 20-9-1948 in accordance with the Mines and Minerals (Regulation and Development) Act, 1948, (Act 53 of 1948) reads with Mineral Concession Rules, 1949.
>
> (b) an order or direction to respondents Nos. 1 to 5 not to interfere with the petitioner's right of possession & enjoyment of the mineral property and not permit or alienate any right or interest to any other person in the aforesaid property and
>
> (c) a writ of mandamus or any other direction or order commanding respondent No. 1 to dispose of the petitioner's applications dated the 27th and 28th October 1949 respectively and to pass orders thereon in accordance with the Mineral Concession Rules, 1949."

(43) Included in the petition are prayers for certain other reliefs which it is unnecessary to specify here.

(44) The facts which have given rise to this petition may be stated as follows:

(45) Of the joint family firm known as Messrs. Northern India Lime Marketing Association the petitioner is the 'karta'. The four other members of this firm are his sons, namely, Manohar Lal, Madan Gopal, Nand Gopal and Surendra Mohan. The petition has been filed by the petitioner on behalf of the firm as a whole. The petitioner firm was granted a prospecting licence (No. 5 of 1948) which is marked as Appendix 'A', p. 89, on 31-7-1948 for a period of one year in the first instance covering an area of ten villages in the district of Dehra Dun. This district has rich limestone deposits. This licence permitted the petitioner firm to prospect for sulphates, carbonates and sulphides such as gypsum, albaster, 'limestone', calcite marble, dolomite, magnocites, apatite, rock sulphate and phyrites in the land mentioned above in Dehra Dun district.

It was executed in the standard form prescribed for prospecting licences, i.e., it was in the form of an agreement or indenture made between the Governor of Uttar Pradesh of the one part & the licensee of the other part. It purports to have been signed on behalf of the Governor by the then Collector of Dehra Dun, Sri A. D. Pandit, and Sri Brij Lal Suri on behalf of the Northern India Lime Marketing Association. Under its terms, the 'exclusive' right to exploit the mineral resources and to enter upon the land, to mine, quarry, bore, dig, search for, win and work all or any of the above mentioned minerals lying or being within, under or thereabout the said lands was conferred upon the petitioner firm.

The petitioner's case is that the land specified in the licence was put into his possession and that thereafter he started quarrying, and exercising the rights which had been granted to him under the licence. The petitioner's allegation further is that his possession was proclaimed in the village comprised in the licence through the tahsildar. After depositing the requisite security under the rules and complying with the other rules of procedure governing such applications, the petitioner, invoking his rights under Cl. IV(1) of the licence, applied on 20-9-1948 for a mining lease for 30 years relying not only on Cl. IV(1) of the licence but also — and this is important — on R. 33, United Provinces Mining Concessions and Mineral Development Rules, 1940, which provides that the licensee shall have a right on or before the termination of his licence in the case of minerals other than precious stones to a mining lease in accordance with the terms contained in the rules for mining leases.

It may be further mentioned that there is a provision in R. 31 of the 1940 Rules that if the licensee has before the termination of the period of licence applied for a grant of a mining lease

> "the Collector may further extend the period of the licence until a mining lease is granted or for such time as he may deem fit."

Here it may be mentioned that on 26-10-1948 a suit was filed by persons claiming to be working minerals under leases from certain zamindars for an injunction restraining the petitioner from quarrying limestone in the licensed area. On 3-11-1948 another suit of a similar nature was filed by some other parties. 'Ex parte' injunctions were granted in both the suits which were ultimately dismissed on 10-2-1950 and 14-1-1950 respectively. On 3-11-1948 the Collector, however, direct-

ed the petitioner not to carry on the operations in the excluded area on the ground that one Sri Jairam Singh Oberoi had been granted a certificate of approval and that the U. P. Government had directed that, pending a final decision about the grant of a lease, no other party should be allowed to remove limestone from the area which he had hitherto been working and where he had spent considerable sums of money in the construction of roads etc., (see Appendix Fi. P. 209).

The petitioner protested against that order & sent a telegram to the Minister, Development Industries, Lucknow, on 12-11-1948 (see Appendix Q1, p. 211), requesting him to recall the orders interfering with his work of essential production. He also wanted an enquiry to be instituted into the conduct of those responsible for interference with him. On the same date, i.e., 12-11-1948 the petitioner also interviewed the Secretary to the U. P. Government, Industries Department, Sri Mathur. On 17th November there was a meeting at Lucknow at which the Collector, Sri A. D. Pandit, and the Industries Secretary, Sri H. K. Mathur, were present. In a later part of this judgment I shall discuss the conclusions I have arrived at in regard to the happenings at this meeting.

To continue with the story, on 22-11-1948 the Collector issued a temporary permit to the petitioner permitting him, pending the issue of a mining lease, to extract 10,000 tons of limestone from the area described in his prospecting licence dated 31-7-1948, subject to certain conditions (see Appendix Sl, p. 217). In December 1948 the petitioner was asked to deposit Rs. 30,000/- as advance royalties. On 30-12-1948 the Collector wrote to the petitioner firm that he would cancel the permit unless the royalty was paid within 24 hours by it.

On 14-6-1949, i.e., before the expiry of his prospecting licence, the petitioner wrote to the Collector pointing out that as he had applied for a long term lease on 20-9-1948 in accordance with the rules governing the application and issue of a mining lease of the land for which the prospecting licence No. 5 dated 31-7-1948 had been granted to him and that as there was likely to be some further delay in the execution of the mining lease, the prospecting licence granted to the petitioner firm should be extended till the issue of the mining lease in his favour (see Appendix B, p. 109). On 28-6-1949 the Collector wrote to the petitioner informing him that his prospecting licence No. 5 dated 31-7-1948 had been cancelled and that indeed he had himself voluntarily agreed to abrogate the licence on 17-11-1948 (vide Appendix B/B, p. 111).

On 12-7-1949 the petitioner wrote to the Secretary to the Government U. P., Industries Department, Lucknow, requesting him to pass orders for the grant and execution of a mining lease and pointed out that the Central Government had permitted the Provincial Government to grant mining lease, pending the issue of rules to be framed by the Central Government under the new Act, in accordance with the instructions issued to them by the Central Government and his prayer was that, in case of any further unavoidable delay in the execution of the mining lease, orders might be passed extending the period of the prospecting licence till such time as the lease was executed. He placed his reliance on Cls. (1) & (2) of Part IV of the licence agreement (see Appendix C. P. 113), which are reproduced below:

"IV(1). During the subsistence of this licence the licensee shall have the right subject to compliance with the said rules to a mining lease in accordance with the said rules in respect of over so much of the said lands as the licensees may desire and the Provincial Government shall think fit to grant and to the first offer of such mining lease in respect of precious stones within the said lands as Governor may think fit to grant.

(2) If during the term hereby granted the licensees shall apply in accordance with the said rules for a mining lease of the said lands or any part thereof this licence shall upon the expiration by effluxion of time of the term hereby granted if the licensees shall by notice in writing to the Collector so required be extended for a further term to and either on the date on which such lease shall be granted or on such other date as the Collector shall in his discretion prescribe."

On 24-7-1949 the Secretary to Government, U. P., Industries Department, Lucknow, wrote to the Counsel for the petitioner, Sri J. M. Chatterji, pointing out that he had not promised to get the petitioner's licence extended so far as limestone or gypsum was concerned. As regards the other minerals, the petitioner was told that 'prima facie' at that time there was no prohibition against the grant of permission to private parties to exploit those minerals and that the petitioner's application would be considered on its merits and early orders passed. The letter further stated that the rules for the grant of mineral concessions and mining leases were under revision by the Central Government in consultation with the Provincial Government and that it was not possible for Sri Suri or any one else to get anything out of Government by using "high pressure methods", (see Appendix D, p. 115).

It is argued that this was tantamount to a refusal to grant a permit for extracting limestone at that time. On 11-8-1949 the petitioner wrote to the Central Government to direct the Provincial Government to execute the mining lease in his favour to which he was entitled (see Appendix E, p. 117). On 22-9-1949 the Central Government wrote a letter to the U. P. Government which is marked Appendix F, p. 119, stating that it would no doubt be preferable for the Provincial Government to issue fresh mining leases on the coming into force of the new rules; but it was not desirable in the public interest that mining activities should come to a stand-still in the meantime.

It was, therefore, suggested that the Provincial Government might consider extending the period of the prospecting licence of the petitioner by another year from the date of expiry (see Appendix F, p. 119). On 27-10-1949 and 28-10-1949 the petitioner submitted further applications for the grant of a mining lease in respect of some other minerals. On 23-11-1949 the Assistant Secretary to the Government of India, Ministry of Works, Mines and Power, New Delhi, Sri M. Malhotra, wrote to the Secretary to Government, U. P. Industries Department, Lucknow, pointing out that the petitioner had written to them that he had not been granted either a mining lease or renewal of the prospecting licence for which he had made an application to the Provincial Government and that his minerals production was suffering.

The letter added that it was not desirable in the public interest that mining activities should come to a stand-still. It was further pointed out in that letter that Mineral Concession Rules under S. 5, Mines and Minerals (Regulation and Development) Act, 1948, had since been issued in the Gazette of India (Extraordinary), dated 19-10-1949. A request was, therefore, made that the Provincial

Government should take a very early decision on the application of the petitioner so as to enable him to proceed with the production of the minerals in question (vide Appendix F/F, p. 121). On 24-11-1949 a permit was issued by the Collector to the petitioner. On 26-11-1949 the petitioner firm made an application against the U. P. Government under S. 20, Arbitration Act in the court of the Civil Judge, Dehra Dun. It was numbered as suit No. 202 of 1949 (see Appendix G, p. 123). The prospecting licence contained the following arbitration clause:

"IV(5). If and whenever any dispute or question shall arise regarding the construction, meaning or effect of these presents or the rights, powers, liabilities or duties of the licensees hereunder or as to the amount or payment of any royalty, or other payable by virtue hereof or otherwise however, in relation to these presents such dispute or question shall be referred to the Governor whose decision thereon shall be final and binding on the parties hereto.

PROVIDED ALWAYS that any dispute as regards the price to be paid under Cl. 17(c) in head or Part II of these presents shall be determined by two arbitrators one to be nominated by the Governor & the other by the licensees or in case of disagreement between the arbitrators by an umpire to be appointed by the arbitrators by writing under their hands before proceeding with the arbitration and the decision of such arbitrators or umpire as the case may be shall be final and binding on the parties hereto."

(46) The points in dispute in respect of which the petitioner sought arbitration were 'inter alia' as follows:

"(i) Whether the applicant is entitled to hold, exercise and enjoy the land and all the rights and powers under the licence as he has been doing so far till the grant of the mining lease without any hindrance or interference by the opposite party.

(ii) Whether the opposite party can directly or indirectly alienate any rights or interests in the property to third party in violation of the contract or impose any conditions, limitations and restrictions over the rights, possessory or otherwise, of the applicant under the licence as the opposite party threatens to do.

.. ..

(v) Whether the opposite party can withold the grant of a mining lease to the applicant indefinitely as is being done by them.....".

(47) The defence of the U. P. Government appears to have been that the prospecting licence for minor minerals was not governed by the U. P. Mining Concessions and Mineral Development Rules, 1940 and that for that reason no application could be legally entertained nor any concession in pursuance thereof be conceded by the Collector. A further plea was that the prospecting licence issued by the Collector was not binding on the Government as he was not competent to execute it. Other pleas taken were that the agreement was never acted upon and as a matter of fact had been voluntarily given up by the applicant.

(48) It was further contended that the licence having run out its period and no other prospecting licence having been issued the applicant had no rights under the licence and that in any case the applicant was estopped by his conduct to present the application for arbitration. The line of defence taken would appear from the objections raised against the interim injunction issued by the court (Appendix M, pp. 131-133).

(49) On the very date on which the application under S. 20, Arbitration Act was made the court at the instance of the petitioner firm issued an injunction (a) restraining the opposite party to the suit from issuing any permit, licence or lease to any other party, and (b) allowing any other person to remove or quarry limestone in the area covered by the petitioner's licence (vide Appendix J, p. 129). On 30-11-1949 the petitioner instituted contempt proceedings for breaches of the order of 26-11-1949. Thereafter between 13-12-1949 and 18-12-1950 disputes went on regarding the injunction application before the court of the Civil Judge, Dehra Dun. On 18-12-1950 the Collector ordered the petitioner to stop quarrying and removing minerals.

On 18-12-1950 the Collector wrote to the railway authorities, Dehra Dun, directing them not to book limestone consigned by the petitioner firm and also to detain four wagons booked by them. On the same date, i.e., 18-12-1950, the Collector further wrote to two of petitioner's customers directing them not to make any payment to the petitioner of the amount claimed to be due by him as price of the limestone supplied. On 19-12-1950 the petitioner filed a third application for injunction restraining Government from interfering with the petitioner's rights (vide Appendix U, p. 153).

(50) It may be mentioned that the Collector passed another order on 1-2-1951 directing the petitioner to stop quarrying and removing limestone from two villages in the licensed area. Further an 'ex parte' order was passed under S. 144, Criminal P. C. by the Sub-Divisional Magistrate, Mussoorie, restraining the petitioner from quarrying and removing limestone from three villages. Moreover on that day the petitioner's licence for blasting explosives which he had been blasting since 31-7-1948 was suspended for the first time and on 15-2-1951 the District Magistrate ordered that the stocks of explosives in his possession be seized. The petitioner filed a representation for setting aside the 'ex parte' order of the Sub-Divisional Magistrate on 22-2-1951 and the allegation is that that has not been disposed of so far.

Further on 23-2-1951 an order was passed by the Sub-Divisional Magistrate, Dehra Dun for the attachment of the petitioner's property of Rs. 9,000/- on account of royalty. This, according to the petitioner, was an act unauthorised by law, there being no provision under the terms of the licence for such attachment. On 6-3-1951 the police seized the stock of gypsum which the petitioner had in his possession and the petitioner's allegation is that this was done by the police under the orders of the District Magistrate who ordered the prosecution of the petitioner under S. 379, I. P C. for the offence of theft of gypsum from village Sehra.

(51) The petitioner filed the present writ petition on 16-3-1951 claiming the various reliefs mentioned in the opening part of this judgment. I have considered it necessary to narrate the facts stated above because on the assumption that the petitioner had, apart from any rights under the contract with which we are not concerned, 'also a statutory right to a mining lease', it strikes me that the petitioner's activities so far as the carrying of the limestone and other business is concerned were interfered with only after the Constitution came into force. No final orders by the Governor or Government appear to have been passed on the first application for a mining lease though the position that the State Government

took up in the correspondence with him appears to be that he was not entitled to one.

The fact, however, stands out that the petitioner's possession was not actually disturbed until December 1950 and it is contended that it is because such disturbance took place after the Constitution had come into force that he could claim the aid of this Court under Art. 226 of the Constitution in respect of an agreement under which by force of statutory rules, the right to a mining lease, though it may have accrued to him before the coming into force of the Constitution, nevertheless subsisted on the date the Constitution came into force and the present application was filed.

Now even if it be assumed that the Government intimated through its letter No. 4/217, W. P./XVIII-245(S) 1948, dated 27-5-1949 addressed to the District Magistrate, Dehra Dun, that it considered the prospecting licence as cancelled, it cannot be said that the controversy between the parties ended finally with that letter. Before its receipt the petitioner appears to have sent a letter on 14-6-1949 for the extension of the prospecting licence in view of the application made by it on 20-9-1948 for a long term lease.

While the official attitude was that the petitioner firm had given up its rights to a mining licence at the meeting of 17-11-1948, the petitioner firm continued to assert that it had not done so and the petitioner's contention is that no final orders were ever passed disposing of its application of 20-9-1948 under R. 24, Mining Concession Rules and that the refusal to do so deprives it of its right under S. 52, Mining Concession Rules, 1940 to file a revision, if it becomes so necessary, against the order to the Central Government. In fact it is asserted by the petitioner that the attitude taken up by the Central Government in respect of a representation made by it in or about May 1950 was that the petitioner's representation was premature as the Provincial Government, as it was then called, had not disposed of the petitioner's application dated 20-9-1948.

(52) On these facts the first question that we have to consider is whether the petitioner is entitled to any relief under Art. 226 of the Constitution in respect of a prospecting licence under which, it is argued for the State, the right to obtain a mining lease accrued, assuming that it was one under statutory rules, both to the petitioner and was denied by the opposite party before the Constitution came into force. Reliance has been placed on the Supreme Court case of — 'AIR 1951 SC 128 (D)', for the proposition that every statute including a constitutional document is 'prima facie' prospective unless it is expressly or by necessary implication made to have a retrospective operation and that the question of an inconsistency of existing laws with fundamental rights can only arise on and from the date all those rights came into being.

Other cases to which reference may be made are those of — 'AIR 1950 Cal 512 (G)', — 'AIR 1951 Nag 443 (FB) (F)', and — 'AIR 1952 SC 339 (E)'. It is unnecessary to consider these and other cases in this case in the view that I am taking.

(53) Properly speaking, in my opinion, no question of the retrospectivity of Art. 226 of the Constitution arises in this case. On the facts which have been set out above, it is clear that there was no disturbance with the petitioner's possession of the quarries until after the Constitution came into force, though it is true that the right to a mining lease accrued to him before the expiry of the prospecting license in 1948 and could be specifically enforced by him under Art. 113, Limitation Act within three years. That Article fixes a period of three years for specific performance of a contract from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that performance is refused.

There is no specific article fixing the time limit for a suit to enforce a statutory liability for specific performance of a contract inferable from a statute or statutory rules. There being no such period fixed by the Limitation Act for such a liability, the article which would govern limitation for such an action would presumably be Art. 120, Limitation Act, 1908. Now, even if it be assumed that the right to sue for specific performance of the contract for a mining lease either accrued to him when his application dated 20-9-1948 for a mining lease is said to have been refused under the prospecting licence which was only for a year or his prospecting licence cancelled, the position is that before the expiry of the period within which a suit could have been brought another remedy, namely, that of invoking the writ jurisdiction of this Court under Art. 226, provided he could otherwise make out a case for it, became available to the applicant under the Constitution.

The position, as I see it, is that on the allegations made by the petitioner he had a subsisting right at the time the Constitution came into operation which could have been enforced by a regular suit for specific performance. I do not see why, in these circumstance, on the assumption that he had a subsisting right to sue for specific performance for the grant of a contract, either statutory or otherwise for a mining lease, the alternative remedy, 'if other suitable conditions exist', for the grant of a writ should be deemed to be barred on the mere ground that at the time when the right to the mining lease or its renewal accrued the constitutional remedy provided under Art. 226 had not come into existence.

Reference may be made on this part of the case to the case of — 'AIR 1950 SC 163 (H)'. In that case the petitioner had been carrying on wholesale business in vegetables and fruits at Kairana in the district of Muzaffarnagar in Uttar Pradesh State for two years at a rented shop, there being no bye-laws regulating the sale of vegetables and fruits within the limits of the municipality. Bye-laws having been passed on 19-4-1949 and confirmed on 1-1-1950 by the Commissioner, the respondent board auctioned "the contract for wholesale of vegetables" to the highest bidder, one Habib Ahmad. The application of the petitioner for a licence to carry on his wholesale business was rejected by the respondent board by a resolution on or about 22-12-1949.

The decision, however, was not communicated to the petitioner until 9-2-1950. He was required by the notice served on him of that decision to desist from selling any vegetables. While the bye-law provided that no person shall establish any new market or place for wholesale business in vegetables except with the permission of the board there was no bye-law authorising the board to issue a licence. Consequently a monopoly having been granted to Habib Ahmad the board found itself unable to grant a licence to the petitioner to carry on wholesale business in vegetables either at the fixed market place or at any other place within the municipal limits of Kairana.

On the above facts the Supreme Court came to the conclusion that the bye-laws were void under Art. 13(1) of the Constitution. Their Lordships repelled the argument that the bye-laws having come into force on 1-1-1950, i.e., before the Consti-

tution came in force, the petitioner had no right to continue the business and that therefore his case could not be governed by Art. 19(1)(g), as that would amount to protecting persons who were carrying on business before the Constitution came into force. I think the principle of that case applies and I am satisfied that the plea that the petition should fail on the ground that it relates to a period anterior to the coming into force of the Constitution has, on the facts established in this case, no basis.

(54) I come now to the main part of the petitioner's case. The petitioner's case is that he was under the prospecting licence entitled to a mining lease, that that right was not merely contractual but, having regard to the Mining Concessions Rules which gave a right to the holder of a prospecting licence to a mining lease, essentially one based upon statutory rules, that the licence and the statutory rules vested him with rights of property in the mines prospected by him and that he is, therefore, entitled to seek the assistance of this Court to give him the relief that he seeks under Art. 226 of the Constitution. To put it rather differently, the contention of the learned counsel for the petitioner is that, apart from the prospecting licence, he has by virtue of that licence a right under various statutory rules for a mining lease and that inasmuch as there has been a failure to grant it to him he is entitled to the reliefs asked for in this petition.

(55) The learned Advocate General denies that the rules on which reliance is placed by the learned counsel for the petitioner have any statutory force and contends that, in any case, these rules have not been made applicable to limestone. His argument is that that being so no prospecting licence given under the rules can give rise to any right to the petitioner as regards limestone. The learned Advocate General's contention is that all that can be said at the most is that contractual obligations arose under the prospecting licence.

If that is so, obviously an application for a writ of mandamus cannot be a proper basis for enforcing them. The case for the State is that mandamus can only be granted where the applicant has a right to the performance of a legal duty and has no other specific or equally appropriate and convenient means of compelling its performance. Obviously that duty should be of an imperative and not a discretionary character. I think that this proposition cannot be disputed and it is unnecessary to quote authorities in support of it. The question, however, is whether the duty in this case was on the facts established in this case, a statutory one and this will be dealt with on a latter part of the judgment.

(56) Another line of argument advanced by the learned counsel for the State is that whatever rights might have been possessed by the petitioner were voluntarily given up at the meeting of the 17th November to which reference has been made.

(57) The argument which has been advanced by the learned Advocate General is that the rules on which reliance has been placed by the learned counsel for the petitioner and which are supposed to have given him a statutory right as the holder of a prospecting licence to a mining lease are really departmental rules having no Parliamentary or legislative sanction behind them. In view of this argument it is necessary to examine the origin of the 1940 Rules and determine whether they can be said to have any statutory basis and whether they conferred any statutory rights to the holder of a prospecting license for a mining lease.

(58) The learned Advocate General has referred to the paucity of legislation on the question of mines and contended that the only pieces of legislation prior to 1948 with regard to mining operations were Regulation 2 of 1800 which sought to regulate the working of stone quarries at Chunar, Ghazipur and Mirzapur and the Indian Mines Act, 1923, the main concern of which was the regulation of conditions on labour in Indian mines. Act 4 of 1923 was passed with the object of amending & consolidating the law relating to the regulation and inspection of mines and came into force on 1-7-1924. It has been amended from time to time by the following Acts:
The Repealing and Amending Act (37 of 1925),
The Repealing Act (12 of 1927),
The Indian Mines (Amendment) Act (13 of 1928),
The Indian Mines (Amendment) Act (21 of 1931),
The Indian Mines (Amendment) Act (5 of 1935),
The Indian Mines (Amendment) Act (11 of 1936), &
The Indian Mines (Amendment) Act (29 of 1937).
Barring these Acts, the learned Advocate General contends that there is no Act of the legislature concerning itself with mines or mineral developments. The regulation and the Acts noted above were passed to regulate the conditions of labour on mines and to lay down the duties and responsibilities of owners, agents and managers and did not contain any provisions for the conditions on which prospecting licences might be granted. The argument for the State is that there is no statutory basis for the 1940 Rules, which, it is alleged by the petitioner were made applicable to mines, minerals etc., such as limestone by a separate order by the State Government in 1948 and that the petitioner's case, therefore, being one based upon a contract cannot be the subject-matter of a writ application for mandamus.

(59) Before analysing the above argument, I think it desirable to consider the validity of the argument raised by the Advocate General that the Collector had no authority to sign a prospecting licence on behalf of the Governor, that indeed he acted without authority in doing so and that the Governor or Government is not bound by the prospecting licence given by the Collector. I may at once state that I am unable to accept this argument as correct. By Notification No. 765/VII-127-1935, dated 27-4-1938, the Collector was vested with powers of making contracts on behalf of the Governor in respect of matters enumerated therein. That notification reads as follows:

"In exercise of the powers conferred by sub-s. (3) of S. 175, Government of India Act, 1935, the Governor of the United Provinces is pleased, in supersession of the resolution of the Government of the United Provinces in the Judicial (Civil) Department No. 955/VII-127-1935, dated 15-7-1937, to declare that the undermentioned contracts and assurances of property may be executed as follows :

....

3 (a) Contracts and other instruments connected with ferries, dues for grazing cattle on places other than canal banks, fisheries, nazul buildings, *spontan ous products* and minerals, execution of works not under the Public works department and the supply of necessaries for depots.

By Collectors and Deputy Commissioners and also all other officers below the rank of departments, e. g., heads of local offices who have been or may be empowered to enter into a contract.

P. C. Mogha,
Secretary to Government, United Provinces."

This notification was made under sub-section (3) of S. 175, Government of India Act, 1935, which is to the following effect:

"Subject to the provisions of this Act with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor General, or by the Governor of the Province, as the case may be, and all such contracts and assurances of property shall be executed on behalf of the Governor General or Governor 'by such persons and in such manner as he may direct or authorise."

(60) It is apparent that under the notification of 27-4-1938, the Governor had authorised the Collector to execute contracts and other instruments connected with spontaneous products and minerals. The prospecting licence having been signed by the Collector on behalf of the Governor must, therefore, be deemed to be a valid prospecting licence and the argument of the counsel for the State has no force on this point.

(61-70) The prospecting licence is marked as Appendix A and purports to have been executed on 31-7-1948. It is as pointed out before, in the form of an indenture between the Governor of the United Provinces of the one part and the petitioner firm of the other part and signed by the Collector on behalf of the Government. From a perusal of that document it would appear that the petitioner firm was granted the sole right to enter upon the lands described in the schedule and to mine, quarry, bore, dig, search for, win and work all or any of the minerals lying or being within, under or throughout the said lands. It would further appear that the petitioner had a further right by notice in writing to the Collector made before the expiry of the licence to require an extension of the period of his licence for a further term to either on the date on which such lease shall be granted or to on such other dates as the Collector shall, in his discretion prescribe.

(71) The petitioner invoked his right within the period the licence was subsisting after having deposited the requisite security and complying with all the rules of procedure governing applications of the grant of mineral concessions. On the basis of the clauses referred to above, it is now contended by the learned counsel for the petitioner that the prospecting licence made the grant of the mining lease to the petitioner mandatory. Had this only been the case, the proper remedy no doubt for the petitioner would have been to fight the matter out by way of a regular suit for specific performance of the contract for a mining lease. It is, however, contended that the liability created under the prospecting licence was not of a purely contractual nature but had also a statutory basis, inasmuch as under the rules having the force of law the petitioner was as of right entitled to a mining lease and the denial by the State Government to comply with those rules entitled him to a mandamus to have that duty performed.

(72) The question has, therefore, to be considered whether apart from any right under the prospecting licence for which the proper remedy seems to be a regular suit for specific performance, the petitioner had any rights under any rule having the force of a statute to a mining lease. This involves a consideration of the question whether the rules on which reliance is placed have any statutory basis at all. The learned Advocate General contends, as I have said before, that the rules to which our attention has been invited and which I shall presently notice are merely departmental rules having no legislative sanction behind them. I shall now proceed to deal with this matter.

(73) The question, therefore, to which I shall now address myself is whether the United Provinces Mineral Concessions and Mineral Development Rules, 1940, published in the United Provinces Gazette, Part 1-A, dated 28-12-1940, under Industries Department, Miscellaneous, Notification No. 1825/XVIII-319 (L) — 40, dated 19-12-1940, have any statutory basis. Before doing so I may point out that Rule 3 lays down:

"No licence to prospect for minerals or lease of mines and minerals shall be granted otherwise than in accordance with these rules, except with the previous sanction of the Provincial Government."

Rule 4 lays down the conditions under which a certificate of approval or a prospecting licence or a mining lease shall be granted to a person. Rule 6 expressly enacts that—

"Nothing in these rules shall apply to minor minerals, such as slate building stone, limestone and clay, the extraction of which may be regulated by such separate orders as the Provincial Government may pass in the matter, having regard to the merits of each individual case."

(74) It will be noticed that Rule 6 exempts minor minerals such as slate building stone, limestone and clay from the operation of these rules and their extraction is to be regulated by such separate orders as the Provincial Government may pass in the matter, having regard to the merits of each individual case. The controversy in this case is in respect of a minor mineral, namely, limestone and had there been no evidence that Rule 6 was applied subsequently to a minor mineral, the question whether the rules had any statutory basis or not would be immaterial, for even, as the rules stood, the petitioner would have no right to a mining lease in respect of limestone. The argument that the 1940 Rules have statutory authority behind them has taken this shape.

It is contended that they are a continuation, with necessary adaptations, of the earlier rules called the 'Mining Rules and Standard Form of Prospecting Licence and Mining Laws' framed by the Governor-General in Council under statutory authority and published with amendments in 1936. The 1936 Rules were an amendment of the 1913 Rules which were also framed by the Governor General in Council under statutory authority. What is the statutory authority behind these rules? For an answer to this question we have to consider some sections of the Government of India Acts prior to the coming into force of the new Constitution.

(75) For very nearly sixty years rules regulating the grant of prospecting licences have existed in this country. The earliest rules on this subject are to be found in the Supplementary Gazette of India, dated 22-12-1894, p. 1887. The 1894 Rules were subjected to a revision in 1899 as is apparent from the Supplement to the Gazette of India, dated 27-5-1899, page 996. A new set of rules superseded the 1899 Rules and they are to be found in the Supplement to the Gazette of India, dated 20-9-1913. It is unnecessary to notice the various amendments to which they were subjected until they were republished by the Governor-General in Council in 1936 with the sanction of the Secretary of State in Council.

(76) The Government of India Act, 1859, made the British Crown directly responsible for the government of this country and the powers exercised by or on behalf of the East India Company were transferred to it. By Section 1 of that Act the Governor-General in Council and some other officials were authorised subject to such provisions or restrictions as the Secretary of State in Council with the concurrence of a majority of votes at a meeting shall from time to time prescribe, 'inter alia', to sell and dispose of any real or personal property in India for the time being vested in Her Majesty under the Government of India Act, 1859 and to make assurances for that purpose. Section 2 of that Act laid down the mode of execution of those contracts and assurances.

(77) This Act was amended by the East India Contracts Act, 1870 (33 & 34 Vict. c. 59). In 1915 it became necessary for the British Parliament to pass a statute consolidating the law as amended by various statutes relating to the Government of India between 1859 and 1915. Attention may be drawn to sub-sections (1) and (2) of Section 30, Government of India Act, 1915, which are to the following effect:

"30(1). The Governor-General in Council and any local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council, with the concurrence of a majority of votes at a meeting of the Council of India, prescribes, sell and dispose of any real or personal estate whatsoever in British India, within the limits of their respective governments, for the time being vested in His Majesty for the purposes of the government of India, or raise money on any such real estate by way of mortgage, and make proper assurances for any of those purposes, and purchase or acquire any property in British India within the said respective limits, and make any contract for the purposes of this Act.

(2) Every assurance and contract made for the purposes of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and if so executed may be enforced by or against the Secretary of State in Council for the time being."

(78) It is well known that in 1919 important changes were made in the Constitution of this country. The Act of 1915 was, therefore, amended but there was no amendment of the provision contained in Section 30, Government of India Act, 1915, to which attention has been drawn.

(79) The Act of 1919 was intended to give to Provincial Governments and legislatures larger authority, particularly in respect of matters which were to be transferred to the control of ministers responsible to their provincial legislatures. With that end in view Section 45A of the Act made a provision, by the exercise of the rule-making power, for a classification of Central and Provincial subjects and for the devolution of authority in respect of the latter class of subjects to the Provincial Governments. Reference may also be made in this connection to S. 129 of that Act, which lays down that—

"Where any matter is required to be prescribed or regulated by rules under this Act, and no special provision is made as to the authority by whom the rules are to be made, the rules shall be made by the Governor-General in Council, with the sanction of the Secretary of State in Council, and shall not be subject to repeal or alteration by the Indian Legislature or by any local legislature."

By virtue of the authority given by Section 45A read with Section 129A Devolution Rules came to be made in 1920. They have been in operation in the United Provinces from 23-1-1921 and item no. 25 of these rules, which is to be found in the List of Central subjects enumerated in *Part 1* of the Schedule, is in the following terms:

('Control of mineral development, in so far as such control is reserved to the Governor-General in Council under rules made by or sanctioned by the Secretary of State, and regulation of mines."

I have made it clear that while the statutory basis for the rules of 1894 and 1913 is Section 2, Government of India Act, 1859, that of those which came into force in 1936 is to be found in Section 30, Government of India Act, 1915, which was kept in tact by the Act of 1919.

(80) It is well known that the Government of India Act, 1935 effected a vast modification in the relationship between the Secretary of State and the Government of India. It became necessary, therefore, for the British Parliament to make it clear that laws existing on the date on which the Act came into operation would continue in force until altered, repealed or amended by a competent legislature or other competent authority or by order in council. Sections 292 and 293 of the Government of India Act, 1935, make that position absolutely clear. The 1936 Rules were with some variations republished in the 1940 Rules and the authority for so doing was the Government of India (Adaptation of Indian Laws) Order, 1937.

Whether by adaptation the rules could be altogether modified or not is not a question before us. I think for the purposes of this case it is enough to say that to the extent that the 1940 Rules do not depart in any substantial particular from the 1936 Rules there is a statutory authority for these rules. In 1949 the Indian Legislature passed an Act known as the Mines and Minerals (Regulation and Development) Act, 1948. Section 5 of that Act authorised the Government to make rules and under the provisions of that Act the Mineral Concession Rules, 1949, were made. They superseded the rules made in the 1940 Rules. The conclusion at which I have arrived is that the 1940 Rules have a statutory basis.

(81) Before parting with this part of the case I may notice the argument of the learned Advocate General that it was not competent to Government to grant a mining lease to the Association as by so doing it would be virtually creating a monopoly in favour of it, limestone being almost entirely comprised in the area specified in the Association's licence. I do not think that we can go into this question as no material has been placed before us which would justify us in holding that they would constitute a monopoly.

(82) I may point out that the Madras High Court in — 'Sankara Mining Syndicate Ltd. Nellore v. Secretary of State', AIR 1938 Mad 749 (O) treated these rules as statutory rules. Leach, C. J., in that case observed that—

"The Government of India have framed certain rules regulating the grant of mining concessions and the validity of these rules is not in question."

(83) On the materials referred to above, I have come to the conclusion that the 1940 Rules were a continuation of the 1936 Rules with adaptation and modification which in turn can be traced

back to 1913 and 1894, that they have a statutory basis and that there is no force in the contention of the learned Advocate General on this point.

(84) I come to the interpretation of 1940 Rules, published in the United Provinces Gazette, Part 1-A, dated 28-12-1940, under Industries Department, Miscellaneous, Notification No. 1825/XVIII-319 (L)-40, dated 19-12-1940. Rule 3, which has been quoted before, expressly provides that—

"no licence to prospect for minerals or lease of mines and minerals shall be granted otherwise than in accordance with these rules, except with the previous sanction of the Provincial Government'.

Rule 4, which has also been quoted before, lays down the conditions under which a certificate of approval of a prospecting licence or a mining lease shall be granted to a person. Rule 6 of the Rules to which attention too has also been drawn before exempts minor minerals such as limestone and clay from the operation of these rules unless the Provincial Government so decides by such separate orders as it may pass having regard to the merits of each case. It will be clear from the rules to which attention has been drawn that they do not apply to minor minerals such as limestone. It is contended that the word used is not 'limestone' but 'limistone and clay', that the word 'clay' qualifies 'limestone' and, therefore, only means 'limestone used for lime burning' but does not include chemical limestone which is a major mineral.

On this part of the case our attention has been invited to the Mineral Concession Rules, 1949, made under Section 5, Mines and Minerals (Regulation and Development) Act, 1948 (Act 53 of 1948) which treat limestone as a minor mineral. I am unable to accept this argument as correct. I do not think that the word 'clay' qualifies the word 'limestone'. The argument is based on the contention that there is no comma after the word 'limestone' and that the word between 'limestone' and 'clay' is 'and'. Limestone and clay are separate minerals and the word 'and' has been used conjunctively. I do not think that there is any force in this contention. This point has been dealt with by my brother Mootham and I am in agreement with him.

(85) I now come to the most vital point in the case. Is there anything to show that the 1940 Rules were subsequently amended by such separate orders as the Provincial Government may pass having regard to the merits of each individual case to include limestone? There is on this part of the case a controversy between the parties as regards exactly what occurred, the case of the petitioner being that these rules were applied by a separate order to limestone.

(86) The controversy has centred round the question whether by a separate order limestone was ever included, for the main interest of the petitioner is in the right, which he claims was given to him, of exploiting the commercial possibilities of limestone in the district of Dehra Dun. Exclusive of the affidavit accompanying the petition 16 affidavits have been filed in this case. Some of those affidavits cannot be regarded as proper affidavits at all. It is conceded by the learned Advocate General that the counter-affidavits filed by Sri B. B. Lall and Sri Gyan Prakash on 25-5-1951, and Sri Inder Dutt Saklani on 1-6-1951, and Sri Dharam Vir Singh on 14-6-1951, are not in proper form as they have been neither properly sworn nor affirmed. If they are excluded, then the four affidavits filed by way of rejoinder by Sri Brij Lal Suri on 17-3-1952, and one by Sri Madan Gopal on 29-5-1952, must also be eliminated from consideration.

We cannot also look into the supplementary affidavit filed by Sri Brij Lal Suri on 17-7-1952, as it was filed without leave of the Court. I think that the affidavits filed, and particularly those on behalf of the respondents are not quite satisfactory. I am constrained to observe that the rule that statements made in affidavits, save in interlocutory matters, must be based upon personal knowledge has often been ignored. In fact some of the affidavits in this case read more like arguments than statements of facts. I consider it important to emphasise this point, as I have noticed, that the tendency to file argumentative affidavits not sworn to on personal knowledge has not yet diminished in this Court.

(87) Were the rules relating to mining lease contained in the 1940 Rules applied by a separate order to limestone? The position on this part of the case would seem to be somewhat as follows: Soon after the licence was granted, the then District Magistrate, Dehra Dun, wrote a letter (Appendix J1, p. 193), dated 18-8-1948, to the petitioner that under the U.P. Mining Concessions and Mineral Development Rules, 1940, no licence could be granted for minor minerals such as slate building stone, limestone and clay, that the entry relating to limestone from his licence was being deleted and that he should present his licence form for correction. That letter was replied to by the petitioner by a letter (Appendix K1, p. 195), dated 20-8-1948. In it he pointed out that the U. P. Government had already passed orders in respect of Dehra Dun limestone deposits after taking into consideration their importance for the industrial growth and development of these Provinces and had held that prospecting licences and mining leases in respect of these limestone deposits should be granted in accordance with these Rules.

He further pointed out that if the District Magistrate would refer to the correspondence and other papers on the subject, he would be satisfied that a prospecting licence for Dehra Dun limestone could also be granted under these Rules and that the grant of prospecting licence No. 5 dated 31-7-1948, in respect of limestone was perfectly in order. On 23-8-1948, the Collector wrote to the petitioner (Appendix L1, p. 199) informing him that the entry regarding limestone in this licence was 'in order' as it was within the powers of Government to give him a prospecting licence for minor minerals such as limestone under R. 6, U. P. Mining Concessions and Mineral Development Rules, 1940. He was further informed that under the terms of this prospecting licence the Government had conferred on him the sole right, subject to the conditions in the licence, to mine, quarry, bore, dig and search for and win, work & carry away the minerals specified therein.

On 6-9-1948, the Collector, Dehra Dun, again wrote to the petitioner (vide Appendix M1, p. 201) stating that Government had ordered that applications for limestone from quarries should be forwarded to Government and that he had referred the whole question to Government. On 10-9-1948, the petitioner wrote a letter to the Minister for Industries and Development, U. P. Government, Lucknow, pointing out that while no doubt R. 6, U. P. Mining Concessions and Mineral Development Rules, 1940, had laid down that minor minerals such as limestone etc., should not ordinarily be governed by the restrictions and rigorous and other formalities of procedure of those rules, the latter part of that rules had also em-

powered Government to make rules or pass such separate orders as it deemed fit in respect of those minor minerals after taking into consideration the merits of each individual case.

The petitioner further pointed out that Government had already passed orders in respect of limestone deposits and had thus made the said rules applicable to the Dehra Dun limestone deposits (vide Government Orders Nos. 1296/UP/XVIII, dated 12-4-43 and 2419/L/XVIII, dated 27-7-43). On 16-10-1948, Sri L. M. Bhatia, P. C. S, Under Secretary to Government, Industries (A) Department, U. P. Government, Lucknow (Appendix O1, p. 207) wrote to Sri A. D. Pandit, I. C. S., Collector, Dehra Dun, that the rules only authorised the licensee to prospect for and quarry or mine specified minerals for experimental purposes in order to judge the commercial potentialities of a particular area. If the results so warranted and if the party concerned decided to undertake commercial operations, then it must obtain a mining lease. It would thus be seen that the prospecting licence could be used only for a definite limited end. No party could be allowed to use it for purposes other than those contemplated under the rules. It was further added in the letter that:

> "It is true that the 1940 Rules, as they stand, are not clear cut on this point and leave much room for doubt. Government have, therefore, taken up detailed examination of, the rules 'which are now equally applicable to limestone' with a view to fill up these gaps and suitable instructions in the matter will issue in due course."

This is a very important document as on the basis of this letter it has been argued that the 1940 Rules were made applicable to limestone by a separate order. It is contended by the petitioner that it is not possible for him to produce the order as that is something which is within the possession and special knowledge of Government. He says that he is entitled to rely on this letter for proving that R. 6 was made applicable to limestone.

(88) The question for consideration is whether any presumption can be made on the basis of this letter with safety as to the existence of a separate order making the 1940 Rules applicable to limestone. Undoubtedly, the onus initially is on the petitioner to prove that they were so applied. Though the case for the State is that those rules were not made applicable to limestone, the fact cannot be ignored that the statement that these rules were so made applicable was made in a letter marked as Government Order and signed by an Under-Secretary to Government. It is contended that the obvious inference to be drawn from the letter is that orders were passed for making the rules applicable to limestone. It will be noticed that this letter is prior in date to the meeting of 17-11-1948, at which it is alleged that the petitioner voluntarily gave up his rights under the prospecting licence to a mining lease.

The discussions in the meeting of 17-11-1948, appear to have proceeded upon the assumption that there was a valid prospecting licence which included limestone for no question relating to its validity appears to have been raised at that meeting. Learned counsel for the petitioner contends that this letter coupled with the further circumstance that the validity of the prospecting licence was not questioned by the spokesmen of Government at the meeting of 17-11-1948, should be sufficient to satisfy the Court that he had discharged the burden of proving that the 1940 Rules were made applicable to limestone. I cannot help regretting that important documents which might have thrown light on the facts in this case have not been produced by the State. The contention on behalf of the State is that the statement contained in Sri L. M. Bhatia's letter of 16-10-1948, is incorrect.

It is further urged that no inference should be drawn from the letter as it is somewhat loosely worded and does not mean what it purports to say. Surely evidence could have been produced that the statement in the letter is incorrect. The relevance of the documents throwing light on the existence or otherwise of the rule cannot be disputed. The material question raised by Sri Bhatia's letter is as to the inference to be drawn from it. The petitioner's case is that he has produced Sri Bhatia's letter, that this is all that he could be reasonably expected to do and that it is for the opposite party, in those circumstances, to offer an explanation of the statement contained therein. An affidavit explaining what Sri Bhatia meant could have been produced by the opposite party. Obviously the person indicated for that purpose was Sri Bhatia or some high Secretariat official having personal knowledge of what had actually happened. I cannot help feeling that evidence must be existing as to whether there was an order or not and that it should have been easy by proper affidavits or otherwise to make it available to the Court.

It is, in my opinion, against sound legal principles for those relying upon a set of facts to withhold from the Court that best evidence in their possession which would throw light on the matter to be investigated by it. For this proposition, I would rely upon the cases of — 'Murugesam Pillai v. M. D. Gnana Sambandha Pandara Sannadhi', AIR 1917 PC 6 (P) and — 'Rameshwar Singh v. Bajit Lal Pathak', AIR 1929 PC 95 at p. 99 (Q). Is it, in these circumstances, unreasonable for the court to draw an adverse inference from the failure of a party to produce the best evidence in its possession to prove a fact the initial burden in regard to the proof of which has been discharged by the petitioner? I do not think so. Had the matter rested here, I might have been disposed to hold that the petitioner had discharged the burden of proving that the 1940 Rules were made applicable to him. But there is a further difficulty in the case which I am bound to point out.

Appendix W1, p. 223, is the copy of a Government letter dated 27-5-1949, which purports to be written by the same Sri Bhatia who wrote the letter dated 16-10-1948. It is addressed to the District Magistrate of Dehradun and is irreconcilable with his previous letter. After pointing out that under R. 6, U. P. Mining Concessions and Mineral Development Rules 1940, Government are competent to frame separate Rules or orders for the regulation and control of minor minerals such as slate building stones, limestone and clay, it goes on to state that the authority to grant such licences vests with Government and the action of the District Magistrate in granting a prospecting licence to Northern India Lime Marketing Association, Dehra Dun, without any reference to Government, must, therefore, be deemed to be ultra vires so far as it relates to limestone.

Nothing, however, is stated in this letter as to whether any such separate order was ever passed by Government, but the tone of the letter suggests that it probably was not passed. It is to be noted that in the concluding part of the letter there is a direction to the Collector to cancel

the licence and that if as a sequence of that cancellation the Association files a suit against Government, to contest it, I find it difficult to reconcile both the letters of Sri Bhatia except on the basis that at one time it was decided to apply the rules and later the decision was probably reversed. In this state of evidence the question whether R. 6 was made applicable or not by a separate order is not free from doubt.

(89) The further question, however, to be considered is whether that being the case, the petition of the petitioner should be dismissed or a further opportunity should be afforded to the parties to prove their respective cases by following the procedure indicated in the order of my brother Mootham. I have come to the conclusion that the latter alternative should be preferred in this case, more particularly for the reason that the case has been argued at considerable length and that the course suggested will enable the controversy between the parties to be settled expeditiously.

(90) No doubt there are no rules regarding the issue of peremptory writs and alternative writs by this Court requiring compliance by the persons to whom they are directed. That in exercising the power of issuing mandamus English Courts have resorted to this procedure has been pointed out by my brother Mootham and I do not think it is necessary to dilate on this point. I would like, however, to add that the power given by Art. 226 of the Constitution is of a very wide nature.

(91) I would further like to point out that the power given under Art. 226 to issue not only the well known writs as obtaining in England but to pass any order or direction which would be appropriate and effective for the enforcement of not only fundamental rights but also other rights as well to any person or authority including any government within the territories in which the Court exercises jurisdiction is of a most comprehensive nature. To put it differently, in the exercise of this power under this Article this court can issue a mandamus, order or direction for the enforcement of any legal right and the performance of any legal duty. Though this is so, it is incumbent on this Court not to resort to this extraordinary procedure where an adequate remedy is available to the petitioner by ordinary legal process. These principles are so well known that it hardly seems necessary to cite authorities in support of them. Without multiplying authorities I will content myself by referring on this part of the case to three cases. — 'Bagaram v. State of Bihar', AIR 1950 Pat 387 (FB) (R); — 'AIR 1951 All 257 (FB) (K)'; and — 'Asiatic Engineering Co. v. Achhru Ram', AIR 1951 All 746 (FB) (S); I shall discuss this question more fully a little later.

(92) Now the respondents contend that under the licence the petitioner had the legal remedy of having all disputes relating 'inter alia', to the rights of the licensee to be referred to arbitration. The provision in respect of this matter has been quoted before. It has been further pointed out that in actual fact an application was filed by the petitioner under S. 20, Arbitration Act. That case came to be numbered as 202 of 1949 and in the plaint the matters in dispute between the parties are enumerated. I have also pointed out what the defence taken in the written objection filed on behalf of the State on 19-12-1949 was? One of the most important pleas taken by the State was that the agreement of 31-7-1948, between the petitioner and the Governor of the Uttar Pradesh had been superseded by a subsequent agreement dated 17-11-1948, under which the petitioner accepted a limited permit in lieu of the agreement dated 31-7-1948, and that as a result of the alleged new agreement dated 17-11-1948, the prospecting licence ceased to have any binding effect on the opposite party.

Now it is well known that where the parties have chosen under an agreement to refer their disputes to arbitration, courts will insist that they should have recourse to arbitration before pursuing any other remedy. The contention of the learned counsel for the petitioner however is that under the arbitration clause to which a reference has been made before only disputes or questions regarding the construction, meaning or effect of these presents or the rights, powers, liabilities or duties of the licensees hereunder or as to the amount or payment of any royalty or other money payable by virtue hereof or otherwise hereafter in relation to such presents can be referred to arbitration. The case of the respondents being that the petitioner gave up his right to a mining lease at the meeting of 17-11-1948, no question of arbitration can arise. The dispute had to be with reference to the rights under the licence and assumed the existence of these rights.

Thus it is only the interpretation of the rights or powers and duties and liabilities under the licence that could be the subject-matter of an arbitration suit. No doubt, the application for reference to arbitration in this case was initially presented by the petitioner, but in coming to the conclusion whether the arbitration suit will be a suitable remedy for the petitioner not only the plaint but the pleadings of the parties can also be looked into and for this proposition I would rely upon the principles laid down in regard to this matter by the Full Bench in the case of — 'D. N. Rege v. Mohd. Haider', A I R 1946 All 379 (FB) at pp. 381 and 382 (T). On a balance of considerations I have come to the conclusion that the arbitration suit does not provide an effective remedy for the determination of some of the questions raised by the petitioner in this case.

(93) Apart from the considerations to which I have invited attention, there is one other reason why a method should be devised whereby the dispute between the parties should be more speedily and conveniently disposed of. It appears that an application was presented to this Court by the petitioner on 19-9-1951, under Art. 228 of the Constitution for the withdrawal of the arbitration case from the arbitration court to the file of this Court on the ground that the questions raised in it related to an interpretation of the Constitution. Simultaneously with the filing of that application an application was moved for an interim order staying further proceedings in the district court. The interim order prayed for was granted by this Court and it stayed further proceedings in the District Court. That interim order is still in operation, the State Government having taken no steps to have it vacated so far.

I am, therefore, driven to the conclusion that the State Government had no objection to the indefinite stay of the arbitration suit. It would, in these circumstances, be hard on the petitioner if after the lapse of this time, he was made to pursue the remedy of the arbitration suit. More than five years have elapsed since the dispute regarding the right of the petitioner to a mining lease arose. During these five years there have been many litigations both in the civil and criminal courts between the parties. If the petitioner is now directed after a full hearing in this case on his writ petition either to pursue his remedy

in the arbitration suit or to file, as I think he can, a suit for specific performance of the contract it will be before several years that he will be able to get his rights, which as the case now stands are capable of speedy ascertainment, adjudicated upon by the court.

There is, therefore, in my opinion good reason to think that it will not be in the interest either of the petitioner or the State if the controversy is allowed to continue. I would like in this connection to refer to the case of — 'Budh Prakash Jai Prakash v. Sales Tax Officer', AIR 1952 All 764 (U). In that case I made the observation that where arguments had covered a wide ground and the material facts on which this court could have ultimately come to its conclusions had been placed before it, it was desirable in order to avoid multiplicity of proceedings and inconvenience to all the parties including the State to deal with the matter itself. This was also the view which commended itself to Agarwala J. On the grounds stated above I am not prepared to dismiss this application on the ground of the availability of an alternative remedy. That alternative remedy cannot, in the circumstances of the case, be now described as equally convenient, beneficial and effectual.

(94) I have indicated that, in my opinion, the petitioner has, so far as he is concerned, placed all the material that was in possession regarding the issue of orders in his particular case to cover limestone. I have pointed out that the attitude of the State Government has not been helpful so far as the determination of this question is concerned. A way has been pointed out by my brother Mootham for having the issues between the parties decided expeditiously. It is well known that before the abolition by S. 7, Administration of Justice (Miscellaneous Provisions) Act, 1938, the writ of mandamus except where it was peremptory could be used to command the authority or person to whom it was directed to perform its statutory duty or to show cause to the contrary within the time indicated in the writ for the performance of that duty.

After return disputed questions of fact could be fully investigated by proceedings virtually assuming the form of an action. In those circumstances under that procedure witnesses could be examined and the provisions of Civil P. C. for discovery and inspection utilized. It is unnecessary to refer to English cases on this point as reference has been made to them by my brother Mootham. I shall in a later part of this judgment revert to this question by citing certain American authorities.

(94a) The procedure adopted by my brother Mootham is based upon the assumption that at the meeting of 17-11-1948, the petitioner did not give up his rights under the lease. It is, therefore, necessary to examine a little closely as to what actually happened on that day.

(94b) On 17-11-1948, there took place a meeting at Lucknow at which the persons present were Sri H. K. Mathur, Industries Department, Dehra Dun, Sri A. D. Pandit, I. C. S. Collector Dehradun, and the petitioner and his son. The record of the proceedings has been produced before us. It is signed, among others, by the petitioner. It is contended that the petitioner agreed to have his licence cancelled at that meeting. Five points have been urged in connection with the minutes of this meeting and their legal effect. They are as follows:

"(a) That the records of these minutes cannot be construed to constitute a deed of relinquishment or surrender as the decision in them was not embodied in a registered deed of document.

(b) That the petitioner was coerced or intimidated into entering into the arrangement embodied in that agreement by the pressure of the officials present at that meeting.

(c) That there was no consideration to support the arrangement.

(d) That the terms of the agreement, if any, embodied in the minutes of that meeting were never carried out by the State Government, and that that being so the petitioner is absolved from any legal duty adhering to it.

(e) That the agreement itself has no validity as there is nothing to indicate that it had the necessary sanction or approval of the Governor under S. 175, Government of India Act, 1935.

(94c) Before considering each of these questions separately, I would like to say that the meeting appears to have been held as the petitioner firm had been complaining to Government that certain factories had made arrangements for obtaining limestone from other parties and were seeking, with the permission of the zamindars, to work in part of the area covered by its prospecting licence and that Government officials had not been co-operating with the firm in enabling it to exercise that right claimed by it under its licence. Apparently the Association was apprehensive that if that state of affairs continued, it would not be able to fulfil the commitments that it had entered into with sugar factories for the supply of limestone.

At the time when the meeting took place relations between the petitioner firm and the local officials appear to have been strained as apparently the Government view was that it was not open to the Association under its prospecting licence to quarry limestone on a commercial basis. On a fair construction of the agreement arrived at, at that meeting, I think that it can be said that what the parties agreed to was that the Association would be willing to give up the rights it claimed under the prospecting licence and supply one hundred and twentyfive wagons of limestone to one Sri J. S. Oberoi and a hundred to one Har-Kishan Lal, the rate of supply to be determined by the Collector, provided that Government on its own part would grant to the Association a temporary mining lease for the remaining period of the sugar factories session and, after the new mining concession rules had been framed, undertake to examine the Association's application for a mining lease on merits with other candidates.

I have no difficulty in coming to the conclusion that a temporary mining lease cannot mean, as contended for by the State, a permit. It, in my opinion means mining lease of a short duration. I have also difficulty, however, in coming to the conclusion that the words 'on merits with other candidates' simply mean not that priority as between the Association and other applicants would be determined according to any new rules framed by Government but that it would be for Government to grant or refuse the Association's application after considering it on the merits, i.e., its capacity and experience, as compared with other applicants.

(94d) I shall first consider the objection that the minutes do not constitute a deed of surrender or relinquishment as the decision in them was not embodied in a registered deed or agreement. The notion of a 'profit-a-prendre' is that of rights appurtenant to land supplemented by the right to

enjoy the profits of the land over which they are exercised. In English law a 'profit-a-prendre' is regarded as something taken from the soil or the right to take a part of the soil or the produce of the soil.

(94e) In his well known work 'The Law Relating to Easements in British India', 3rd edition, Mr. Peacock explains that in English law:

> "Whilst an easement is merely the right appurtenant to land to do something, or require something not to be done, on the land of another, a profit a 'prendre' is not merely the privilege to do, but the right to take and use, and is, therefore, something more than an easement." (page 4).

He further points out that:

> "While an easement can never import an interest in land, a profit a 'prendre' which gives a right to take away a portion, or the produce, of anothers' soil, may be said to that extent to be an interest in land, or a possessory right." (para 4).

He further observes that:

> "A profit a 'prendre', considered as a right, is an incorporeal hereditament equally with an easement, but considered as a tangible thing taken from the soil is a corporeal thing.
>
> Another point of difference between profits a 'prendre' and easements is that the former cannot, but the latter can, be claimed by virtue of a custom.
>
> Further, unlike an easement proper, an exclusive profit a 'prendre' such as a right of fishing, is capable of being trespassed upon." page 5).

Now the separate existence of 'profit-a-prendre' in English law is founded upon the distinctions quoted above. In India, however, the definition of the word 'easement' as contained in S. 2, sub-section (5), Limitation Act (Act 9 of 1882) includes a 'profit-a-prendre'. The word 'easement' is used in the statutes of this country in a very wide sense for it not only includes 'beneficial enjoyment', but also a possible convenience, remote advantage and even a mere amenity. Now Mr. Peacock explains that:

> "Easements in India are capable of being exercised not only over actual land itself, but over things permanently attached to the land, such as houses or buildings of any kind, or over anything growing on, or attached to, or subsisting upon, land, such as woods, tanks or rivers". (Pages 8 and 9 of the Law Relating to Easements in British India, 3rd edition.)

The position appears to me to be clear that the term 'easement' as used in Indian Law

> "includes even a right to enjoy profits arising out of the soil of another owner, and may be acquired in the same way as ordinary easement rights are acquired."

(See page 23 of 'Easements and Licenses' by K. N. Joshi, 1st edition.) It is quite obvious that the term 'easement' as used in the Indian Law includes 'profits-a-prendre' in gross which are unappurtenant to any dominant tenement and are enjoyed solely for the benefit of an individual. See on this point — 'Chundee Churn Roy v. Shib Chunder Mundul', 5 Cal 945 (V), — 'Chinnanam Pillay v. Manu Puttur', 1 Mad LJ 47 (W); and — 'Bhabadeb Chatterjee v. Bhusan Chandra', AIR 1926 Cal 507 (X).

(95) The question whether the relinquishment of a 'profit-a-prendre' requires registration or not raises a difficult question having regard to the provisions of Ss. 17 and 47, Registration Act. It is, however, unnecessary to go into it as, in my opinion, the minutes would not constitute a release or waiver of any rights possessed by the petitioner, but represent a mere narration of a transaction which took place between the petitioner and certain senior officials representing Government. It is nothing more than a recital of certain events which occurred at one time in the history of relationship between the parties. I think, therefore, that the document can be looked into by this Court.

(96) I come now to the question whether Sri Brij Lal Suri, who was representing the Association, entered into this agreement by coercion or duress on the part of the officials of Government. It is clear that there was a difference of opinion between the Government and Brij Lal Suri as regards the latter's claim that he had a right to a commercial exploitation of the mineral. Sri Suri's version is that Sri Pandit told him that unless he signed the memorandum, Government would not help him in his difficulties as a prospector. Sri Suri is an intelligent businessman quite capable of looking after his own interests & I find it impossible to believe that the two officials of Government could, or did in fact, dominate his will. It may be that the arrangement arrived at was not to his liking. But Sri Brij Lal Suri appears to have discovered that only after he had left the meeting and given his blessings to it. For one reason or another he was a consenting party to it and there is no force in the plea that he signed it under coercion or duress.

(97) The next point to be considered is whether the so-called agreement has any consideration to support it. The petitioner possessed under the prospecting licence the sole right to a mining lease and on an application made before its expiry to an automatic extension of the licence pending the execution of a mining lease. That this was so is clear from Cl. (1) of Part 4 of the licence and also R. 33 which is important for the purposes of deciding this case. Rule 33 specifically lays down that:

> "On or before the determination of his licence, the licensee shall have a right .....to a mining lease in accordance with the terms contained in the rules for mining leases...."

The petitioner had a clear right to a mining lease as soon as an application was made by him within the period of his licence in the prescribed manner. By the mere fact that the licence for the mining lease was not issued during the period of the mining lease or that the authorities failed to issue it before it expired the right to this right would not disappear. The right to an extension of the period of the prospecting licence is, if an application is made within the time, an automatic one. For a licence for a mining lease to which the petitioner was entitled he agreed to accept a temporary mining lease provided certain conditions were fulfilled.

No doubt, Government issued to him on 22-11-1948, a temporary permit which was to remain valid upto 31-3-1949, authorising him to extract 20,000 tons of limestone. The argument of the State is that this was the temporary running lease referred to in the agreement. I cannot look upon this permit as constituting any consideration for under the terms of the prospecting licence the Association possessed a right to a mining lease, as will be evident from Cl. (1) of Part 1 of the prospecting licence which is in accordance with R. 14 of the 1940 Rules. According to this rule,

as also from the clause referred to above, the petitioner firm had

> "the sole right subject to the conditions contained in the licence, to mine, quarry, bore, dig and search for, win, work and carry away only specified minerals or, in the event of no minerals being specified, all minerals lying, or being within, under or throughout the land specified in the licence."

Under the licence the Association had acquired the sole right to extract limestone within its area and the fact that the permit permitted it to do so cannot constitute a consideration for the agreement.

(98) Lastly, in any case, in my opinion, the State did not carry out the undertaking that it would grant a temporary mining lease for the permit cannot be looked upon as a mining lease. An application having been made for the extension of the licence during the term of the licence the petitioner clearly became entitled under the rules & the licence to a mining lease, and the fact that the authorities did not choose to grant it to him within time cannot affect his right to it.

(99) The last point forcibly urged by Mr. Dhawan is that the agreement is of no effect as it was not only implemented by Government and agreed to by the Association without consideration but it was also not in the form required by S. 175(3), Government of India Act, 1935, which has been quoted in an earlier part of this judgment. There is nothing before us to show that the two senior officials, who were representing Government had the authority of the Governor of the Province to enter into the arrangement. The so-called agreement arrived at between some officials of Government and the petitioner did not purport to have been made in the name of the Governor. It, therefore, violates the provisions of S. 175(3), Government of India Act, 1935, inasmuch as it seeks to modify or alter the previous grant made by the Governor on the one part and the petitioner on the other part.

(100) I shall now briefly notice an argument which was only advanced by learned counsel for the petitioner, Sri Dhawan. It was contended by him that the right to a mining lease arose out of a demise or grant which gave him an exclusive right and entitled him to sustain an action for trespass. Now it may be conceded that having regard to the definition of an easement in the Indian Easements Act the licence constituted the grant of a right in gross. Thus the petitioner came to acquire a right of property before the Constitution came into force. It is contended that Art. 19(1)(g) which guarantees a right to acquire, hold and dispose of property merely recognises a right to property which was in existence in this country before and did not confer any new rights.

On the basis of this argument Sri Dhavan contends that the contingent right which had accrued to him under S. 21, T. P. Act became a vested right and must be regarded as a fundamental right within the meaning of the Constitution. Being a fundamental right it is entitled to be enforced by the Constitution. It may be that there is force in this contention but I do not think it necessary to consider it at any length as in the view that I am taking he had a statutory right to a mining lease under rules framed by Government capable, if other suitable conditions exist, of enforcement by Art. 226. The question to my mind which is of importance in this case is whether that statutory right included a right to a mining lease including limestone. That, as I have pointed out, on the evidence before us is a matter involving some doubt.

I have pointed out before that I am not satisfied with the attitude taken up by the State in this case. No evidence indicating that the statement contained in Sri Bhatia's letter dated 16-10-1948, does not state the facts correctly or is, at all events, based upon a misunderstanding has been produced before us. I have already referred to the fact that it is not easy to reconcile the statement contained in Sri Bhatia's earlier letter so far as the applicability of the 1940 Rules with his later letter regarding limestone is concerned. In these circumstances I do not think that we have sufficient material before us to justify us in holding definitely one way or the other that either by any general order or special order made by the Provincial Government the 1940 Rules were applied to limestone. In these circumstances the right claimed for by this writ is of a doubtful character and the question that has to be considered is that of the course we should adopt in these circumstances.

(101) Insisting upon the petitioner having his dispute settled by a regular suit for specific performance would involve inconvenience and delay undesirable from many points of view. I have, therefore, been driven to the conclusion that the proper course for us in this case is to issue what is known as a Writ of mandamus in the alternative so that on its return the issue between the parties may be finally decided.

(102) The Rules of this Court do not lay down the procedure to be followed on the issue of a Writ of mandamus. It must be assumed, however, that the 'founding fathers' were conversant with the difference between a peremptory and an alternative writ of mandamus and that the right to mandamus contemplated by them was analogous to that which obtains in Britain as also that in the United States of America. Reference has been made by my brother Mootham to the practice of the English courts prior to 1938. I would like to point out that in the United States an alternative writ, according to the law as stated in Corpus Juris Secundum, Vol. 55, S. 312, page 550, is

> "in the nature of an order to show cause and directs the respondent to do the act required or to show why he should not do it."

It appears that:

> "After its issuance respondent may comply with its terms or contest its issuance up to the time of a hearing on the peremptory writ. An alternative writ also operates as process. The function of the writ is to give respondent the benefit of a return and an opportunity for the ascertainment of the facts before a judgment is pronounced and to give petitioner or relator an opportunity to establish his right to a peremptory writ. It does not affect a substantial right because it settles nothing against respondent or in favour of the relator except questions as to the jurisdiction of the Court, and moreover, its scope and character may not be modified by stipulations, at least as far as the rights of third persons may be affected. The alternative writ may be dispensed with by statutes providing a different procedure.
>
> The effect of an alternative or preliminary writ is to preserve the existing status until the court can hear the parties and determine the issues between them." (p. 550)

(See p. 550 of 55 Corpus Juris Secundum). The practice in that country would appear to be:

"To issue an alternative writ before the issuance of a peremptory writ. Indeed, except where the alternative writ is abolished by statute, no peremptory writ of mandamus may ordinarily be granted before the issuance of an alternative writ, specially is this true where the legal right to the writ is not clear, and material facts are in controversy. In other words, the petition and order to show cause cannot be substituted in lieu of the alternative writ, except by consent of the parties and of the court. Nevertheless, in most jurisdictions, a peremptory writ may be granted in the first instance after notice where there are no disputed questions of fact and a clear case is presented; but, if it appears that there are disputed questions of fact and a clear case is not presented, an alternative, rather than a peremptory, writ may, and ordinarily should, be issued."

(See p. 609 of 55 Corpus Juris Secundum). It may be further pointed out that after the issue of the alternative writ the practice, as it obtains in the United States, is that general rules relating to evidence in civil actions ordinarily apply in mandamus proceedings initiated by the alternative writ. So the position is that where an alternative writ is granted the respondent must either perform the act directed or appear to show cause within the time indicated in the writ why he does not do so.

(103) The position, as explained by Ferris in his 'Extraordinary Legal Remedies', 1926 edition, is that;

"A peremptory mandamus issues in the first instance only where there is a clear, undisputed legal right—where there is no dispute as to the material facts requiring the intervention of a jury; only an alternative writ can issue where there is a question of fact. So, where an issue of fact on a material question requiring evidence to sustain it is presented, which fact, is true, would be a defence, it is error to sustain a motion for judgment on the pleadings. (page 288).

....

The mandatory clause of the alternative writ commands respondent to perform such act as prayed for by the petitioner, or else to show cause why it should not be done. That is, respondent must either obey or show proper excuse for not doing so. Where he elects to obey the writ, it is sufficient to set forth this fact by way of return, averring with sufficient certainty and clearness his compliance with the mandate of the court. He should substantially follow the mandatory clause of the writ, stating his performance of the duty as by the writ commanded. Where respondent complies with the alternative writ, it is, of course, unnecessary to proceed, and the proceeding will be dismissed. (p. 292).

....

Where respondent elects not to obey the writ, he must show in his return that petitioner has no clear legal right to demand obedience, or that no corresponding duty exists which he can be compelled to perform. This he may do by questioning the sufficiency of the writ in law by a demurrer, or in fact by a plea or answer." (pp. 292 and 293).

It will be clear from the statement of the law, as given by me regarding mandamus in the United States, 'that even there an alternative writ can be issued where the right is not clear or the facts are not clear in order that the right may be tried upon the return.'

(104) Now in this case it is clear that the prospecting licence itself was as of a right renewable if the application was made before the expiry of the original prospecting licence and that there is evidence which has not been explained by the respondent to show that the statutory rules which, while exempting limestone from their operation, gave authority to the provincial Government by a separate order to apply them to limestone and that they were possibly so applied.

I think it can also reasonably be said that it is undesirable for this litigation to continue indefinitely, that the arbitration clause proceeded upon the assumption that only matters covered by these presents would be the subject-matter of arbitration, that the arbitration suit could not bar a suit for specific performance, that its trial having been stayed by this Court by an interim order and the respondents not having had vacated it so far, requiring them to have resort to it now after the matter has been discussed at length before us would not be to provide the petitioner with an equally beneficial and effective remedy. For the reasons given above I concur in the order proposed to be made by Mootham J.

(105) The position in regard to the other reliefs claimed has been explained by my brother Mootham and I have nothing to add.

A/V.R.B. Order accordingly.

A. I. R. 1954 ALL. 415 (Vol. 41, C. N. 170)

MOOTHAM AND SAPRU JJ.

Prabhakar Yajnik, Applicant v. Dist. Magistrate, Bulandshahr and others, Opposite Party.

Civil Misc. Writ No. 871 of 1953, D/- 23-10-1953.

(a) Municipalities — U. P. Municipalities Act (2 of 1916) (as amended by U. P. Act 7 of 1953), S. 12-D (1) — Meaning of — Grounds for disqualification for registration — (Representation of the People Act (1950), Ss. 16, 19).

The meaning which should be placed on S. 12-D (1) is this, that a person shall not be qualified for registration in an electoral roll if he is not qualified for registration in the Assembly roll. It further follows, that an objection may be taken to the retention of a name on the municipal electoral roll on any of the grounds specified in S. 16 (i) or Cl. (a) of S. 19 of the Representation of the People Act. The Electoral Registration Officer has therefore, jurisdiction to enter into the question whether a person has the necessary residential qualification for his name to be entered on the electoral rolls. (Para 12)

(Necessity to redraft Ss. 16 (1) and 19 of the Representation of the People Act, 1950 in such a manner as to include in either section all that is now to be found in both sections, stressed). (Para 10)

S. N. Kacker, for Applicant; V. K. S. Chaudhari, for Opposite Party.

MOOTHAM J.:

This is a petition under Art. 226 of the Constitution.

(2) A general election to the Anupshahr Municipal Board will be held in the course of the next

few days and the petitioner, who is at present the Junior Vice-Chairman of the Board, is desirous of becoming a candidate for the office of President. He duly filed his nomination papers, but on the 26th September last respondent No. 4 lodged an objection before the Electoral Registration Officer alleging that the petitioner was not entitled to stand as a candidate on the ground that his name was improperly included in the municipal electoral roll. A summary enquiry was held by the Electoral Registration Officer, the third respondent, who by an order of the 2nd October, 1953, upheld the objection and directed that the petitioner's name be removed from the municipal electoral roll. On the 6th October, 1953, the petitioner's nomination paper was rejected by the Returning Officer, who is respondent No. 2, on the ground that the petitioner's name did not appear in the municipal electoral roll.

(3) The petitioner now comes to this Court with a three-fold prayer, for a writ in the nature of 'certiorari' to quash the order of the Electoral Registration Officer made on the 2nd October; secondly, for a writ in the nature of 'mandamus' to command the Electoral Registration Officer and the Returning Officer to restore his name to the municipal electoral roll; and, thirdly, for a writ in the nature of 'mandamus' to command the Returning Officer to re-scrutinise his nomination paper. Learned counsel for the petitioner concedes that unless he succeeds in obtaining the first two of these reliefs he cannot be entitled to the third.

(4) It has been strongly urged before us that the petitioner is entitled to have his name restored to the municipal electoral roll. His name was ordered by the Electoral Registration Officer to be removed from that roll on the ground that he was not ordinarily resident within Ward No. 4 of Anupshahr Municipality; and the submission on behalf of the petitioner is that the Electoral Registration Officer acted wholly without jurisdiction in rejecting the nomination paper on this ground.

(5) In order to understand the arguments which have been addressed to us in this case it is convenient to read the relevant parts of three sections of the U. P. Municipalities Act, 1916, (as amended by Act VII of 1953) and of two clauses of the Uttar Pradesh Municipalities (Preparation and Revision of Electoral Rolls) Order, 1953, an Order which it is convenient to refer to as the 1953 Order. These are sections 12-B, sub-ss. (1) and (2), S. 12-C and S. 12-D, sub-s. (1), and sub-clause (c) of clauses 8 and 9 of the 1953 Order. They read as follows:

"12-B. 'Electoral Roll for every ward'. — (1) There shall be an electoral roll for every ward which shall be prepared in accordance with the provisions of this Act under the supervision of the Director of Elections (Local Bodies).

(2) The Electoral Registration Officer shall, for purposes of preparation of the electoral rolls for the ward, adopt the Assembly rolls relatable to the area comprised in the said ward and published in the same manner prescribed, and upon its publication it shall, subject to any alteratioin, addition or modification made under or in accordance with this Act, be the electoral roll for the ward prepared in accordance with this Act.

12-C. 'Qualifications for electors' : Subject to the provisions of S. 12-D, every person who is qualified to be registered in the Assembly electoral roll relatable to the area comprised in the ward or whose name is entered therein shall be entitled to be registered in the electoral roll of the ward.

12-D. 'Disqualifications for registration in an electoral roll : (1) A person shall be disqualified for registration in an electoral roll if he is disqualified for registration in the Assembly rolls.

Clause 8. 'Claims to inclusion of names in the roll of a ward' : Any person

(c) whose name is not included in the Assembly rolls at all or in the rolls for the area relatable to the ward but who is otherwise qualified to be registered in the electoral roll of that ward;

may apply to the Electoral Registration Officer for the inclusion of his name in the electoral roll of the ward.

Clause 9. 'Objection to entries in the electoral roll' : Any person

(c) who objects to the retention of any name on the electoral roll of the ward on the ground that the person in question has become disqualified under S. 12-D of the Act for registration in the roll of the ward;

may apply to the Electoral Registration Officer for exclusion of the name or for correction of the particulars, as the case may be."

The argument of Sri S. N. Kacker for the petitioner is a straightforward one and, as usual, has been concisely stated. It is common ground that the petitioner's name is entered in the Legislative Assembly electoral roll relating to the area comprised in Ward no. 4 and that the petitioner is therefore entitled under S. 12-C of the Municipalities Act to be registered in the municipal electoral roll of that ward subject only to the provisions of S. 12-D. Now S. 12-D says that the petitioner shall be disqualified from registration in the municipal electoral roll if he is disqualified for registration in the Assembly electoral rolls; and the contention is that the petitioner can be so disqualified only on one of the grounds specified in S. 16(1) of the Representation of the People Act, 1950. As those grounds do not include non-residence the Electoral Registration Officer had, it is argued, no jurisdiction to remove the petitioner's name from the roll on the ground that he did not ordinarily reside in Ward No. 4, Anupshahr. The argument for the respondents is that the grounds for disqualification for registration in the Assembly electoral rolls are not restricted to those mentioned in S. 16(1) of the Representation of the People Act but include also the absence or lack of either of the positive conditions for eligibility for registration which are specified in S. 19 of the Act. The question which we have therefore to decide is the meaning and effect of S. 12-D(1) of the Municipalities Act.

(6) Now Ss. 16(1) and 19 of the Representation of the People Act, 1950, read as follows :

"16. 'Disqualifications for registration in an electoral roll' : (i) A person shall be disqualified for registration in an electoral roll if he

(a) is not a citizen of India; or

(b) is of unsound mind, and stands so declared by a competent court; or

(c) is for the time being disqualified from voting under the provisions of any law relating to corrupt and illegal practices and other offences in connection with elections.

19. 'Conditions of registration' : Subject to the foregoing provisions of this Part, every person who

(a) has been ordinarily resident in a constituency for not less than 180 days during the qualifying period, and

(b) was not less than 21 years of age on the qualifying date,

shall be entitled to be registered in the electoral roll for that constituency."

I may add that nothing turns upon the meaning of the expression "qualifying date" and "qualifying period" which are defined in S. 21 of the Act.

(7) I confess I have found it difficult to understand the grounds for the division made in this Act between circumstances which operate as a disqualification for registration and those which constitute conditions of entitlement to registration. Article 326 of the Constitution, which makes provision for adult sufferage, says that every citizen of India who has attained the age of 21 years shall be entitled to be registered as a voter unless he is disqualified under the Constitution or any law made by the appropriate Legislature on one of the grounds mentioned in that Article. Under S. 19 of the Representation of the People Act, the age of twenty-one is made a condition but not citizenship of India except by implication, 'not' being a citizen being a ground for disqualification under S. 16(1). Non-residence and unsoundness of mind are disqualifications under Art. 326; under the Representation of the People Act the latter remains a disqualification but a prescribed period of residence becomes a condition of registration.

A further variation is to be found in the now repealed' S. 14 of the Municipalities Act where, for example, the non-attainment of the age of twenty-one years and the fact of not being a citizen of India are both classified as disqualifications.

(8) In support of his argument counsel for the petitioner draws attention to the use of the specific term "disqualified" in clause 9(c) of the 1953 Order and in S. 12-D(1) of the Municipalities Act; and he points particularly to the fact that not only is the headnote to S. 12-D the same as that to S. 16 of the Representation of the People Act, but that the opening words of the section in each case are the same namely "A person shall be disqualified for registration in an electoral roll"; and from this he argues, with considerable cogency, that it must have been the intention of the State Legislature in enacting S. 12-D that the grounds for disqualification for registration in the municipal electoral rolls should be those grounds only which are specified in the Representation of the People Act 'as' grounds for "disqualification for registration", namely, those mentioned in S. 16 and none other.

(9) The argument is a forceful one, and my mind has fluctuated during the hearing; but on consideration I have come to the conclusion that we should not be justified in placing on S. 12-D the somewhat narrow construction for which the petitioner contends.

(10) It is I think apparent that it is difficult to find any wholly satisfactory reasons for regarding certain circumstances as being in the nature of conditions entitling a person's name to be placed on the register of electors and other circumstances in the nature of disqualifications. There would, for example, be no difficulty in redrafting Ss. 16(1) and 19 of the Representation of the People Act, in such a manner as to include in either section all that is now to be found in both sections. To the ordinary man the positive conditions specified in S. 19 and the absence of the disqualifications mentioned in S. 16(1) would all be regarded — and I think not unreasonably — as qualifications needed to obtain registration. The provisions of S. 19 are, it is to be noted, linked to those in S. 16 by the initial words of S. 19 "subject to the foregoing provisions of this part".

(11) When we examine clauses 8 and 9 of the 1953 Order we find that Sub-clause 8(c) refers to the inclusion of the names of persons who are "qualified" to be registered, and that sub-clause 9(c) refers to the deletion of the names of persons who have become "disqualified". So also S. 12-C of the Municipalities Act refers to the "qualifications" of persons entitled to be registered while S. 12-D refers to "disqualifications" for registration. The conclusion which I have reached, although not without some hesitation, is that in S. 12-D of the Municipalities Act the word "disqualified" is used as meaning the opposite to 'qualified', that is as meaning 'not qualified'. It is also to be observed that although a period of residence in a particular area is prescribed almost invariably as a necessary qualification for entitlement to registration as a voter, non-residence, or the failure to fulfil such qualification, comes under the general term "disqualification" in Art. 326 of the Constitution.

(12) Taking this view of the matter it follows that the meaning which should, in my opinion, be placed on S. 12-D(1) is this, that a person shall not be qualified for registration in an electoral roll if he is not qualified for registration in the Assembly roll. It further follows, in my opinion, that an objection may be taken to the retention of a name on the municipal electoral roll on any of the grounds specified in S. 16(1) or clause (a) of S. 19 of the Representation of the People Act. I reserve my opinion on the question (which does not arise in this case) whether objection can be taken under clause 9(c) of the 1953 Order to an objection based on the ground that the person concerned is under twenty-one years of age in view of the tense of the verb "has become disqualified" in clause 9(c).

(13) In my judgment the Electoral Registration Officer had jurisdiction to enter into the question whether the petitioner had the necessary residential qualification for his name to be entered on the electoral rolls. The correctness of his finding, although not accepted, is not challenged in this petition. I held therefore that the petitioner is not entitled to the first two reliefs for which he prays, and the question of his right to the third relief does not, in the circumstances, arise.

(14) I dismiss the petition with costs which I would fix at two hundred rupees of which one hundred rupees will be paid to the fourth respondent.

SAPRU J.:

(14a) I agree with the order proposed to be passed by my brother Mootham.

(15) I think a possible remedy which the petitioner has (I express no opinion as to whether he has or has not this remedy) is to file an election petition under S. 43(b) of the U. P. Municipalities Act. That section is to the following effect:

"43.B. No election of the President shall be called in question except by an election petition presented to the State Government in accordance with the provisions of this section."

Now, sub-s. (4) of that section states that

"In hearing the petition the Tribunal shall follow such procedure and have such powers as may be prescribed and without prejudice to the generality of the foregoing provision, it may, if the petition is found to be frivolous, direct that the deposit mentioned in sub-s. (2) shall be transferred to the State Government."

Now, it has been pointed to us that the powers which the Tribunal will possess have not yet been prescribed by the State Government. In view of the fact that finality attaches to the order of the Returning Officer removing a person from the roll of a ward it may be worth while for the State Government to consider whether the position in regard to the powers of the Election Tribunal in dealing with petitions where the allegation is that the nomination was improperly rejected should not be precisely defined.

(16) I agree that the petition should be dismissed with costs which I would assess at two hundred rupees.

B/G.M.J. Petition dismissed.

A. I. R. 1954 ALL. 418 (Vol. 41, C. N. 171)

(LUCKNOW BENCH)

HARI SHANKAR AND RANDHIR SINGH JJ.

Ali Haider, Appellant v. Sakina Begum and others, Opposite Party.

Misc. Appeal No. 32 of 1947, D/- 4-11-1953, against decree of Civil J. of Malihabad, Lucknow, D/- 27-3-1947.

Civil P. C. (1908), O. 33, R. 10 — Suit and application for leave to sue in forma pauperis dismissed in terms of compromise — Order under R. 10 cannot be passed.

Plaintiff instituted a suit on insufficient court-fee. The Court directed the plaintiff to make good the deficiency. The plaintiff, who was unable to pay, applied for leave to sue in forma pauperis. When the application was pending, the parties came to a compromise whereby the defendant agreed to pay a certain monthly sum to the plaintiff as maintenance and the plaintiff agreed to get her suit and the application to sue as pauper dismissed. The compromise was filed before the Court. The Court passed an order dismissing the suit and the application, in terms of the compromise. It also passed an order asking the Collector to recover the court-fees under O. 33, R. 10, either from the plaintiff or the defendant:

Held that the order under O. 33, R. 10 was misconceived. The Court had not entered into and decided the question of the plaintiff's pauperism, but it dismissed the application and the suit instead of asking the plaintiff to pay the court-fee. The result of the filing of the petition of compromise was that the plaintiff did not proceed with her suit or with her application for permission to sue as a pauper. No court-fee could, therefore, be payable under the circumstances of this case by the plaintiff. (Paras 6, 7)

Anno: Civil P. C., O. 33, R. 10 N. 1.

1953 Mulla: O. 33, R. 10 (Topic discussed in N. 1 to O. 33, R. 10 in A.I.R. Com. extra).

Mohd. Husain and B. N. Roy holding brief of B. K. Dhaon, for Appellant; B. K. Dhaon, for Respondent No. 1; Addl. Standing Counsel, for Addl. Junior Standing Counsel, for the State.

RANDHIR SINGH J.:

This is a miscellaneous appeal arising out of proceedings under Section 47 of the Civil Procedure Code.

(2) A suit was instituted by Srimati Sakina Begam, respondent No. 1, against the appellant and respondents Nos. 2 to 12 for a declaration of her share in certain properties and for possession thereof on the allegations that she had inherited a share in the property which originally belonged to Yusuf Ali. The suit was contested only by the appellant, who was defendant No. 2, on various grounds. One of the grounds raised was that the court-fee paid by the plaintiff was insufficient. The Court framed an issue on this point and came to the conclusion that the court-fee paid by the plaintiff was insufficient and ordered the plaintiff to pay a further sum of Rs. 3,820/4/- as court-fee.

The plaintiff found that she was unable to pay the court-fee and she, therefore, made an application for permission to sue in 'forma pauperis'. This application was pending when it appears that the parties came to terms and the plaintiff agreed to get her suit as also the application for permission to sue as a pauper dismissed on certain conditions. A petition for compromise was then filed in Court and it was mentioned in this application that the suit, as also the application No. 29 of 1946 be consigned to records, and that the plaintiff had agreed to get her suit consigned to records in lieu of the defendant No. 2 agreeing to pay her Rs. 130/- per mensem as maintenance. It was also mentioned in the petition for compromise that if defendant No. 2 defaulted in the payment of maintenance for three months at a time, the plaintiff shall have the right to get her suit restored and reheard.

(3) The Civil Judge pointed out to the parties that the condition that the suit might be restored under certain circumstances was not acceptable to the Court and a decree for this prayer could not be made. The Court then ordered the suit and the miscellaneous application No. 29 of 1946 to be dismissed in terms of the compromise. After the above order had been passed it was pointed out to the lower Court by the Government Pleader that no order for payment of court-fee had been passed and that an order should be passed under Order XXXIII, Rule 10 of the Code of Civil Procedure.

The Court then ordered as follows—

"The court-fees should be paid by the defendant No. 2 and can be realised from the plaintiff also under Order XXXIII, Rule 10, Civil P. C. The Collector may be informed. The Government Pleader Mr. B. N. Roy is present and informed."

(4) Objections were raised to this subsequent order of the Court by both the parties and these objections were finally disposed of by the learned Civil Judge on the 27th March, 1947. It is this order which is now in appeal.

(5) The learned Civil Judge modified his order for realisation of court-fee to this extent that he ordered that the court-fee should be paid by the defendant No. 2 and the plaintiff or either of them as the Collector thought fit under Order XXXIII, Rule 10 of the Code of Civil Procedure. The question as to whether the court-fee should be realised from the plaintiff or from defendant No. 2 was left to the option of the Collector.

(6) The orders passed by the learned Civil Judge in this case subsequent to the order in the original suit and the application appear to us to be misconceived. It was the duty of the learned

Civil Judge to have decided the question as to whether the plaintiff was or was not a pauper before proceeding further with the case and if the plaintiff had made an application that her application for permission to sue as a pauper be dismissed, the lower Court should have asked the plaintiff to make good the court-fee which had been found deficient earlier and in respect of which an order had already been passed in the original suit which was pending.

The learned Civil Judge, however, did not make any such order and decided the suit. It has now been urged on behalf of the Government that it may be presumed that the Court accepted the plaintiff to be a pauper and that this presumption could have been raised from the petition of compromise itself. It is difficult to appreciate this argument specially in view of the fact that an application had been made by the plaintiff herself that her application for permission to sue in 'forma pauperis' may be dismissed. This clearly showed that the plaintiff was not declared a pauper and her application for permission to sue as a pauper stood dismissed. The Court, instead of asking the plaintiff to pay the court-fee, dismissed the suit in terms of the compromise.

(7) It has been urged on behalf of the Government that in case a Court decides a suit in which proper court-fee has not been paid, the Government should be allowed to realise the deficient court-fee even subsequently and reliance has been placed on the provisions of Section 6A and B, and Section 12 of the Court-fees Act. It is not necessary to discuss the provisions referred to by the learned Counsel for the State in view of the fact that the suit cannot be said to have been heard and decided in the present case.

The petition of compromise clearly shows that the plaintiff asked the Court to dismiss her suit, as she had come to terms with the defendant. No executable decree was asked for by the plaintiff or the defendant by means of the petition of compromise; there was an express prayer towards the end of the petition of compromise and it was that both the suit and the application be dismissed. The result of the filing of the petition of compromise was that the plaintiff did not proceed with her suit or with her application for permission to sue as a pauper. No court-fee could, therefore, be payable under the circumstances of this case by the plaintiff.

It was open to the plaintiff to pay the court-fee and then ask the Court to proceed with the suit or to refuse to pay the court-fee and get her suit dismissed. The plaintiff seems to have adopted the latter course and the order of the learned Civil Judge allowing the Collector to realise the court-fee from either party does not appear to us to be a good order. We are, therefore, of opinion that this order should be set aside.

(8) Accordingly the appeal is allowed and the order dated the 27th March, 1947 as also the order dated the 17th January, 1947, regarding the court-fee are set aside. We make no order as to costs of this appeal.

B/R.G.D. Appeal allowed.

A.I.R. 1954 ALL. 419 (Vol. 41, C. N. 172)

MALIK C. J. AND SAPRU J.

Zahid Hussain, Appellant v. B. Khairati Lal Jain and others, Respondents.

First Appeal from Order No. 284 of 1948, D/- 23-12-1953, against the order of Dist. J., Bulandshahr, D/- 5-10-1948.

Provincial Insolvency Act (1920), S. 75 — Cross-objections — Applicability of O. 41, R. 22, Civil P. C. — (Civil P. C. (1908), O. 41, R. 22).

There is no provision in the Provincial Insolvency Act for a cross-objection to be filed within 30 days after service of notice as under O. 41, R. 22 and there is nothing in the Provincial Insolvency Act making the provisions of O. 41, R. 22 applicable to an appeal under Section 75. (Para 5)

Anno: Provincial Insolvency Act, S. 75 N. 1. Civil P. C., O. 41, R. 22 N. 1a.

1953 Mulla: O. 41, R. 22 (Topic discussed in N. 1a to O. 41, R. 22 in A.I.R. Com. extra — See however, N. "Application.....rule" on P. 1208 in Mulla, containing topic discussed in Ns. 7 and 8 to O. 41, R. 22 in A.I.R. Com.).

J. Swarup, for Appellant; Harish Chandra Sharma, S. B. L. Gaur and M. A. Kazmi, for Respondents.

MALIK C. J.:

This is an appeal under Section 75 of the Provincial Insolvency Act (Act No. V of 1920). A creditor Khairati Lal applied on the 30th July, 1931, that Sh. Zahid Husain be adjudicated an insolvent. On the 14th November, 1931, an order of adjudication was passed. The creditors were all paid up in full and on the 15th March, 1948, the insolvent was discharged. A sum of Rs. 22,000, however, after payment of all the debts in full, remained in the hands of the Official Receiver and the creditors claimed that interest from the date of adjudication at the rate of 6 per cent. per annum might be allowed to them in accordance with the provisions of Section 48 of the Act. The creditors also claimed that prior to the date of adjudication they should be given interest at the contractual rate.

(2) The learned Insolvency Judge granted the request that interest at 6 per cent. per annum should be allowed from the date of adjudication. As a matter of fact, he had no option in the matter as the provisions of Section 61 (6) were mandatory.

(3) As regards interest prior to the date of adjudication, he did not allow any interest to Ruqayya Khatoon, the wife of the insolvent, who had claimed a sum of Rs. 10,000/- as her dower, but he allowed interest to the other creditors at the rate of 6 per cent. per annum. Two of these creditors, Bansi Dhar and Khairati Lal, have filed cross-objections and the others have submitted to the order.

(4) The appeal has no force and has not been seriously pressed. On behalf of Bansidhar and Khairati Lal it is urged that the cross-objections should be allowed and they should be awarded interest at the contractual rate from the dates when the money was borrowed by the insolvent.

(5) The first question that arises is whether these cross-objections are maintainable. Section 75 of the Insolvency Act provides for an appeal within 30 days to the District Court and within 90 days to the High Court. There is no provision for a cross-objection to be filed within 30 days after service of notice as under Order XLI. Rule 22 of

the Civil Procedure Code. So far as we can see there is nothing in the Provincial Insolvency Act making the provisions of Order XLI, Rule 22, Civil P. C. applicable to an appeal under S. 75. These cross-objections were, therefore, misconceived.

(6) We are further satisfied that there is no force in these cross-objections. The creditors have been allowed interest at 6 per cent. per annum from the dates when the money was lent to the date of adjudication and thereafter for a further period of almost 22 years. This, in our view, should be quite sufficient.

(7) There is no force in the cross-objections and the appeal which are dismissed with costs.

B/V.R.B. Appeal and cross-objections dismissed.

A. I. R. 1954 ALL. 420 (Vol. 41, C. N. 173)

(LUCKNOW BENCH)

RANDHIR SINGH J.

Mohd. Suleman and others, Appellants v. Maqsood Hussain and another, Respondents.

Second Appeal No. 456 of 1947, D/- 30-11-1953, against the decree of Addl. Civil Judge, Lucknow D/- 12-3-1947.

(a) T. P. Act (1882), S. 72 — Mortgaged property put up for sale in execution of money decree — Payment of decree amount by mortgagee — S. 72 does not apply.

After a mortgage is made the property is comprised of two parcels, the equity of redemption and the mortgagee rights. If a person puts to sale the equity of redemption in execution of a simple money decree, the rights of the mortgagee under the mortgage and the mortgage security remain unaffected. Section 72 would not cover the case of the mortgagee paying the money-decree amount to save the property from sale in execution of the money decree. 16 Oudh Cas 48, Relied on. (Para 5)

Anno: T. P. Act, S. 72 N. 3(B).

1949 Mitra: S. 72 P. 493 N. "Clause (b) .... sale."

(b) Civil P. C. (1908), O. 34, R. 2 — Possessory mortgage — Mortgaged property leased back to mortgagor — Suit by mortgagee for recovery of mortgage money — Mortgagee cannot include theka money in the amount — He must file separate suit for the same. **(Para 8)**

Anno: C. P. C., O. 34 R. 2 N. 13.

1953 Mulla: O. 34 R. 2 P. 1093 N. "Account .... possession" (2 Pts. extra in N. 13 to O. 34 R. 2 in AIR Com.).

Brij Bahadur, for Appellants; Anwarul Hasan for Respondents (Nos. 1 and 2).

CASE REFERRED: Para

(A) ('13) 16 Oudh Cas 48: 5 Ind Cas 800 5

JUDGMENT: This is a plaintiff's second appeal against a decree of the Additional Civil Judge of Lucknow.

(2) Defendants 1 and 2 executed a mortgage in favour of Hafiz Afzal Husain, since dead, for Rs. 1000/- on 3rd of July, 1937. No interest was contracted and it was mentioned in the mortgage deed that the mortgagee had been put into possession. The mortgagee, however, gave back the mortgaged property to the mortgagors on theka. On the 11th of April, 1946, a suit for the recovery of the mortgage money and certain sums due from the mortgagors on account of the unpaid theka money as also for Rs. 103/12/3 said to have been paid by the mortgagee in satisfaction of a decree was instituted.

It was alleged on behalf of the plaintiff that he had to pay Rs. 103/12/3 in order to save the property from being sold in executioin of a decree and he was, therefore, entitled to recover this amount along with the mortgage money from the mortgagors under section 72 of the Transfer of Property Act. The un-realized theka money was claimed on the ground that it represented interest on the principal sum.

(3) The suit was contested on several grounds. The material grounds, however, on which the suit was contested are that the plaintiff was not entitled to any interest as the mortgage was a possessory mortgage and that he was not entitled to recover Rs. 103/12/3, as this sum had not been paid for protecting the property from sale and further that no notice had been served upon the mortgagors to pay up the money before the sum was paid by the mortgagee in the execution court. A plea was also raised that a sum of Rs. 74/- out of Rs. 1000/- had not been received by the mortgagors.

(4) The trial court came to the conclusion that the plaintiff was entitled to a decree for Rs. 926/- on account of the principal sum and was not entitled to recover any money on account of interest. The trial court also held the plaintiff entitled to recover Rs. 103/12/3. Both the parties then went up in appeal to the Additional Civil Judge. The Additional Civil Judge dismissed the appeal instituted by the present appellant, but allowed the appeal of the defendants to this extent that the decree in respect of Rs. 103/12/3 was set aside on the ground that the mortgagee was not entitled to this sum. The mortgagee plaintiff has now come up in second appeal. Hafiz Afzal Husain appellant died during the pendency of the appeal and his heirs have been brought on the record.

(5) Two points have been pressed on behalf of the appellants. The first is that the lower appellate court should not have rejected the claim in respect of Rs. 103/12/3, as this sum had been paid by the predecessor of the appellants in satisfaction of a decree in execution of which the property was being put up for sale. It is contended on behalf of the respondents that this decree in execution of which the property was being put up for sale was a simple money decree and the appellant was not bound to pay up this sum nor did the sale in execution of that decree affect the rights of the mortgagee.

After a mortgage is made the property is comprised of two parcels, the equity of redemption and the mortgagee rights. If a person puts to sale the equity of redemption in execution of a simple money decree, the rights of the mortgagee under the mortgage & the mortgage security remain unaffected. S. 72 of the Transfer of Property Act would not, therefore, cover the case of such a payment. This view has also been held in 'Sheo Dulare v. Mt. Batasha', 16 Oudh Cas 48 (A), as also in some other cases. The learned counsel for the appellants has not been able to cite any law in support of his contention that payment under such circumstances would entitle the mortgagee to recover the amount paid by him to save the equity of redemption from being sold.

(6) The other question, whether a notice was or was not given to the mortgagors before the payment was made, does not therefore, arise and the view taken by the lower appellate court that the appellants were not entitled to recover the sum

of Rs. 103/12/3 appears, therefore, to be the correct view.

(7) The next point which has been argued on behalf of the appellants is that a decree in respect of the unpaid theka money, which represented interest, should have been passed in favour of the appellants. I am unable to agree with this contention. The theka money represented the profits of the land let out on theka and it was open to the mortgagee to sue for recovery of the theka money in the revenue courts. If he did not do so, it would not be open to him to claim that amount along with the mortgage money in a suit brought by him. There is, therefore, no merit in this contention also and the view taken by the two courts below cannot be assailed. No other point has been pressed in arguments.

(8) In this case although both the points argued arose out of the same judgment and decree, two separate appeals had been filed. As both the appeals have been heard, it is not necessary to decide whether two separate appeals could be maintained.

(9) Both the appeals are dismissed with costs.

B/R.G.D. Appeals dismissed.

A. I. R. 1954 ALL. 421 (Vol. 41, C. N. 174)

(FULL BENCH)

B. MALIK C. J., M. C. DESAI AND B. MUKERJI JJ.

Gir Raj Kishore, Applicant v. State.

Criminal Revn. No. 1050 of 1950, D/- 19-8-1953, against order of Sessions. Judge, Azamgarh, D/- 19-7-1950.

(a) High Denomination Bank Notes (Demonitisation) Ordinance (3 of 1946), Ss. 7 (3), 4, 5 and 6 — Sanction for prosecution for contravention of S. 4 — Conviction under S. 6 — Validity.

A prosecution under the Ordinance can only be instituted under the previous sanction of the Central Government. (Para 3)

Sections 4 and 6 do not create separate offences. (Para 9)

Reading the three Sections 4, 5 and 6 together, it appears that S. 4 was intended to include all cases of transfer of high denomination notes contrary to the provisions of the Ordinance and Sections 5 and 6 are to be read as exceptions to S. 4. Therefore, conviction of the accused under S. 6, in a prosecution started under a sanction given for prosecution for contravention of S. 4, is not bad. (Para 10)

(b) High Denomination Bank Notes (Demonitisation) Ordinance (3 of 1946), Ss. 4, 5 and 6 — "Person" — (General Clauses Act (1897), S. 3 (39)).

The three Sections 4, 5 and 6, read together clearly show that the word "person" in S. 4 of the Ordinance was used in its widest sense, S. 4 was intended to include all cases which did not come under the exceptions given in S. 5 and S. 6. The word "person" therefore includes a banking company and a Government treasury. (Para 10)

Anno: Gen. Clauses Act, S. 3 (39) N. 1.

B. S. Darbari and Baleshwari Prasad, for Applicant; Dr. M. H. Faruqi, Government Advocate, for the State.

MALIK C. J.:

The applicant Girraj Kishore was convicted by a Magistrate of the First Class for having contravened the provisions of the High Denomination Bank Notes (Demonitisation) Ordinance, 1946, Ordinance No. III of 1946, and has been sentenced to undergo two years' rigorous imprisonment and to pay a fine of Rs. 2,000/- in default of payment of the fine to a further term of rigorous imprisonment for six months. The learned Magistrate's order is in these terms:

"I find the accused Girraj Kishore guilty of the offence under Section 7 (1) of the Ordinance No. III of 1946 for contravening Section 4 of the Ordinance by exchanging one thousand rupee notes on 14-1-1946, from the Sagri Sub-treasury without filing a declaration as required under sub-section (2) of Section 6 of the Ordinance and convict him under the said section of the said Ordinance."

(2) Girraj Kishore was Treasurer's agent at the Azamgarh Government Treasury and the charge against him was that on the 14th of January, 1946, he had exchanged 20 notes of Rs. 1,000/- each for notes of lower denomination without making a declaration as provided in Section 6 of the Ordinance.

The relevant portion of Section 6 is as follows:

"6(1) Notwithstanding anything to the contrary contained in the Reserve Bank of India Act, 1934 (II of 1934), any high denomination bank note held by a person other than a bank or Government treasury shall after the 12th day of January 1946 be exchanged only on tender of the note for exchange by the owner thereof in the manner provided in this section.

(2) Every such owner of a high denomination bank note desiring to tender it for exchange shall prepare in the form set out in the Schedule or in a form as near thereto as may be, three copies of a declaration signed by him giving in full the particulars required by that form, and shall, within ten days after the commencement of this Ordinance, deliver such copies in person together with the high denomination bank notes he desires to exchange to a branch of the Reserve Bank or to a scheduled bank or to a Government treasury."

The proviso to the sub-section is not relevant. The other sub-sections also need not be quoted as they are not relevant for our purposes.

(3) A prosecution under this Ordinance can only be instituted under the previous sanction of the Central Government (vide Section 7(3)). On 8th February, 1947, the sanction to institute the proceedings was given by the Government of India under sub-section (3) of Section 7 of the Ordinance, in these terms:

"The Central Government is pleased to sanction the institution of prosecution proceedings against Mr. Girraj Kishore, Government Treasurer's Agent who is alleged to have exchanged 20 pieces of one-thousand rupee notes on 14th January, 1946, from the Sub-Treasury, Sagri, contrary to the provisions of the Ordinance and thus to have contravened Section 4 of the Ordinance in circumstances which constitute an offence punishable under Section 7 of the said Ordinance."

(4) Against the conviction by the Magistrate, Girraj Kishore filed an appeal in the Court of the learned Sessions Judge and the argument advanced on his behalf was that if the facts as alleged by the prosecution were established, he

would be guilty under Section 6 of the Ordinance and not under Section 4 and no sanction having been obtained by the Central Government for his prosecution under Section 6, the trial was invalid and he was entitled to an acquittal. The learned Sessions Judge was of the opinion that figure "4" was a typing mistake for figure "6" and that as the facts were fully set out in the sanction, no prejudice had been caused to the accused and the trial was not vitiated on that account. The learned Sessions Judge upheld the conviction and sentence.

(5) Against that order a revision was filed in this Court which was referred by a learned Single Judge to a Division Bench and by the Bench to a Full Bench. In the referring order the learned Judges have said that the whole case was being referred to the Full Bench for decision. We do not think, however, that it is necessary that the time of three Judges be taken in deciding questions other than the question on which the learned Judges seemed to have some doubt and which necessitated their making this reference to a larger Bench.

(6) The point urged on behalf of the accused was, as we have already indicated, that Sections 4 and 6 of the Ordinance provide for two separate offences and as the sanction was to prosecute for an offence under Section 4, the conviction under Section 6 was bad in law.

(7) Section 4 of the Ordinance is as follows:

"Save as provided by or under this Ordinance, no person shall after the 12th day of January 1946 transfer to the possession of another person or receive into his possession from another person any high denomination bank note."

Then section 5 makes certain exceptions in favour of banks and Government treasuries. It is, however, not necessary for the purposes of this case to quote that section. Section 6 provides that if after the 12th of January, 1946, any person, other than a bank or Government treasury, wants to tender a high denomination note for exchange, he will be required to act in the manner provided in the subsequent sub-clauses of the section, one of the main requirements being that he will have to fill in a form in triplicate giving the various particulars mentioned in that form, which information was required by the Government for certain purposes of its own.

(8) The argument advanced by learned counsel is that section 4 deals with the case of dealings between an individual and another, while section 6 deals with a case where a private individual goes to a bank or a Government treasury and wants to deposit or to exchange a high denomination note after the 12th of January, 1946.

(9) The argument that sections 4 and 6 of the Ordinance create two separate offences must be rejected. Section 4 of the Ordinance starts with the words

"Save as provided by or under this Ordinance."

If section 4 is confined to dealings between individuals and not between an individual and a Bank or a Government treasury, these words would become redundant as there is no exemption in any of the subsequent sections allowing a private individual to exchange a high denomination note with another individual after the 12th of January, 1946, for cash or for lower denomination notes. There is an absolute bar against private dealings.

Sections 5 and 6 are the only exemptions that allow exchange of high denomination notes in certain circumstances and, therefore, the exemption mentioned in section 4 could have reference only to those sections. Section 6 allows a person to go to a Bank or a treasury to exchange high denomination notes provided he gives the declaration required by that section. So far as we can see, the Ordinance provides for only one offence and not two separate offences under sections 4 and 6 and that offence is committed when a high denomination note has been exchanged after the 12th of January, 1946, in contravention of the provisions of the Ordinance.

(10) Learned counsel has referred us to the definition of the word "person" in the General Clauses Act (Act No. X of 1897), where a person is defined as including

"any company or association or body of individuals, whether incorporated or not."

The argument is that though under this definition of the word "person" a banking company may be included, a Government treasury will not be, and, therefore, section 4 of the Ordinance will not apply to a case where high denomination notes have been exchanged at a Government treasury. This argument has no substance. The three sections 4, 5 and 6 read together clearly show that the word "person" in section 4 of the Ordinance was used in its widest sense and section 4 was intended to include all cases which did not come under the exceptions given in sections 5 & 6. To quote an example, in section 6, sub-section (1) the words are

"any high denomination bank note held by a person other than a bank or Government treasury".

If the word "person" was not intended to include a bank or Government treasury in section 4 then it was not necessary to make this exception in section 6. The definitions in the General Clauses Act are to apply unless there is anything repugnant in the subject or context. Reading the three sections together, it appears to us that section 4 was intended to include all cases of transfer of high denomination notes contrary to the provisions of the Ordinance and sections 5 and 6 are to be read as exceptions to section 4. The sanction to prosecute given under section 7 of the Ordinance was, therefore, in order.

(11) The case must now go back to the learned single Judge for decision according to law.

A/R.G.D. Order accordingly.

A. I. R. 1954 ALL. 422 (Vol. 41, C. N. 175)
(LUCKNOW BENCH)
BEG AND RANDHIR SINGH JJ.

Ram Lakhan, Appellant v. Mirza Mahbub Hasan Beg and others, Respondents.

Ex. D. A. No. 65 of 1946, D/- 8-12-1953, against decree of Civil J., Bahraich, D/- 19-11-1946.

Civil P. C. (1908), O. 21, R. 54; O. 39, R. 1, S. 64 — Order of temporary injunction if an order for attachment.

The order for a temporary injunction in favour of a decree-holder restraining the alienation of property would not amount to an order for attachment nor would the service of the temporary injunction amount to an attachment. Therefore, if no attachment is made in such an order the order of the Court that the attachment will continue will not operate as an attachment or a continuance of

an attachment. AIR 1919 Oudh 4, Dist.
(Paras 4, 5)

Anno: Civil P. C., O. 21, R. 54 N. 1.

1953 Mulla: O. 21, R. 54 (Topic discussed in N. 1 to O. 21, R. 54 in A.I.R. Com., extra).

Civil P. C., O. 39, R. 1 N. 3.

1953 Mulla: O. 39, R. 1 P. 1151 N. "Principles .....injunction" (11 Pts. extra in N. 3 to O. 39, R. 1 in A.I.R. Com.).

Civil P. C., O. 39, R. 1 N. 17.

1953 Mulla: O. 39, R. 1, P. 1152 N. "Effect.... injunction" (1 Pt. extra in N. 17 to O. 39, R. 1 in A.I.R. Com.—1 Pt. extra in Mulla).

Civil P. C., S. 64 N. 3.

1953 Mulla: S. 64, P. 255 N. "Where..... made" (10 Pts. extra in N. 3 to S. 64 in A.I.R. Com.—A.I.R. 1934 P.C. 217, not noticed on Pt. 11 in N. 3 to S. 64 in A.I.R. Com.).

B. K. Dhaon and S. P. Avasthi, for Appellant.

CASE REFERRED: Para
(A) (V6) AIR 1919 Oudh 4: 23 Oudh Cas 18 4

RANDHIR SINGH J.:

This is an execution first appeal against the judgment and decree of the Civil Judge, Bahraich, dated 19th November, 1946.

(2) It appears that a decree for costs and some money was obtained by respondents 1 to 4 against the respondent No. 5 on the 30th March, 1935. The decree-holders put their decree into execution on the 30th March, 1938. Some proceedings were taken but ultimately the execution application was ordered to be consigned to record room on the 15th October, 1938. A fresh application for execution was made on 1st May, 1941 and a prayer for realisation of the decretal amount by attachment and sale of a house of respondent No. 5 was made. During the pendency of this execution, an application was made on the 27th August, 1941 in which a prayer was made that the house 'Sultan Manzil' of the judgment-debtor be attached under Order 39, Rule 1, Civil P. C. Reference was also made to Section 151 and O. 21, Rule 51 (54?), Civil P. C. in the heading given to the application dated 27th August, 1941. The Court passed an order in the following words:

"Issue a temporary injunction as prayed".

The injunction was then issued and it was served by a proclamation made on the 5th September, 1941. The execution application was ordered to be consigned to the record room on the 17th August, 1942 but it was mentioned in the order that the property shall remain under attachment. A third application for execution was made on the 20th August, 1942, and in this application also a prayer for the attachment and sale of 'Sultan Manzil' was made. This application also proved infructuous and was ordered to be consigned to the record room on 30th January, 1943. Once again the order that the property shall remain under attachment was made when the application was ordered to be consigned to the record room. A fourth application for execution was made on the 3rd February, 1945 and this also was consigned to the record room on the 15th May, 1945. Subsequently the last application for execution was made on the 9th February, 1946 and a prayer was made that the decretal amount be realised by sale of the attached property.

It was in these proceedings that an objection was made by Ram Lakhan who had on the 3rd November, 1945 obtained a sale-deed in respect of 'Sultan Manzil' from the judgment-debtor for a sum of Rs. 25,000/-. The main grounds taken up in the objection were that there had been no attachment of 'Sultan Manzil' and as such it could not be sold in execution; secondly the entire proceedings of sale were irregular and lastly that the objector was a bona fide transferee for value without notice and as such the sale-deed in his favour was binding on the parties to the decree. A number of issues were framed by the learned Civil Judge before whom the execution proceedings were pending and they are detailed in the judgment.

(3) The learned Civil Judge, after considering the proceedings which had been taken in the various execution applications, came to the conclusion that the order passed on the application dated the 27th August, 1941 was in effect an order of attachment and that there had been an attachment of the property. Any sale made by the judgment-debtor in favour of the objector, after this attachment, was therefore, invalid. It, therefore, dismissed the objection made by the objector. The objector Ram Lakhan has now come up in appeal.

(4) The crucial point which arises for determination in this appeal is whether or not there had been a valid attachment of the property acquired by the appellant on the 3rd November, 1945. We have examined the application dated 27th August, 1941 and the order passed by the execution Court on this application. It is on the file of execution case No. 52 of 1941. It has been observed by the learned Civil Judge that if an order of attachment is passed on an application in which the provisions of law have not been correctly narrated, the attachment would nevertheless be valid and he has relied on a ruling — 'Bishambar Nath v. Girdhari Lal', AIR 1919 Oudh 4 (A). In this reported case although an application was made under Order 39, Rule 1, Civil P. C. an attachment had been ordered and had been duly made, it was held that it was a valid attachment. In the present case neither an order of attachment was made nor was an attachment effected in pursuance of any order of attachment. The order was for a temporary injunction and this order was executed. The order for a temporary injunction would not amount to an order for attachment nor would the service of the temporary injunction amount to an attachment. It would be difficult therefore, to agree with the view taken by the lower Court that the attachment of the property 'Sultan Manzil' had been made at any time in any of the execution proceedings.

(5) If no attachment had been made an order of the Court that the attachment will continue will not operate as an attachment or a continuance of an attachment. The subsequent orders passed in other execution applications would not, therefore, be of any material assistance to the decree-holders in establishing a valid attachment of the property.

(6) The other point raised in the objection made by the appellant would not arise if there had been no attachment in this case. The execution Court evidently was under a misapprehension that the property had already been attached when it ordered the attachment to continue. The decree-holders also seem to have been misled by this order of the Court when they made the last application for execution in which they asked for a sale of the property only. The entire execution proceedings following the application for execution dated the 9th February, 1946 should, therefore, be set aside and the execution Court should be ordered to proceed afresh taking into consi-

deration the views expressed above. As no valid attachment of the property has been made, it will be open to the execution Court to make the attachment and then proceed according to law.

(7) The appeal is, therefore, allowed and all the proceedings in the execution Court including the order of the lower Court under appeal are set aside. The execution case shall be restored to its original number by the Court below which will proceed to execute the decree from the stage when the application for execution dated the 9th February, 1946 was made. We make no orders as to costs.

B/H.G.P. Order accordingly.

A. I. R. 1954 ALL. 424 (Vol. 41, C. N. 176)

DESAI J.

Umrao Lal, Convict-Applicant v. State.

Criminal Revn. No. 796 of 1952, D/- 5-10-1953, against order of 1st Temporary S. J., Bareilly, D/- 15-5-1952.

Penal Code (1860), S. 193 — Contradictory statements not in course of same deposition — Conviction for perjury — Nature of proof — Proceedings under S. 476, Distinguished — (Criminal Procedure Code (1898), S. 476).

If the prosecution succeeds in proving that an accused in the witness box deliberately made two statements which are so contradictory to, and irreconcilable with, each other, that both cannot possibly be true, he can be convicted of perjury even without its being proved which one of them was not true. It is only when the prosecution charges him with making a particular statement falsely, that it has to prove that that statement is false and not the other. In that case the mere fact that he made the other statement conflicting with it would not suffice because it may very well be that the other statement was false and not the statement with which he was charged. When all that is proved is that one of the two statements is false, it means that it is not proved that a particular statement is false. If the accused is charged with making that statement falsely, naturally the charges must fail. (Paras 2, 3)

'Mens rea' is an essential ingredient of the offence of perjury; the mere fact that a statement made by a witness turns out to be wrong or inaccurate does not make him liable to punishment. He must make the statement deliberately and must know or believe it to be false or must not believe it to be true. It is not difficult to imagine a witness's making two statements which are contradictory to each other and one of which he does not know or believe to be false. (Para 4)

When a witness admits having made a previous statement incorrectly and corrects himself later, it is not expedient to prosecute him for perjury. When, however, a witness makes two contradictory statements intentionally and there is nothing to show that the earlier statement was wrong and was corrected by the subsequent statement and he does not admit that he had committed a mistake in making the earlier statement and when the prosecution charges him in the alternative with making one of the two statements falsely, he must be convicted of perjury. **Where the two statements made by the applicant were so contradictory to each other that they could not be reconciled with each other and could not both be true and one of them was bound to be false, the applicant deposing about matters which were within his knowledge and there being no scope for his making any mistake, it is clearly a case of making both the statements deliberately and when they are bound to be irreconcilable he must be convicted.** (Para 4)

It is quite immaterial that the two contradictory statements were made in the course of one deposition in one trial. If the first statement is false, the applicant committed the offence of perjury as soon as he made it. Whether he made it deliberately and whether he knew or believed it to be false or did not believe it to be true is to be seen with reference to the time at which he made it. If the requirements of S. 191 are fulfilled, he committed the offence of perjury as soon as he made it. The completion of the offence does not remain in abeyance for a short time in order to give him an opportunity of repenting and correcting himself. What he does subsequently has absolutely no bearing on the offence already committed by him. The offence is not purged or wiped off by subsequent repentance or retraction or correction; of course, on account of the subsequent repentance and admission of mistake, the Court may say that he had not made the earlier statement deliberately knowing or believing it to be false or not believing it to be true; but that would mean that he had not committed the offence at all by making the earlier statement and not that he had committed it and the commission is purged or wiped off by the subsequent repentance and confession. Section 191 does not take into consideration the fact that the false statement was, subsequently in the same deposition or in the same trial, admitted to be incorrect and replaced by the correct statement or that the deposition was not finished before the accused corrected himself. (Para 6)

The questions that are in issue when a person is prosecuted for perjury are quite different from those that arise in proceedings under S. 476 of the Criminal Procedure Code. In the latter the Court has to see whether it is expedient in the interest of justice to prosecute the witness for committing perjury whereas in the former the Court has only to see whether the ingredients of the offence of perjury are proved by the prosecution and is not at all concerned with the question of the expediency. No accused can be acquitted of the charge of perjury on the ground that it was not expedient to prosecute him. (Para 9)

Anno: Penal Code, S. 193 N. 7, 8, 9; Criminal P. C., S. 476 N. 24.

L. Chandra, for Applicant; A. K. Kirty, for the State.

CASES REFERRED: Paras

(A) ('85) 7 All 44: 1884 All WN 258 2
(B) ('84) 10 Cal 937 2, 9
(C) (V15) AIR 1928 Lah 125: 15 Lah 407: 29 Cri LJ 212 2
(D) (1838) 8 Car & P 238: 173 ER 476 3
(E) ('04) 28 Bom 533: 1 Cri LJ 390 4
(F) (1937) 81 Law Ed 808: 300 US 564 4, 7
(G) (V12) AIR 1925 Lah 646 (1): 26 Cri LJ 1380 4
(H) ('03) 26 Mad 55: 1 Weir 166 4

(I) ('11) 12 Cri LJ 405: 11 Ind Cas 589 (Lah) 9
(J) (V11) AIR 1924 All 83: 21 All LJ 673: 24 Cri LJ 779 9
(K) (V23) AIR 1936 Oudh 373: 37 Cri LJ 885 9
(L) (V24) AIR 1937 Oudh 116: 38 Cri LJ 873 9
(M) (V14) AIR 1927 Nag 189: 28 Cri LJ 645 9
(N) (V16) AIR 1929 Nag 279: 30 Cri LJ 724 9
(O) (V11) AIR 1924 Oudh 373: 26 Cri LJ 10 9
(P) (V13) AIR 1926 Pat 517: 27 Cri LJ 953 9

ORDER: This is an application in revision by Umrao Lal from his conviction and sentence under Section 193, I. P. C. One Babu Ram was prosecuted for demanding a bribe from the applicant and the applicant was the principal witness in the case against him. He was examined-in-chief on 17-11-1950 and made the following statement:

"I had a talk with Babu Ram at the house of Matru Lal. Babu Ram demanded 200/- Rs. from me in consideration of his getting the case relating to the money order hushed up. Matru Lal settled the transaction for Rs. 50/-. I paid Rs. 40/- which I had with me then to Matru Lal who gave them to Babu Ram."

He was cross-examined under Section 256 of the Code of Criminal Procedure on 8-12-1950 and in the course of the cross-examination he made the following statement:

"The talk about the payment of the bribe had taken place between me and Matru Lal. The accused never demanded a bribe from me. He did not hear the talk about the payment of the bribe. When I paid Rs. 40/- to Matru Lal, he was not present."

The Magistrate who tried the case against Babu Ram was of the opinion that the above two statements made by the applicant were so contradictory to each other that one of them was necessarily false.

He considered it expedient in the interests of justice to prosecute him for committing perjury in respect of either of them and made a complaint for his prosecution under Section 193, I. P. C. Thereupon he was tried under S. 193 and has been convicted of the same offence by the Courts below.

(2) The following contentions were raised on his behalf:

1. That he could not be convicted under S. 193, I. P. C. unless it was found which of the two statements was false.
2. That the two statements were made in one deposition in the course of a trial.
3. That the applicant had 'locus paenitentiae' and could correct the previous false statement which was wrong.

These contentions are all unsound.

"Whoever being legally bound by an oath or by an express provision of law to state the truth.....makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence."

See Section 191, I. P. C.

"Whoever gives false evidence at any stage of a judicial proceeding" is punishable under S. 193, I. P. C. Under Section 236 of the Code of Criminal Procedure an accused may be charged in the alternative with having committed some one of two or more offences.

If a witness bound by an oath or law to speak the truth, makes two statements one of which is necessarily false and the prosecution is unable to prove which one of them is false, he can be charged in the alternative with having made one or the other statement falsely. Illustration (b) to the section shows that he can also be convicted in the alternative. If the prosecution succeeds in proving that an accused in the witness box deliberately made two statements which are so contradictory to, and irreconcilable with, each other, that both cannot possibly be true, he can be convicted of perjury even without its being proved which one of them was not true. It has been held in — 'Queen-Empress v. Ghulet', 7 All 44 (A); — 'Habibullah v. Queen-Empress', 10 Cal 937 (B) and — 'Taj Mahomed v. Emperor', AIR 1928 Lah 125 at p. 128 (C) that an accused who is proved to have made two wholly irreconcilable statements can be convicted of perjury without its being shown which one of them was false.

(3) Really the question is whether it is proved or not that the accused committed perjury. If he has made two statements which are so contradictory and irreconcilable that both cannot possibly be true, it means that one of them is false and if the other ingredients of the offence are made out, he can be convicted. It is only when the prosecution charges him with making a particular statement falsely, that it has to prove that that statement is false and not the other. In that case the mere fact and that he made the other statement conflicting with it would not suffice because it may very well be that the other statement was false and not the statement with which he was charged. When all that is proved is that one of the two statements is false, it means that it is not proved that a particular statement is false. If the accused is charged with making that statement falsely, naturally the charge must fail.

In — 'R. v. Wheatland', (1838) 8 Car & P 238 (D), the accused made one statement before a Magistrate and a wholly contradictory statement at the Quarter Sessions, he was prosecuted for perjury in respect of the latter statement and it was proved that the falsity of the latter statement could not be proved merely by the fact that it was contradicted by the earlier statement.

(4) 'Mens rea' is an essential ingredient of the offence of perjury; the mere fact that a statement made by a witness turns out to be wrong or inaccurate does not make him liable to punishment. He must make the statement deliberately and must know or believe it to be false or must not believe it to be true. It is not difficult to imagine a witness's making two statements which are contradictory to each other and one of which he does not know or believe to be false. In — 'K. v. Bankat Ram Lachhi Ram', 28 Bom 533 (E) the question was whether the joint family property had been partitioned among the members and the accused on one occasion deposed that it had been partitioned and on another occasion that it had not been partitioned and it was held that he might have honestly held the two views and he was held not to have committed perjury by making the conflicting statements. A witness may innocently make a statement which is incorrect or wrong and may later correct himself; simply because he has made two contradictory statements it cannot be said that he has committed perjury. It was remarked by Roberts, J. in — U. S. v. Norris', (1937) 81 Law Ed 808 (F) that

"this is not to say that the correction of an innocent mistake, or the elaboration of an incomplete answer, may not demonstrate that there was no wilful intent to swear falsely."

In — 'Fakir Chand v. Emperor', AIR 1925 Lah 646 (1) (G), the accused who had made a certain statement, on being warned by the Magistrate that he had told a lie at once corrected himself

and it was held that he had not intentionally made the earlier statement falsely and should not be convicted of perjury. In 1847 the Indian Law Commissioners, dealing with this question stated:

"It is possible, indeed, that the first statement may have been false through an error or mistake, which has been corrected by subsequent information, and that the second contradicts the first because it contains the truth which had come to the knowledge of the party in the meantime. But when there is no such allegation or any explanation of the contradiction to negative the inference that the party at one time or the other has been guilty of stating on oath as true what he knew to be false in order to deceive a Court of justice, on a point material to the question to be decided by the Court, we think the law should be so framed that he should not be able to escape from the punishment he would well deserve" (quoted from — 'In the matter of Palani Palagan', 26 Mad 55 (H)).

There are authorities, which will be mentioned later holding that when a witness admits having made a previous statement incorrectly and corrects himself later, it is not expedient to prosecute him for perjury. When, however, a witness makes two contradictory statements intentionally, there is nothing to show that the earlier statement was wrong and was corrected by the subsequent statement and he does not admit that he had committed a mistake in making the earlier statement and when the prosecution charges him in the alternative with making one of the two statements falsely, he must be convicted of perjury. In the present case the two statements made by the applicant were so contradictory to each other that they could not be reconciled with each other and could not both be true. One of them was bound to be false. The applicant deposed about matters which were within his knowledge and there was no scope for his making any mistake. It is not his case that the first statement made on 17-11-50 was incorrect; in his statement as an accused he stated that both the statements were correct. So it is not a case of his having made the earlier statement wrongly under a mistake and of his subsequently correcting himself by making the second statement. It is clearly a case of making both the statements deliberately and when they are found to be irreconcilable, he must be convicted.

(5) It is not true to say that it has not been proved that any particular statement is false. The learned Magistrate has given a finding in the following words:

"It leaves me in no doubt that Umrao Lal perjured himself later in order to screen away Babu Ram from punishment."

He was thus satisfied that it was the earlier statement that was correct and the subsequent statement that was false. But even in the absence of such a finding the applicant was bound to be convicted.

(6) Coming to the second contention I find that it is quite immaterial that the two contradictory statements were made in the course of one deposition in one trial. If the first statement is false, the applicant committed the offence of perjury as soon as he made it. Whether he made it deliberately and whether he knew or believed it to be false or did not believe it to be true is to be seen with reference to the time at which he made it. If the requirements of Section 191 are fulfilled, he committed the offence of perjury as soon as he made it. The completion of the offence does not remain in abeyance for a short time in order to give him an opportunity of repenting and correcting himself. It does not remain in abeyance so long as the trial is not over or so long as he has not been cross-examined under Section 256 of the Code or so long as he has an opportunity of being recalled and making the correct statement later. What he does subsequently has absolutely no bearing on the offence already committed by him. The offence is not purged or wiped off by subsequent repentance or retraction or correction. Of course, on account of the subsequent repentance and admission of mistake, the Court may say that he had not made the earlier statement deliberately knowing or believing it to be false or not believing it to be true; but that would mean that he had not committed the offence at all by making the earlier statement and not that he had committed it and the commission is purged or wiped off by the subsequent repentance and confession. Section 191 does not take into consideration the fact that the false statement was, subsequently in the same deposition or in the same trial, admitted to be incorrect and replaced by the correct statement or that the deposition was not finished before the accused corrected himself.

In the case of — 'Palani Palagan (H)' the facts were exactly similar to those in the present case and the conviction of the witness for perjury was maintained. Benson, J. stated at page 61 that there was nothing to justify the distinction suggested between two contradictory statements made in two separate trials and two contradictory statements made in the same trial in the same Court. On page 65 he observed:

"The essence of the offence lies in the intention to give false evidence, and that intention may, I think, just as well exist when the contradiction is in various stages of the same deposition as where it is in different stages of the same proceedings..... To consider whether the false statement was made in the course of one deposition or in the course of two separate depositions seems to be irrelevant, and calculated to obscure the real question."

There also the accused had not pleaded that his former statement was made under any misapprehension and had not attempted to reconcile the two statements or to explain them in any manner consistent with an honest intention on his part.

In — 'Habibullah's case (B)', the accused was cross-examined on one day and re-examined on the following day, he made contradictory statements on the two days and yet he was convicted of perjury. Tottenham, J. said on page 941 that:

"The essence of the offence is the intention, and that may exist where the contradiction is in various stages of a single deposition, as well as where it is manifested in two distinct proceedings."

Wilson, J. concurring with him, said on p. 946:

"I can see no sufficient distinction in principle between such contradiction in one deposition and in two. If it is an offence under Section 193 to make two contradictory statements, one or other of which must be false, and to do so with a guilty intention, on two distinct occasions, I think it must be equally an offence to make them on one occasion."

(7) No question of 'locus paenitentiae' should arise when an accused is prosecuted for making two contradictory statements. It is impossible to lay down that a witness, who deliberately makes a false statement, is entitled to purge the offence

by repentance and retraction. The offence of perjury once committed cannot be purged.

In — '(1937) 81 Law Ed 808 (F)' N made a certain statement which was false. He heard evidence of other witnesses later and then made an application to the Court for permission to be re-examined. In the re-examination he admitted having made the previous statement falsely and made a correct statement. Still his conviction for perjury was maintained by the Supreme Court and his plea that he was entitled to 'locus paenitentiae' was rejected. Roberts, J. said at p. 813:

"The implications and results of such a doctrine prove its unsoundness. Perjury is an obstruction of justice; its perpetration well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when a witness's statement has once been made. It is argued that to allow retraction of perjured testimony promotes the discovery of the truth and, if made before the proceeding is concluded, can do no harm to the parties. The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the Court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross-examination, by extraneous investigation or other collateral means."

He has pointed out that there is no respectable body of authority under the Common Law or statute in England or United States to support the claim of 'locus paenitentiae', and said on page 814:

"The plain words of the statute and the public policy which called for its enactment alike demand we should hold that the telling of a deliberate lie by a witness completes the crime defined by the law. This is not to say that the correction of an innocent mistake, or the elaboration of an incomplete answer, may not demonstrate that there was no wilful intent to swear falsely."

(8) It is stated in Corpus Juris Secundum, Volume 70 under the title "Perjury", paragraph 2, that—

"It has been variously held that the crime is complete when the false statement is once made."

It is stated in paragraph 8 (c) that

"the retraction or correction of false testimony before the close of the cause or proceeding in which the testimony is given does not, 'ipso facto', exculpate the witness of perjury."

and that

"the principle applies with even greater force when perjury follows truthful testimony, and thus constitutes the last and unrecanted choice of the author."

It is further stated that

"even where it is held that perjury will not be predicated on false statements corrected before submission of the case in which made, especially where the statement as originally made was more incomplete than literally untrue, this does not require the tribunal to remain open for any particular length of time to permit the witness to purge himself of perjury."

Further in paragraph 17 (b) (6) it is stated that

"the correction of an innocent mistake may demonstrate that there was no wilful intent to swear falsely".

that

"an attempt to correct testimony knowingly falsely given has no effect on the existence of perjury in knowingly giving the false testimony"

and that

"if the witness withdraws the false testimony of his own volition and without delay, the false statement and its withdrawal may be found to constitute one inseparable incident out of which an intention to deceive cannot rightly be drawn."

(9) The questions that are in issue when a person is prosecuted for perjury are quite different from those that arise in proceedings under Section 476 of the Code. In the latter the Court has to see whether it is expedient in the interest of justice to prosecute the witness for committing perjury whereas in the former the Court has only to see whether the ingredients of the offence of perjury are proved by the prosecution and is not at all concerned with the question of the expediency. Naturally after the witness is put on trial, it is too late to consider the question of expediency. A Court may refuse to hold that it is expedient to prosecute a witness who has deliberately made two contradictory statements, at least one of which is false, but cannot refuse to convict him of perjury when that is proved. No accused can be acquitted of the charge of perjury on the ground that it was not expedient to prosecute him. Therefore the decision in—'Dasondha Singh v. Emperor', 12 Cri LJ 405 (I); — 'Maharaj Prasad v. Emperor', AIR 1924 All 83 (J); — 'Paragi v. Emperor', AIR 1936 Oudh 373 (K); — 'Tecomal v. Pir Ali Muhammad', AIR 1937 Sind 116 (L); — 'Local Government v. Gambhir Bhujua', AIR 1927 Nag 189 (M); — 'Tara Chand v. Emperor', AIR 1929 Nag 279 (N); — 'Chedi Lal v. Emperor', AIR 1924 Oudh 373 (O) and — 'Hit Narayan Singh v. Emperor', AIR 1926 Pat 517 (P) all of which dealt with the question of expediency, are of no help and are to be distinguished.

In — 'Dasondha Singh's case (I)', the Court said that he had at once admitted having made the statement falsely and so should not be prosecuted. In — 'Maharaj Prasad's case (J)' he made one statement at first and then on being confronted with a document corrected himself and it was stated by Kanhaiya Lal, J. that he must be allowed 'locus paenitentiae' to correct himself.

In — 'Tara Chand's case (N)', he, in cross-examination, resiled from the previous statement made in examination-in-chief, admitting it to be false and it was observed by Findlay, J. C. that at the most it was an attempt to commit perjury in examination-in-chief and that it was not desirable to prosecute him. He observed that for the offence of perjury to be complete that of misleading and deceiving the Court — the deponent must leave the Court under the lie with which he began by deceiving it. It cannot be said that the applicant in the present case did not leave the Court on 17-11-1950 with a lie on his lips.

In — 'Chedi Lal's case (O)' he made three conflicting statements in quick succession and it was held to be a case of correcting himself.

In the case of — 'Hit Narayan Singh (P)' in cross-examination, the accused resiled from the earlier statement made in examination-in-chief saying that it was false and he was held entitled

to 'locus paenitentiae'. The Court doubted if it was a fit case for prosecution. It was not satisfied that he deliberately meant to perpetuate a fraud or had any dishonest intention when he made the first statement at all. So it was a case in which the Court held that no offence of perjury was committed at all by making the earlier statement.

In — 'Habibullah's case (B)' it was said that no Court would sanction prosecution unless satisfied that the false statement was deliberately and intentionally made. In the present case the applicant has himself not claimed 'locus paenitentiae'. During the trial he maintained that both the statements were correct. Therefore, even the issue of expediency could have been decided against him.

In the case of — 'Paragi (K)' it was observed that witnesses should be free to speak the truth in Sessions Court regardless of what they had said in the Magistrate's Court.

In — 'Teoomal's case (L)' also it was observed that witnesses should be encouraged to speak the truth but within reasonable time. Witnesses should certainly be encouraged to speak the truth but not by ignoring perjury committed by them or by refusing to punish them for it. They should not be encouraged to tell lies. I have already pointed out that the offence of perjury is committed as soon as the false statement is deliberately made. Contradictory statements, whether made in the same trial or on the same day or in the same deposition are not always made in the same circumstances and one rule cannot govern all cases of contradictory statements. A subsequent statement may show that the previous statement was untrue but was not made deliberately with the intention of deceiving the Court; in that case no offence of perjury is at all committed by making the previous statement and there does not arise any question of 'locus paenitentiae'.

If the previous statement is made deliberately with intention to deceive the Court then no amount of repentance will purge the offence. The question whether it is expedient in the interests of justice to prosecute him or not is at the discretion of the Court and it may decide not to prosecute him. But if he is prosecuted and all the ingredients of the offence are proved, the trying Court has no discretion in the matter and is bound to convict him. It cannot acquit him on the ground of repentance. There is no reason why a perjurer should be allowed 'locus paenitentiae' and not any other offender. There are many offences besides that of perjury which are punished for doing a certain act with a dishonest intention even if the dishonest intention has not been carried out. If persons committing those offences are not entitled to 'locus paenitentiae', there is no justification for saying that a perjurer is entitled to it.

Moreover, it cannot be assumed that the previous statement was false and that the subsequent statement was not only correct but also made out of repentance. It may very well be that the previous statement was correct and the subsequent statement was false and the doctrine of 'locus paenitentiae' cannot be blindly applied to such a case. In the instant case there was absolutely nothing to suggest that the previous statement was false. The applicant did not himself allege that it was false. It is quite likely, as actually found by the learned Magistrate, that the subsequent statement was false.

(10) There is thus no force in the contention that a witness who has committed perjury must be allowed sometime to purge himself of the offence. If he admits having committed the perjury and makes the true statement the fact may be considered in mitigation of the punishment to be inflicted upon him but he remains liable to punishment.

(11) The applicant has been rightly convicted under Section 193, I. P. C. The sentence passed upon him was unnecessarily lenient. An offence of perjury is a serious offence and is not adequately punished with an imprisonment of six months only. Ordinarily a sentence of one year should be inflicted.

(12) The applicant's conviction and sentence are maintained and the application is dismissed.

B/R.G.D. Revision dismissed.

A. I. R. 1954 ALL. 428 (Vol. 41, C. N. 177)

RAGHUBAR DAYAL AND V. BHARGAVA JJ.

Brij Kishore and another, Applicants v. Rent Control and Eviction Officer and others, Opposite Party.

Civil Misc. Writ No. 284 of 1953, D/- 24-11-1953.

(a) **Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7-D(4) — Action under section — Who can take.**

If the Rent Control and Eviction Officer or the Additional District Magistrate takes action under S. 7-D(4), it would not be covered by the section. (Para 15)

(b) **Constitution of India, Art. 226 — Alternative remedy — Remedy under S. 7F, U. P. (Temporary) Control of Rent and Eviction Act — (Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7-F.).**

Section 7-F does not afford any alternative remedy to a landlord. A landlord has not been given any right to approach the State Government to revise the order passed by the Rent Control and Eviction Officer. Section 7-F just empowers the State Government to call for the record and make suitable orders. The landlord, therefore, cannot approach the State Government by way of appeal or revision against the order of the Rent Control and Eviction Officer. (Para 16)

(c) **Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7(1)(a) — Vacancy of accommodation.**

The vacancy of an accommodation referred to in S. 7(1) means the vacancy of the entire accommodation in the tenancy of any person and cannot refer to the tenant's not using, for the time being, part of the accommodation which had been let out to him as a result of the transaction of the contract of tenancy between him and the landlord. (Para 18)

Therefore the disuse by a tenant of a portion of the accommodation let to him does not amount to the tenant's vacating that portion of the accommodation and does not, therefore, give any right to the Rent Control and Eviction Officer to allot such portion of the accommodation to another person. (Para 18)

(d) **Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7(3) — Permission of landlord.**

The Rent Control and Eviction Officer's order alone cannot be sufficient for creation of a sub-tenancy. There should also be the consent of the landlord in writing. (Para 19)

S. K. Verma, for Applicants; Gopalji Mehrotra (Standing Counsel), for Opposite Party.

RAGHUBAR DAYAL J.:

This is an application under Article 226 of the Constitution of India, praying that a writ, order or direction in the nature of certiorari be issued to the opposite party No. 1, that is, the Rent Control and Eviction Officer and Magistrate, Kanpur, and the order of allotment, dated the 4th of March, 1953, passed by opposite party No. 1 in favour of opposite parties Nos. 2 and 3, namely, the Annapurna Cafetaria, Kanpur, through the Secretary, District Food Advisory Committee, Kanpur and Mrs. Rathore, President, District Food Advisory Committee, Kanpur, be quashed.

(2) The facts leading to this application are:

(3) The applicants are the landlords of certain buildings in a compound with one municipal number 17/3 situated on the Mall, Kanpur. Of the various buildings on this land, one was let out to one Shri Uma Shankar Mehrotra, son of Shri Bhupat Prasad Mehrotra, several years ago, Shri Uma Shankar Mehrotra, whose father Shri Bhupat Prasad Mehrotra carried on a business in the name of S. Varma in that portion of the accommodation, was in occupation of that portion on the 5th of March, 1953, when, according to the allegations in the affidavit filed in support of this application, opposite party No. 1, namely, the Rent Control and Eviction Officer and Magistrate, Kanpur passed the allotment order under section 7 of the U. P. (Temporary) Control of Rent and Eviction (Amendment) Act (Act XLIV of 1948), ordering the applicants to let out the portion, previously occupied by Shri S. Varma, to the Annapurna Cafetaria, Kanpur. The landlord-applicants received this order on the 11th of March 1953.

(4) On 5th March, 1953, according to the admitted case of the parties, a letter, addressed to Mool Chand instead of being addressed to Mool Narain, one of the proprietors of the firm Messrs Brij Kishore Mool Narain (also wrongly described as Messrs Behari Lal Mool Chand) was received from the Rent Control and Eviction Officer, asking Mool Narain to see the Additional District Magistrate (City), Kanpur, at 4 P.M. that day in connection with the bungalow in premises No. 17/3 previously occupied by Shri S. Varma. Mool Narain was not in Kanpur on that day and so could not comply with the request in that letter.

A similar request was then addressed to him on the 6th of March, 1953, requiring him to see the Additional District Magistrate (City), Kanpur, just then. This peremptory request also could not be complied with as Mool Narain had not returned to Kanpur till then. However, one Madho Prasad, brother-in-law of Mool Narain, met the Additional District Magistrate (City), Kanpur and informed him that the portion, occupied by Messrs, S. Varma, was still in their possession, that they had not vacated it, nor had they any intention to vacate the same and that, therefore, no question of allotting it to someone else arose.

He also informed the Additional District Magistrate, when the question of certain repairs was raised by the latter, that, under the contract of tenancy between the landlord and the tenant, it was the tenant who was bound to carry out the necessary repairs. All this in connection with the two letters and the meeting between Madho Prasad and the Additional District Magistrate (City), Kanpur, was repeated in a letter which Mool Narain sent to the Additional District Magistrate on the 9th of March, 1953.

(5) The allotment order, served on the applicants which is annexure D to the application, is dated the 4th of March, 1953, and is with respect to the premises No. 17/3, except one room on the back, the previous occupier of which was Shri S. Varma. The validity of this order is challenged on the ground that the accommodation in dispute had never fallen vacant prior to the allotment order and that, therefore, the allotment order was without jurisdiction and was 'ultra vires' of the Rent Control and Eviction Officer. Another ground urged was that the accommodation in suit formed part of a larger accommodation and that the landlords themselves being in occupation of the other portion, it was incumbent to consult them before this portion could be let out to others.

(6) So far as the second ground is concerned, it was mentioned in the counter-affidavit and is not disputed that there are several houses in the compound of premises No. 17-3 and that the accommodation in occupation of the applicants is not contiguous with the accommodation in suit. The various residences in the compound are separate independent units. The second objection, therefore, has no force.

(7) With respect to the first contention, it was mentioned in the counter-affidavit filed on the 15th of April, 1953, by the Rent Control and Eviction Officer himself that Shri Bhupat Prasad Mehrotra had allowed one Shri B. D. Khanna to occupy the premises in dispute without any legal authority and that the letter, dated the 5th of March, 1953, was issued to Shri Brij Kishore and Shri Mool Narain, requesting them to contact the Additional District Magistrate (City) for the purpose of deciding the terms of tenancy after the allotment had been made.

There was nothing in the letter to indicate this and it does not appear why the Additional District Magistrate (City), Kanpur, was to decide the terms of tenancy when the allotment was made by the Rent Control and Eviction Officer who could be the best person to decide the terms of tenancy if this matter was at all to be decided by the Rent Control and Eviction Officer. Ordinarily, we think that this should, have been the matter for decision between the landlords and the prospective tenant. There is nothing on the record to show and it does not appear probable that the Additional District Magistrate (City) was authorised by the District Magistrate of Kanpur to perform any of the functions of the District Magistrate under the Rent Control and Eviction Act.

(8) It was further mentioned in the counter-affidavit that the allotment order, dated the 5th of March, 1953, was served on the landlord just after the date of the allotment, but they evaded its receipt, and it was finally served on them on the 11th of March, 1953. This assertion is self-contradictory and meaningless. If the allotment order had been served on the landlord on the 5th of March, 1953, there was no question of its being finally served on the 11th of March. If there were any question of the landlords giving any receipt in token of having received the order no such receipt seems to have been given by the landlords on the 11th of March, 1953, as none has been produced in court. We have not been referred to any papers in support of this assertion in the counter-affidavit that the allotment order was served on the landlords on the 5th of March. However, the actual date of the service

of the allotment order is not very material for purposes of this case.

(9) It was alleged that the allottee secured possession on the 6th of March, 1953, and that it was false that the original tenant was in occupation of the accommodation in suit.

(10) It was also denied that the allotment order was made on the 4th of March, 1953. It was alleged that it was made on the 5th of March, 1953. No explanation, however, has been given in this counter-affidavit as to how the allotment order (Annexure 'D' to the application), which has been filed by the applicants, bears the date, 4th March, 1953. No allegation is made that this is not the order served on him, or, that any tampering has been done with the date on it or on any other portion of this allotment order.

(11) It was also mentioned in this counter-affidavit that a notice was issued to the landlords on the 2nd of March, 1953, informing them to appear before the Rent Control and Eviction Officer on the 5th of March, 1953, to file objections, if any, against the allotment of premises No. 17/3 and that as the landlords did not receive the notice, it was served by affixation. No documents were filed along with this affidavit in support of the allegations made therein.

(12) A rejoinder affidavit was filed by the applicants on the 22nd of April, 1953. Its copy was delivered to the Standing Counsel on the 21st of April, 1953. On 20th April, 1953, a supplementary counter-affidavit was sworn by the Rent Control and Eviction Officer, its copy was handed over to learned counsel for the applicant on the 21st of April, 1953, and it was filed in Court on the 28th of April, 1953. In this supplementary counter-affidavit, it was mentioned that the Kanpur Branch of the Women's Food Council was in search of a suitable accommodation for their Cafetaria and applied to the authorities for a suitable place.

No such application has been produced. We are informed that no written application was presented. The supplementary counter-affidavit goes on to say that, on the 19th of February, 1953, the Senior Inspector (Housing) submitted a report to the deponent that the premises in dispute with the exception of one room were in illegal and unauthorised occupation of one B. D. Khanna, that only one room was in the occupation of Shri Bhupat Prasad Mehrotra, the tenant of the premises, that enquiry revealed that B. D. Khanna had been occupying that portion for about a year, that the Rent Control and Eviction Officer visited the premises on the 20th of February, 1953, and that the members of the Women's Food Council visited it on the 22nd of February, 1953.

They approved of the building as a suitable place for the Annapurna Cafetaria. On 24th February, 1953, the Rent Control and Eviction Officer ordered issue of notice to the landlord-applicants with regard to the allotment of the premises in dispute to the Annapurna Cafetaria. A copy of the notice was filed with this affidavit. It shows that it was issued on the 2nd of March, 1953. The endorsement at the back of this notice is to the effect that Behari Lal Mool Chand refused to accept the notice and that the notice was, therefore, affixed in the presence of two witnesses. It is amusing to see this report of the person who went to serve the notice. It does not show who actually refused to accept the notice and to whom it was tendered. It is too much to suppose that the employees of the office of the Rent Control and Eviction Officer expected a firm as such to accept the notice.

(13) The supplementary counter-affidavit further said that, prior to the 5th of March, 1953, the Rent Control and Eviction Officer received a letter from Shri Uma Shankar, dated the 28th of February, 1953, to the effect that the premises in dispute, with the exception of one room, were vacant. A copy of the letter has been filed. It does not support these allegations. The letter is not by Uma Shankar but is by Bhupat Prasad for S. Varma. The letter did not show that Bhupat Prasad Varma or Uma Shankar Mehrotra had vacated the premises. It simply said that it was being confirmed that his refugee relations residing with him had vacated the premises, the possession of which would be handed over to the nominee of Shri Samiuddin, Additional District Magistrate (City), Kanpur.

The letter further made a request that, according to the verbal agreement, one back big room with two adjoining side rooms on the right hand side of the premises in question including the motor-garage, which had been constructed by him, would remain in his possession for which reasonable rent would be fixed by the Rent Control and Eviction Officer. The premises in dispute, it appears, had included the two adjoining side rooms and also a motor garage, which was constructed by him, besides one big room at the back.

(14) The letter further said that it had also been agreed upon that whenever the premises would be vacated by the Cafetaria, the possession of the same would be given to him in good condition. It is interesting to note that the tenant was stipulating to get back the premises in good condition while the premises were supposed to be so bad in condition that it necessitated a prompt meeting between the landlord and the Additional District Magistrate on the 5th of March, 1953.

(15) A copy of the allotment order was filed along with the supplementary counter-affidavit to bear out the assertion that the allotment order was made on the 5th of March, 1953. This does not improve matters in the absence of any explanation as to why the order served on the landlords bore the date, 4th March, 1953. It is also mentioned in the supplementary counter-affidavit that, in connection with the letter of the landlords to the Additional District Magistrate (City), dated the 9th of March, 1953, the Rent Control and Eviction Officer submitted a report on the 10th of March, 1953. Annexure 4 is a copy of the report.

This report shows along with other things that the fact of vacancy had been conveyed to the Additional District Magistrate on phone by the tenant himself on the 27th of February, 1953, that as regards notice to the landlord, he must have had personal conversation with the Additional District Magistrate quite a few times by that time and that he had got sufficient notice in that behalf. What the Rent Control and Eviction Officer or the Additional District Magistrate expected from the landlords in this connection we fail to imagine. Why should the landlords have been sent for in this connection? The question was about notice to them and not about their seeking audience with those officers.

Further, this report said that the matter had been thoroughly looked into by each one of them including the District Magistrate and possession had also been secured by the Additional District Magistrate (City). We fail to see how possession had been obtained by the Additional

District Magistrate (City), Kanpur, who had nothing to do with the matter either as a Rent Control and Eviction Officer or as an office-bearer of the Annapurna Cafetaria. The report further said that the repairs could be undertaken at once and as the Additional District Magistrate (City) had himself seen the building in a bad condition, it needed very extensive repairs and that, under section 7-D(4) of the Act, if the landlords refused to restore the amenities of proper roofing, white-washing etc., the tenant could get it restored on his own and the cost of repairs could be adjusted towards the rent.

On this report of the Rent Control and Eviction Officer, Shri Samiuddin, Additional District Magistrate (City), ordered the Rent Control and Eviction Officer to take necessary action and let him know at once. On the 12th of March, 1953, the Rent Control and Eviction Officer reported that action had already been taken. What that action was and who took it is not clear. If any of these two officers, namely, the Rent Control and Eviction Officer or the Additional District Magistrate (City), Kanpur, had taken this action, that would not be covered by the provisions of section 7-D(4) of the U.P. (Temporary) Control of Rent and Eviction Act (Act No. III of 1947) which is :

"7-D(4) : If the landlord fails to restore the said amenities within the time fixed by the District Magistrate, it shall be competent for the District Magistrate to direct that the tenant may have such amenities restored and the cost thereof may be deducted from the rent which is payable to the landlord."

If the action taken was simply to inform the prospective tenant that he was 'per se' to undertake the repairs, that may come under these provisions. There is nothing on the record to show what particular extensive repairs were necessary to bring back the property which had been in actual possession, may be of an unauthorised person B. D. Khanna. It is in connection with these repairs that the supplementary counter-affidavit mentions that the Annapurna Cafetaria had spent over Rs. 2,000/- in making the necessary repairs. In the supplementary rejoinder affidavit, two assertions deserve mention.

One is with respect to the alleged notice issued on the 2nd of March to the landlords to meet the Rent Control and Eviction Officer on the 5th of March and submit their objections to the allotment. It is alleged that the 2nd and 3rd of March, 1953, were holidays on account of Holi. The other is that the copy of the allotment order filed with the supplementary counter-affidavit does not agree with the allotment order served on the applicants not only with respect to the date but also with respect to the description of the specification of the premises. The allotment order served on the applicants mentioned the specification as 17/3 (except one room in the back) whereas the copy filed with the supplementary counter-affidavit mentions the specification as 17/3 (except one back room).

(16) The learned Standing Counsel has mainly relied on two grounds in submitting that the applicants could not get any relief by this writ petition. One is that they had an alternative adequate remedy in view of the provisions of section 7-F of the U. P. (Temporary) Control of Rent and Eviction Act which runs as follows :

"7-F : The State Government may call for the record of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in section 3 or requiring any accommodation to be let or not to be let to any person under section 7 and may make such order as appears to it necessary for the ends of justice."

We are of the opinion that this section does not afford any alternative remedy to the applicants. The applicants have not been given any right to approach the State Government to revise the order passed by the Rent Control and Eviction Officer. This section just empowers the State Government to call for the record and make suitable orders. The applicants, therefore, cannot approach the State Government by way of appeal or revision against the order of the Rent Control and Eviction Officer. Further, in view of how things have taken place, the applicants cannot be blamed if they did not think of approaching the State Government. Sufficient indication has been given above to show that the officers of the district, including the Rent Control and Eviction Officer, had taken interest in this matter much beyond what is expected from a Rent Control and Eviction Officer in the discharge of his functions under the U. P. (Temporary) Control of Rent and Eviction Act (Act III of 1947).

It is clear that the premises were not vacant when they were inspected and approved for occupation by the Annapurna Cafetaria by the members of its advisory body or by the Rent Control and Eviction Officer or by the Additional District Magistrate (City), Kanpur. Nothing is shown why the Additional District Magistrate should have officially taken interest in this matter even if he was interested in this Cafetaria and should have issued orders to the Rent Control and Eviction Officer which he rightly complied with. We have already referred to the letter of Shri B. P. Varma, dated the 28th of February, 1953, a copy of which was filed along with the supplementary counter-affidavit. That letter referred to three letters from the Rent Control and Eviction Officer to Shri Uma Shankar Mehrotra, son of Shri B. P. Varma and also to some verbal agreement between Shri Uma Shanker and Shri Samiuddin, Additional District Magistrate (City).

As the learned Standing Counsel laid great stress on this question of alternative remedy, we asked him to file the three letters referred to in this letter of the 28th of February, 1953. The first letter, dated the 24th of February, 1953, refers to some telephonic conversation between Shri Uma Shanker and the Rent Control and Eviction Officer, Shri M. Saidullah, who informed him that he was making arrangements for providing suitable alternative accommodation for Shri B. D. Khanna and his other family members and hoped that they would be good enough to vacate the premises No. 17/3, the Mall, Kanpur, as it was needed by Mrs. Munshi who had already inspected the premises.

According to the counter-affidavits B. D. Khanna was the person who had occupied the premises in suit without any authority and had been occupying it for a year. The Rent Control and Eviction Officer could have taken legal action against him instead of showing such solicitude for him and depending on his goodness to get the premises vacated. The second letter, dated February 26, 1953 shows that there had been fair response from Shri Uma Shanker Mehrotra though Khanna was not very helpful. In this letter, it was mentioned that the Rent Control and Eviction Officer was under no obligation to the illegal occupier though he was under obligations to the tenants of the premises. The third letter, dated February 27, 1953, shows that the Additional District Magistrate (City), Kanpur had informed the Rent Control and Eviction Officer

that the premises would be vacant on March 1, 1953; it refers to the efforts on the part of the Rent Control and Eviction Officer to contact the landlord who incidentally was reported to be deaf and dumb but his representative had not yet met him.

Considering this zealousness on the part of the local officer in connection with the vacation of the premises and its allotment, it can be said, as already mentioned that the applicants need not be blamed if they did not approach the State Government because they could have presumed that the officers of the State Government must have taken such an interest under some inspiration, however wrong that notion might have been. We are, therefore, of the opinion that the applicants are not deprived of getting their grievances remedied by a writ application on account of the provisions of S. 7-F of the U. P. (Temporary) Control of Rent and Eviction Act, 1947.

(17) The second point raised for the opposite parties was that the order impugned was an order passed by the Rent Control and Eviction Officer within his jurisdiction as the premises in suit had fallen vacant. It was, therefore, submitted that the order was not to be interfered with in the exercise of our jurisdiction under Art. 226 of the Constitution.

(18) Section 7 of the U. P. (Temporary) Control of Rent and Eviction Act (Act III of 1947) runs as follows:

"7. 1 (a) The District Magistrate may by general or special order, require a landlord to give intimation that any accommodation of which he is the landlord is or has fallen vacant, and to let or not to let such accommodation to any person.

(b) In any case where in pursuance of an order of the District Magistrate passed under clause (a) aforesaid the vacancy of any accommodation is required to be reported, the tenant occupying such accommodation shall, within seven days of his vacating the same, give intimation thereof in writing to the District Magistrate or such officer as the District Magistrate may appoint in this behalf.

Provided that in making the first allotment in the case of any accommodation constructed after July 1, 1946, the District Magistrate shall allot it to the owner, if the owner, not being in occupation of any other house owned by him in that municipality or other contiguous area to which the Act applies, genuinely requires such accommodation for his own residence.

Explanation: A newly constructed accommodation shall be deemed to be vacant as soon as it is fit for occupation."

The vacancy of an accommodation referred to in this section means the vacancy of the entire accommodation in the tenancy of any person and cannot refer to the tenant's not using, for the time being, part of the accommodation which had been let out to him as a result of the transaction of the contract of tenancy between him and the landlord. If a tenant vacates a portion of the accommodation in his tenancy and lets any other person occupy it, the other persons would be the tenant's sub-tenant and cannot become the tenant of the landlord. So far as the landlord is concerned, the original tenant continued to be his tenant till his tenancy comes to an end in any of the recognised manners. If the vacancy of the accommodation, contemplated by section 7, included the vacancy of a portion of the accommodation let to a tenant, it may result in anomalous situations. The landlord has no reason to know of the partial disuse of the accommodation let out to the tenant.

He cannot give any notice to the District Magistrate under clause (a) of sub-section (1) of section 7 of the Act. The original tenant continues to be his tenant and the landlord, therefore, cannot accept another person to whom the Rent Control and Eviction Officer allots the part of the accommodation, on being informed by the tenant that he does not want to use that portion of the accommodation let out to him. The new allottee cannot, therefore, be the tenant of the landlord and cannot be the sub-tenant of the original tenant in view of the allotment order, there being no contract of tenancy between him and the sub-tenant. The landlord may also bring himself within the mischief of sections 8 and 11 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947.

We, therefore, hold that the disuse by a tenant of a portion of the accommodation let to him does not amount to the tenant's vacating that portion of the accommodation and does not therefore, give any right to the Rent Control and Eviction Officer to allot such portion of the accommodation to another person. It follows, therefore that the Rent Control and Eviction Officer's order, allotting the premises No. 17/3 with the exception of one back room in the occupation of S. Varma to the Annapurna Cafetaria, was an order which he had no right to pass and, therefore, that order should be set aside.

(19) Learned Counsel for the opposite parties further submitted that if the tenant could not vacate the portion of the accommodation, the allottee, in the present case, would be the sub-tenant and the applicants could, therefore, take legal action against the tenant for sub-letting in view of section 3(1)(e) and section 7(3) of the Act. We have already indicated that the order of the Rent Control and Eviction Officer is not an order to the effect that the Annapurna Cafetaria would be a sub-tenant of the tenant. The order is directed against the landlords and is with respect to the Annapurna Cafetaria becoming the tenant of the accommodation in suit. Further, section 7(3) provides :

"7(3) : No tenant shall sub-let any portion of the accommodation in his tenancy except with the permission in writing of the landlord and of the District Magistrate previously obtained."

It follows that the Rent Control and Eviction Officer's order alone could not have been sufficient for the creation of the sub-tenancy in favour of the Annapurna Cafetaria. There should also have been the consent of the landlords in writing. It would thus appear that the Rent Control and Eviction Officer's order of allotment, if given effect to as an order creating the sub-tenancy, would amount to condoning an order of the Rent Control and Eviction Officer which he could not have legally passed.

(20) In view of the above, we quash the order of allotment passed by the Rent Control and Eviction Officer in favour of the Annapurna Cafetaria opposite party No. 2 on the 4th or 5th of March, 1953, with respect to premises No. 17/3, the Mall, Kanpur, except one back room previously in the occupation of Sri S. Varma. We further order opposite party No. 1 on whose behalf the case was contested, to pay costs to the applicants which we assess at Rs. 200/-.

(21) We order that the three letters filed by the learned Standing Counsel under our direction be returned to him.

Order quashed.

A/V.R.B.

AIR 1954 ALLAHABAD 433 (Vol. 41 C. N. 178)

MOOTHAM AND CHATURVEDI JJ.

Hafiz Mohammad Yusuf, Applicant v. The Custodian General, Evacuee Properties, New Delhi and others, Opposite Party.

Civil Misc. Writ No. 840 of 1953, D/- 22-12-1953.

Constitution of India, Art. 226 — Jurisdiction and powers of High Court — (Administration of Evacuee Property Act (1950), S. 27 — Power of Custodian-General).

Under S. 27, Administration of Evacuee Property Act, the powers of the Custodian-General are very wide and for all practical purposes are indistinguishable from those of an appellate authority under the Act. Upon the general principle that the order of a Court merges in that of an appellate authority, the order of the Assistant Custodion merges in the order of the Additional Custodian and that order in its turn merges in the order passed by the Custodian General. Wide as are the powers conferred under Art. 226 of the Constitution, a two-fold limitation is placed upon the powers of the High Court. In the first place, the power is to be exercised 'throughout the territories in relation to which it exercises jurisdiction'. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be 'within those territories.' The office of the Custodian-General is located in New Delhi where he himself ordinarily resides. The High Court has therefore no power to summon the records of any case in the custody of the office of the Custodian-General or to quash any order made by him. (Paras 7, 8, 9)

Syed Sadiq Ali, for Applicant; S. S. Dhawan, for Opposite Party.

CASES REFERRED: Paras

(A) ('89) 11 All 267 (FB) 5
(B) ('89) 11 All 314: 1889 All WN 107 (FB) 5
(C) (V21) AIR 1934 All 134: 56 All 603 5
(D) (V1) AIR 1914 PC 66: 36 All 350 (PC) 6
(E) (V22) AIR 1935 Pesh 91: 156 Ind Cas 585 6
(F) (V40) AIR 1953 SC 210: 1953 SCR 1144 (SC) 8

M. L. CHATURVEDI J.:

This is a petition under Article 226 of the Constitution.

(2) The case of the petitioner as set out in the petition is that one Abdul Hakim was the tenant, along with his brother, of a shop in the Vegetable Market, Bisheshar Ganj, Banaras. Abdul Hakim's brother died about 10 years ago, and in 1948 the petitioner became a partner of Abdul Hakim in the fruit business carried on in the shop. The petitioner says that he contributed a sum of Rs. 5,000/- and that a deed of partnership was executed on the 25th October, 1943. Subsequently Abdul Hakim went to Pakistan, and a notice was issued to him in April 1950 under Section 7 of the Administration of Evacuee Property Act of that year to show cause why he should not be declared an evacuee and his property as evacuee property. No objection was filed by Abdul Hakim, and the movable property in the shop was in due course declared to be evacuee property. Subsequently however, Abdul Hakim returned to India, and, on an objection being then filed by him, the order declaring him an evacuee and his property to be evacuee property was set aside.

Abdul Hakim's stay in India appears to have been temporary and he again went to Pakistan. A second notice was thereupon issued under S. 7 of the Act to which an objection was filed by the petitioner on the ground that Abdul Hakim had surrendered his rights as lessee in the shop in question and that the Municipal Board had allotted the shop to the petitioner on a monthly rent of Rs. 8/-. A second objection was that the tenancy rights of Abdul Hakim in the shop were not mentioned in the second notice as property to be declared as evacuee property.

(3) The petitioner's objections were dismissed by the Assistant Custodian, Banaras, on the 25th September, 1951, and an appeal from the order of the Assistant Custodian was dismissed by the Additional Custodian, Lucknow, on the 5th April, 1952. The petitioner then filed an application in revision to the Custodian General under Section 27 of the Act which was also dismissed on the 26th August, 1953. It is in these circumstances that the petitioner has filed the present petition in which he prays for a writ of 'certiorari' to quash each of the orders made by the Assistant Custodian, the Additional Custodian and the Custodian General. He has impleaded one Daya Ram, who appears to be the person who is now a tenant of the shop in question, as respondent No. 4.

(4) A preliminary objection to the maintainability of this petition has been taken by the learned Counsel who appears for the first three respondents. It is that the orders made respectively by the Assistant Custodian and the Additional Custodian have merged in the order of the Custodian General dated the 26th of August, 1953, and that as the Custodian General neither resides nor is his office located within the territory in relation to which this Court exercises jurisdiction, it can issue no writ of 'certiorari' to quash the order made by him. In our opinion this objection must be upheld.

(5) It is, in our opinion, now well settled so far as this Court is concerned that the decree of an appellate Court supersedes the decree of the first Court even in cases where the appellate Court merely affirms the original decree: — 'Mohammad Sulaiman Khan v. Mohammad Yar Khan', 11 All 267 (A); — 'Mohammad Sulaiman Khan v. Fatima', 11 All 314 (B). The same principle has been extended by a learned single Judge of this Court in the case of — 'Gauri Shankar v. Jagat Narain', AIR 1934 All 134 (C), in which it was held that the 'ex parte' decree of the lower Court merged in the decree passed by this Court in revision.

(6) Our attention has been drawn by the learned counsel for the petitioner to the case of — 'Chandu Abdul Majid v. Jawahar Lal', AIR 1914 PC 66 (D). In that case the Privy Council held that where an appeal before the Board had been dismissed for want of prosecution it could not be said that the Privy Council had dealt with the matter judicially in any manner and therefore their Lordships added, the decree of the High Court had not merged in the decree of the Privy Council. The observations in this case support the submission of the respondents rather than that of the petitioner. Reference was also made on behalf of the respondents to a decision of the Judicial Commissioner of Peshawar in the case of — 'Ghafar Shah v. Sikandar Shah', AIR 1935 Pesh 91 (E), in which a distinction was drawn between the case where an application in revision was dismissed and the case in which the application was allowed, and it being held that it was only in the latter case that the decree of the lower Court merged in that of the High Court. The distinction appears to have been based on the fact that when a revision is dismissed the High Court

does not confirm the decree of the lower Court but merely declines to interfere.

We are not impressed by this argument because it appears to us that a Court of appeal which dismisses without modification an appeal from the decree of the lower Court declines to interfere no less than a Court of revision which dismisses an application in revision. But whatever may be the position in the case of the orders passed under Section 115, Civil P. C., we think no such distinction can be drawn in the case of orders passed under Section 27 of the Administration of Evacuee Property Act.

(7) Looking upon the matter somewhat more broadly the word "appeal" includes an application in revision. "Appeal" has been defined in Wharton's Law Lexicon as

> "the removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of the inferior court".

and the expression 'appellate jurisdiction' has been defined by the same authority as,

> "the power of superior Court to review the decision of an inferior Court".

Now under Section 27 of the Administration of Evacuee Property Act, 1950, the Custodian General may at any time, either on his own motion or on an application made to him, call for the record of any proceeding in which any District Judge or Custodian has passed an order for the purposes of satisfying himself as to the legality or propriety of such order, and he may himself pass any order in relation thereto as he thinks fit. No restriction is placed by the Act upon the exercise by the Custodian General of this power other than this that he shall not pass an order prejudicial to any person without giving him a reasonable opportunity of being heard. It is further to be observed that under Rule 31 of the Rules made under this Act a common procedure is prescribed for appeals, reviews and revisions, and that sub-rule 9 of R. 31 provides that the Custodian-General as well as any authority hearing an appeal may admit additional evidence or remit the case for admission of additional evidence. It is manifest, therefore, that the powers of the Custodian-General are very wide and for all practical purposes are, in our opinion, indistinguishable from those of an appellate authority under the Act. Upon the general principle that the order of a Court merges in that of an appellate authority, we are of the view that the order of the Assistant Custodian made on the 25th September, 1951, merged in the order of the Additional Custodian made on the 5th April, 1952, and that that order in its turn merged in the order passed by the Custodian General on the 26th August, 1953.

(8) As regards the second part of the preliminary objection, we are of the opinion that the matter is concluded by authority. In the case of — 'Election Commission v. Venkata Rao', AIR 1953 SC 210 (F), Patanjali Sastri, C. J., delivering the judgment of the Supreme Court pointed out that wide as were the powers conferred under Art. 226 of the Constitution, a two-fold limitation was placed upon their case.

> "In the first place, the power is to be exercised 'throughout the territories in relation to which it exercises jurisdiction', that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be 'within those territories' which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories."

(9) There is no doubt that the office of the Custodian General is located in New Delhi where he himself ordinarily resides. In our opinion, we have no power to summon the records of any case in the custody of the office of the Custodian General or to quash any order made by him. For these reasons we are of opinion that the petition fails on the preliminary objection and must be dismissed with costs which we assess at Rs. 100/- in the case of the first three respondents, and at Rs. 50/- in the case of the fourth respondent.

A/H.G.P. Petition dismissed.

AIR 1954 ALLAHABAD 434 (Vol. 41, C. N. 179)

MALIK C. J. AND SAPRU J.

Bikram Singh, Plaintiff-Appellant v. Sumnehra, Defendant-Respondent.

Second Appeals Nos. 1654, 1657 and 1682 of 1947, D/- 4-1-1954, from order of Sm. C. C. J., Meerut, D/- 21-2-1947.

(a) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 20, Explanation — Applicability.

The explanation does not apply to those who claim to be adhivasis under clauses (a) and (b) of S. 20. (Para 4)

(b) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 20 — Section is not retrospective. (Para 7)

(c) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 20 — Applicability to pending proceedings — (Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Rules (1952), Cls. 4 and 5 (3)) — (Tenancy Laws — U. P. Land Tenures (Legal Proceedings) — (Removal of Difficulties) Order (1942), Para. 2).

In view of the U. P. Zamindari Abolition and Land Reforms Rules, 1952, and the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order, 1952, it must be held that Section 20 of the U. P. Zamindari Abolition and Land Reforms Act will not affect the rights of the parties to pending proceedings. (Para 7)

S. N. Katju, for Appellant; S. N. Misra, for Respondent.

JUDGMENT: These three second appeals arise out of three suits for ejectment filed under S. 175 of the U. P. Tenancy Act, 1939. The plaintiff in all the three actions was Bikram Singh while the defendants were different. The plaintiff claimed that he was the 'sirdar' of the plots in suit, that the defendants were mere non-occupancy tenants, that he no longer wished them to continue as his non-occupancy tenants and that therefore he asked them to quit and that on their failure to do so he had filed the suits for their ejectment. The suits were filed in the year 1944. The defence was that the defendants were hereditary tenants and the plaintiff was not the landlord and had therefore no right to eject them. The trial Court decreed the suits on the 8th of February, 1946. The defendants filed appeals and the lower appellate Court allowed the appeals on the 21st of February, 1947 and the plaintiff thereafter came to this Court in second appeal.

(2) It is the common case of the parties that Harbans Singh was the 'sirdar' of these plots now in dispute. He died in the year 1906 leaving two daughters, Risal Kuer and Bhagwani. Bikram

Singh plaintiff is the son of Bhagwani. On the 14th of October, 1915 Risal Kuer and Bhagwani partitioned the properties and each became the owner in possession of separate plots of land. The plots now in dispute fell to the share of Risal Kuer. On the 1st of November, 1939, Risal Kuer executed a deed of relinquishment in favour of Bikram Singh of the portion of the property that had fallen to her share and Bhagwani attested this document in token of her consent. Bikram Singh then claimed that he was the 'sir'-holder and was entitled to eject the non-occupancy tenants.

The trial Court decided in plaintiff's favour that he was the 'sir'-holder and that the defendants were his non-occupancy tenants. The lower court affirmed the finding that the defendants were non-occupancy tenants of the 'sir' land but it was of the opinion that the deed of relinquishment executed by Risal Kuer could operate only for her life-time and after her death the property vested in Bhagwani by right of survivorship and Bikram Singh therefore could not claim to be the 'sir'-holder. On the 2nd of May, 1950 the case was heard by one of us when the following issues were remitted to the lower Court:

"(a) Whether any partition was effected between Bhagwani and Risal Kuer by which each gave her right of enjoyment over the properties allotted to the other during their respective lifetime?

(b) Whether the deed of relinquishment was executed with the consent of Bhagwani Kuer? and

(c) Whether the defendant was an occupancy tenant of the plots or a hereditary tenant?"

All the three issues have been decided in favour of the plaintiff, i.e. it has been found that a partition was effected, that Bhagwani and Risal Kuer were to enjoy the property separately and that the deed of relinquishment was executed with the consent of Bhagwani and that the defendant was a non-occupancy tenant. These findings have not been challenged by the learned counsel for the respondent and on these findings the plaintiff appellant was entitled to have the appeal allowed and the decree of the lower appellate Court set aside. It is urged however that the decision should now be otherwise as the defendants have acquired certain rights under the U. P. Zamindari Abolition and Land Reforms Act, 1951 (U. P. Act No. 1 of 1951). Reliance is placed on Section 20, Clause (a) (i), relevant portion of which is as follows:

"Every person, who, on the date immediately preceding the date of vesting, was or has been deemed to be, in accordance with the provisions of this Act a tenant of 'sir' shall be called 'adhivasi' of the land and shall, subject to the provisions of this Act, be entitled to take or retain possession thereof."

It is alleged that in accordance with the provisions of the clause quoted above the defendants became 'adhivasis' and were entitled to retain possession of the land in suit.

(3) It has also been urged by learned counsel that he can rely on the provisions of first part of Clause (b) (i) of Section 20 as his name was recorded in the 'khasra' or 'khatauni' of 1356 F. prepared under Sections 28 and 32 of the U. P. Land Reforms Act, III of 1901. Learned counsel for the appellant has however pointed out that there is nothing on the record to show that the names of the defendants were entered as occupants of the land in suit in the 'khasra' or 'khatauni' of 1356 F. If we had considered that this fact would make any change in the result we might have considered the question of remitting an issue or directing the parties to produce before us certified copies of the 'khasra' or 'khatauni'. But in our view the question whether the defendants come under Clause (a) or first part of Clause (b) will make no difference and it is therefore not necessary to require any further evidence to be produced. The defendants claim that they became 'adhivasis' under Sec. 20 of the Act and were therefore entitled under that section to retain possession of the land.

(4) The question whether the defendants can rely on this section and if they can whether the result would be any different would depend upon the question whether the section was intended to have retrospective effect and if not whether it would apply to pending proceedings. Dealing with the first question whether the section was intended to be retrospective great reliance has been placed by learned counsel for the respondent on explanation 1 to Section 20. Section 20 can broadly be said to apply to three classes of cases; firstly, where a person was a tenant on the 30th of June, 1952, (the 1st of July, 1952 being the date of vesting); secondly, if he was not a tenant on the 30th of June, 1952 but was in occupation of the land and had been recorded in the 'khasra' or 'khatauni' of 1356 F. as an occupant of the land then also he could claim to be an 'adhivasi'; and thirdly, if he had been ejected after June 30, 1948 but had still the right under the U. P. Tenancy (Amendment) Act, X of 1947, Section 27 (1) (c), to apply for reinstatement, he could claim to be an 'adhivasi'. Relevant portion of Section 27 (1) (c) is as follows:

"(1) If, on or after the first day of January, 1940, any person was ejected from his holding or any part thereof—

(c) under Section 180 of the said Act notwithstanding his having been recorded as an occupant after the first day of January, 1938 in a record revised under Chapter IV of the United Provinces Land Revenue Act, 1901, or corrected by an officer specially appointed by Government for the correction of annual registers in any tract,

he may apply, within six months from the date of the commencement of this Act, to the Court, which passed the decree for his ejectment for re-instatement in such holding or part thereof, as the case may be."

The explanation has made this change in the section that a person ejected after the 30th of June, 1948 can claim to be an 'adhivasi' if he has the right to claim reinstatement in accordance with the provisions of Clause 1 (c) of Section 27 of the U. P. Tenancy (Amendment) Act No. X of 1947. The explanation therefore only alters the date of ejectment from the 1st of January, 1940 as provided for in Act 10 of 1947 to the 30th of June 1948. The explanation does not apply to those who claim to be 'adhivasis' under Clauses (a) and (b) of Section 20 of the U. P. Zamindari Abolition and Land Reforms Act (Act No. 1 of 1951).

(5) The rights of the 'adhivasis' are given in Section 231. The section provides that an 'adhivasi' except as provided in sections 233, 234 and 237 will have the same rights and liabilities which he possessed on the date immediately preceding the date of vesting, i.e. the 30th of June, 1952. Section 231 has been made subject to Sections 233, 234 and 237. We are not concerned in this case with Sections 233 and 237. Section 234 provides that:

"Without prejudice to the provisions of S. 237, an 'adhivasi' shall be liable to ejectment from the land held by him—

(a) on the ground that he is in arrears of rent,

(b) on the ground that he has made any transfer of his holding or part thereof, or

(c) for using the land for any purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming,....."

(6) The section quoted above is as amended by the U. P. Act No. XVI of 1953. Before the amendment the section read as follows:

"Without prejudice to the provisions of S. 237, an 'adhivasi' shall not be ejected from the land held by him except

(a) on the ground that he is in arrears of rent,

(b) on the ground that he has made any transfer of his holding or part thereof, or

(c) for using the land for any purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming,....."

(7) The section as it originally stood before the amendment made it clear that an 'adhivasi' could be ejected only on the grounds (a), (b) and (c) mentioned in the section. As a result of the amendment it is urged that what the legislature intended by the amendment was to make it clear that an 'adhivasi' shall be liable to ejectment on the grounds (a), (b) and (c) mentioned in the section, but besides those grounds there may be other grounds on which a Court may in a proper case eject an 'adhivasi'. It is difficult to understand the reason for the change and we must assume that the amendment was made with some purpose. It may not, however, be necessary to go into that question as in our opinion Section 20 was not intended to be retrospective. There is nothing in the Act to indicate that the provision was intended to be retrospective and the position was made abundantly clear by certain rules and orders that were subsequently passed. On the 26th of August, 1952 an Order under Section 342 of the U. P. Zamindari Abolition and Land Reforms Act (Act No. 1 of 1951) was passed which is known as the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order, 1952. Relevant portion of paragraph 2 of this Order is as follows:

"Except as expressly provided in the U. P. Zamindari Abolition and Land Reforms Act, 1950, or under the U. P. Zamindari Abolition and Land Reforms Rules, 1952, every suit, appeal or legal proceedings in respect of any rights, or privilege, obligation or liability acquired, accrued or incurred under or in pursuance of the U. P. Land Revenue Act, 1901, or the U. P. Tenancy Act, 1939, shall—

(a) where pending on the 30th day of June, 1952, in any Revenue or Civil Court, be continued in such Court;....., and every such suit, appeal or legal proceedings shall be heard, inquired into and decided under and in accordance with the provisions of the U. P. Land Revenue, 1901, and the U. P. Tenancy Act, 1939."

There is nothing in the U. P. Zamindari Abolition and Land Reforms Act (Act No. 1 of 1951) to indicate that the Act was intended to apply and affect the decision in pending suits, and the U. P. Zamindari Abolition and Land Reforms Rules, 1952 also make it clear that suits and proceedings stayed under Clause 4 of the Rules are to be disposed of in accordance with the provisions of the U. P. Land Revenue Act, III of 1901 and the U. P. Tenancy Act, 1939. Relevant portion of Clause 4 of the Rules is as follows:

"All suits and proceedings whether of the first instance, appeal or revision of the nature as herein below specified, in respect of the area for which a notification under Section 4 has been issued, pending in any Court of hearing on the date of vesting, shall be stayed."

Suits, including appeals, references and revisions, under sections 175 and 179 of the U. P. Tenancy Act, 1939 were specified to which this rule applied and which were to remain stayed. Sub-rule (3) of Rule 5 of the said Rules is as follows:

"Except as provided in sub-rule (2) every suit or proceeding stayed under Clause (iv) of R. 4 shall, whether pending in appeal, reference or revision, be continued and decided in accordance with the provisions of the U. P. Tenancy Act, 1939 & the U. P. Land Revenue Act, 1901 as may be applicable."

The Rules also therefore provide that pending suits, including appeals, are to be decided in accordance with the provisions of the U. P. Tenancy Act, 1939. In view of, therefore, the U. P. Zamindari Abolition and Land Reforms Rules, 1952, and the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order, 1952, it must be held that Section 20 of the U. P. Zamindari Abolition and Land Reforms Act (Act No. 1 of 1951) will not affect the rights of the parties to this action.

(8) It has been urged by learned counsel for the appellant that the defendant cannot claim to be an 'adhivasi' under Section 20, Clause (a) (i), as he had ceased to be a tenant at the end of the agricultural year after the suit for ejectment was filed. In other words, the contract of tenancy which was the result of a mutual agreement, being in this case terminable at will, the tenant could not claim after a suit for ejectment had been filed and decree for ejectment obtained from the trial Court that he was still a tenant on the 30th of June, 1952. This submission in our view appears to have considerable force. Learned counsel for the defendants-respondents has, therefore, relied on Section 20 (b) (i) of the U. P. Zamindari Abolition and Land Reforms Act (Act No. 1 of 1951) and has prayed that the Court should give the defendants an opportunity to prove that their names were entered as occupants in the 'khasra' or 'khatauni' of 1356 F. In the view that we have, however, taken that Section 20 is not retrospective and that the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order, 1952, makes it clear that the U. P. Tenancy Act, 1939 is to be applied to pending proceedings, these appeals must be allowed, the decree of the lower appellate Court set aside and the decree of the trial Court restored with costs in all the Courts.

B/V.R.B. Appeals allowed.

AIR 1954 ALLAHABAD 436 (Vol. 41 C. N. 180)

(LUCKNOW BENCH)

BEG AND RANDHIR SINGH JJ.

Sheoram and another, Defendants-Appellants v. Prem Shankar and others, Plaintiffs-Respondents.

Second Rent Appeal No. 20 of 1945, D/- 8-12-1953, against Order, of Civil J., Unnao, D/- 6-2-1945.

(a) Civil P. C. (1908), O. 22 R. 4 — Death of one respondent — Abatement of appeal — Prin-

ciple — (Tenancy Act — U. P. Tenancy Act (17 of 1939), S. 180).

The principle guiding the abatement of an appeal in part or as a whole is that the decision of the appeal should not result in two inconsistent decrees. (Para 5)

Where in a suit for joint possession of certain plots of land under S. 180, U. P. Tenancy Act, the shares of the different plaintiffs are specified, the mere specification of shares does not alter the nature of the joint decree passed in their favour and the appeal abates as a whole if the appeal against the joint decree has abated against one of the joint decree-holders. AIR 1923 Cal. 294 (1), Rel. on. (Para 5)

Anno: C. P. C. O. 22 R. 4 N. 23.

(b) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Rules (1952) Rr. 4, 5 — Abatement of suit under. (Tenancy laws — U. P. Tenancy Act (17 of 1939)).

Where an appeal from a joint decree passed in a suit under S. 180, U. P. Tenancy Act, 1939, had neither been stayed nor was pending on the date when rule 5 came into force and had already abated as long ago as January 1950, it would not be deemed to be pending when rule 4 or R. 5 came into force and hence no order directing abatement of the suit which had given rise to the appeal could be passed. (Para 6)

P. N. Chaudhry, for Appellants; S. C. Das, (for Nos. 1 and 2) and S. P. Avasthi (for No. 4 (a)) for respondents.

CASE REFERRED: Para

(A) (V10) AIR 1923 Cal 294 (1): 68 Ind Cas 194 5

RANDHIR SINGH, J.:

This is a second rent appeal by an unsuccessful defendant arising out of a suit under section 180 'U. P. Tenancy Act'. It appears that four persons Prem Shankar, Girja Shankar, Durga Shankar and Gyan Shankar instituted a suit against Darshan, who was originally the appellant in this case but has since died, for possession of certain plots of land on the allegations that these plots belonged to the plaintiffs who owned specific shares in the plots but had been taken unlawful possession of by the defendant.

(2) The defendant contested the suit on various grounds and claimed proprietary interest in the plots. An issue on proprietary title was then framed by the Revenue Court and was referred to the Civil court for decision. The decision of the Civil Court was in favour of the plaintiffs. On receipt of the finding of the Civil Court, the Revenue Court decreed the suit for possession of the plots in favour of all the four plaintiffs. Darshan then went in appeal to the District Judge but the appeal was dismissed and the decree passed by the trial court was upheld. He then came up in second appeal.

(3) During the pendency of this appeal, Durga Shankar one of the four respondents died and an application was made by Darshan, appellant, on the 20th February, 1950, praying that Durga Shankar having died on the 16th October, 1949 and the appeal having abated, the abatement may be set aside as Darshan did not know of the death of Durga Shankar within time. This application of Darshan was heard by this Court and an order was passed on the 13th April, 1951, rejecting the application. It was further ordered that the result of the abatement against Durga Shankar would be considered at the time of the hearing of the appeal. The effect of abatement against Durga Shankar, respondent, has now to be considered.

(4) It has been argued by learned counsel on behalf of the appellant that the appeal does not abate as a whole in view of the fact that each of the four plaintiffs had specified his share in the plots in respect of which the suit for possession had been instituted. Reliance is also placed on a partition alleged to have been effected amongst the plaintiffs in the year 1937 by means of a registered document. It is urged on the basis of this partition deed that as the plaintiffs were allotted specific plots in the partition, the joint decree should be deemed to be a decree in respect of specific plots owned by each of the decree-holders.

We are unable to agree with this contention. A perusal of the plaint shows that although the plaintiffs had specified the extent of their shares in the plots in paragraph 1 of the plaint, they asked for a joint decree for possession in respect of all the plots. No objection was made by the defendant, Darshan, in his written statement to the effect that all the plaintiffs were not entitled to a joint decree for possession of all the plots and that a decree for separate possession of specific plots should be passed in favour of each of the plaintiffs. It is also significant that the plaintiffs did not claim specific plots in the plaint. They only mentioned that plaintiffs 1 and 2 owned a one-third share while plaintiffs 3 and 4 also owned a one-third share each. It would appear, therefore, that the plaintiffs claimed an undivided share the extent of which was specified in each of the plots which were in suit.

(5) It is unnecessary to enter into the merits of the title of the plaintiffs to each of the plots in view of the fact that the plaintiffs had claimed a joint decree in respect of all the plots and were granted a joint decree. The decree for possession stood jointly in favour of all the four appellants and if the appeal has abated against one of them, the effect of it would be that the decree passed by the two Courts below in favour of the deceased respondent would stand intact and would not be affected by the result of this appeal. If the appeal against the remaining respondents is allowed, it would result in inconsistent decrees, one standing in respect of all the plots in favour of the heirs of the deceased respondent against whom the appeal has abated and another against the remaining respondents in favour of the appellant. The principle guiding the abatement of an appeal in part or as a whole is that the decision of the appeal should not result in two inconsistent decrees.

A similar case came up for consideration before a Division Bench of the Calcutta High Court in — 'Arjan Mirdha v. Kali Kumar', AIR 1923 Cal 294 (1) (A), and it was held that even though the shares of the different plaintiffs may have been specified, the mere specification by the plaintiffs would not alter the nature of the decree and the appeal would abate as a whole if the appeal against a joint decree has abated against one of the joint decree-holders. We agree with the view taken in the above case. The appeal in this case has, therefore, abated as a whole and not only against Durga Shankar.

(6) Learned counsel for the appellant has also urged that the suit should be ordered to abate in view of the provisions of Rule 5 of the Zemindari Abolition and Land Reforms Act. Rule 5 enjoins that all pending suits or appeals which have been stayed under Rule 4 shall be abated

by the authority or the tribunal before which they are pending. In the present case the appeal has neither been stayed nor was pending on the date when Rule 5 came into force. The appeal abated as long ago as January 1950 and will not be deemed to be pending when Rule 4 or Rule 5 came into force. No order directing abatement of the suit which has given rise to this appeal can, therefore, be passed.

(7) In view of the order declaring abatement of the appeal as a whole Civil Miscellaneous Applications Nos. 499 of 1952 and 510 of 1953 do not arise and they are dismissed.

B/D.R.R. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 438 (Vol. 41, C.N. 181)

MOOTHAM AND SAPRU JJ.

Lalta Prasad, Applicant v. Inspector General of Police and others, Opposite Parties.

Writ Petn. No. 365 of 1952, D/- 22-12-1953.

(a) **Constitution of India, Art. 226 — Fair opportunity to defend — Enquiry under S. 7, Police Act — (Police Act (1861), S. 7).**

It is certainly desirable that departmental enquiries should be conducted without any unnecessary delay, but the person whose conduct is being enquired into must be given a reasonable opportunity of defending himself not merely by calling defence witnesses but by testing the value of the prosecution evidence by cross-examination:

Held on facts of the case that the petitioner did not have a fair hearing, and that the conduct of the enquiry might have proceeded on the assumption that the petitioner was guilty and could have no answer to the charges. The petition under Art. 226 could therefore be allowed on these grounds. (Para 9)

Sapru J.: Important as the discipline of the police force is and desirable as it is for the High Court not to interfere lightly with orders of disciplinary action against police officers, there is no escaping the position that the procedure adopted in disallowing all leading questions in cross-examination was such as could prejudice a fair hearing of the case against the petitioner. (Para 15)

Anno: Police Act, S. 7 N. 1.

(b) **Police Act (1861), S. 7 — 'Think', meaning of — (Words and Phrases — 'Think').**

Sapru J.: The use of the word 'think' in S. 7 is somewhat deliberate. One of its dictionary meaning is "to judge, to form or hold as an opinion, to consider." It is thus milder than the expression 'found' or 'established', for it requires a less degree of positive certainty than those words as regards the fact in controversy or dispute. The processes, however, by which the Police Officers must 'think' have been indicated by the Police regulations. (Para 13)

(c) **Evidence Act (1872), S. 143 — Object of.**

Section 143 lays down that leading questions may be asked in cross-examination. The reason why leading questions are allowed to be put to an adverse witness in cross-examination is that the purpose of a cross-examination being to test the accuracy, credibility and general value of the evidence given, and to sift the facts already stated by the witness, it sometimes becomes necessary for a party to put leading questions in order to elicit facts in support of his case, even though the facts so elicited may be entirely unconnected with facts testified to in an examination-in-chief. Order of the officer holding an enquiry, that 'no leading questions shall be allowed' betrays an ignorance of the principles on which a cross-examination should be allowed to be conducted. It is open to the officer conducting the enquiry to disallow a particular question when that question is composite, irrelevant or confusing. But a general order restricting the right of the petitioner to put any leading question at all stands on a completely different footing, and cannot be justified, regard being had to the basic meaning to be attached to the word 'cross-examine'. (Para 14)

Anno: Evidence Act, Ss. 142 and 143 N. 1.

S. C. Khare, for Petitioner; J. Swarup, for Opposite Parties.

MOOTHAM J.:

This is a petition under Art. 226 of the Constitution. In March 1951 the petitioner was the Station Officer, P. S. Neoria in the district of Pilibhit. On 1-6-1951, the dead body of a newly born child was found; the petitioner made an investigation, and on 9th June he instituted proceedings under S. 318, Penal Code against one Srimati Hulaso. On the 6th July he was transferred to police station Kotwali in the city of Pilibhit. On the 13th July he was placed under suspension, and proceedings were taken against him under S. 7, Police Act on the allegation that he had extorted money from Sri Pitam Lodh, the father-in-law of Srimati Hulaso, by wrongfully confining him and two other persons on the 2nd and 3rd June. The enquiry was conducted by the Superintendent of Police of Pilibhit, the second respondent, who recommended the petitioner's dismissal from the police force.

In September, 1951, the petitioner was called upon by the Deputy Inspector General of Police, Northern Range, to show cause why he should not be dismissed and he was furnished with a copy of the findings of the Superintendent of Police. The petitioner submitted his explanation to the Deputy Inspector General but the latter, by an order dated 12-10-1951, dismissed him from service. An appeal by the petitioner to the Inspector General of Police was rejected on 4-6-1952. The petitioner now prays for the issue of a writ of 'certiorari' quashing the orders of the Deputy Inspector General and of the Inspector General on the ground that the enquiry under S. 7, Police Act was conducted in such a manner as to deprive him of an adequate opportunity of defending himself.

(2) The case is one of some difficulty. No counter-affidavit has been filed on behalf of either of the respondents and the facts set out in the petitioner's affidavit must accordingly be accepted as correct.

(3) According to that affidavit, the petitioner was informed at about 4 P. M. on the 13th July that he was urgently required by the second respondent. The petitioner went at once to the Superintendent's bungalow which he reached between 4 and 5 P. M., and on arrival he was served with the following order dated the preceding day, the 12th July :

"Please submit your written explanation immediately why proceedings should not be initiated against you for having extorted money from Pital Lodh, resident of village Kalika, P. S. Neoria, in the case under S. 318, I .P. C. of

village Kalia by wrongfully confining Pitam Lodh, his wife Punia and his son Beni on 2-6-51 and 3-6-51. You must bring this explanation with you when you report to me as ordered separately in an order sent to you through S. O., Kotwali."

The petitioner immediately wrote out and submitted an "explanation" in which he simply denied that he had extorted any money from Pitam or any one else or had confined anybody wrongfully. As soon as this explanation was handed to the second respondent the latter passed an order suspending the petitioner and informed him that proceedings under S. 7, Police Act would be started then and there against him.

(4) It appears that seventeen witnesses in support of the allegations made against the petitioner were then at the Superintendent's bungalow and their statements had previously been recorded by another police officer. According to the statement of the petitioner — which, as I have said, has not been contradicted — the proceedings started by the substance of his deposition, which had been recorded in English, being translated to each witness who was then asked to sign an endorsement on the record of his statement that it had been read over to him and admitted to be correct. Immediately after the summary of his statement had been read to the witness the petitioner was called upon to cross-examine him. He began to cross-examine the first witness, but objection was taken by the second respondent, who was presiding over the enquiry, to the questions which he put on the ground that they were leading questions. The record of the proceedings of the enquiry is not before us and we do not know what was in fact the nature of the questions put by the petitioner, but after he had endeavoured to cross-examine the first witness he made the following application to the second respondent :

"Sir,

At this stage of proceedings when Mt. Punia, P. W. 1, is being examined and I am allowed to cross-examine her, I put certain questions to her to elucidate the facts but neither the questions nor their answers were recorded by your Honour. I feel that I am not being given the full opportunity to cross-examine the witnesses. Moreover, the preliminary enquiries were done by your Honour and the proceedings are also being conducted by your Honour. So I request that the proceedings should be stopped here and they should be conducted by some other officer of the same rank in order to reach the facts of the case."

On this application the second respondent made the following order :

"(A) No leading questions to be allowed.

(B) This is an absurd demand and there is no provision for sanctioning it in the Police Regulations.

Order conveyed to S. I. who will sign in token of receipt. No vexatious delays will be permitted."

The petitioner made no attempt to cross-examine any of the remaining sixteen witnesses who were then produced.

(5) The proceedings were continued the following morning when four further witnesses for the prosecution were examined and, it appears, cross-examined by the petitioner. A charge was then framed against the petitioner and further proceedings were adjourned to the 21st July when the petitioner was required to file a written statement and produce his defence witnesses. The second respondent refused to summon two of the witnesses whom the petitioner desired to examine, but no complaint is made on that score nor is any complaint made of the fact that the petitioner and two constables, who were alleged also to have been concerned in the act of extortion, were tried jointly.

(6) The three principal objections urged by learned counsel to the enquiry against the petitioner were that he had no sufficient warning that an enquiry was about to be heid, that he had no adequate opportunity of cross-examining the witnesses and that under S. 35, Police Act a charge against a police officer can only be enquired into by an officer having magisterial powers.

(7) We have considered the somewhat meagre evidence before us with much care. The conclusion to which I have reluctantly come is that the petitioner did not have the opportunity which he ought to have been afforded of defending himself against the very serious charge which had been made against him. In arriving at this conclusion I feel bound, in the absence of any denial by the respondents, to accept the petitioner's version of what occurred as substantially correct, and I assume from the fact that the record of the enquiry has not been placed before us that there is nothing therein which would assist us in arriving at a decision.

(8) It appears clear that the petitioner had no adequate warning that proceedings against him under S. 7, Police Act were about to be taken. The second respondent's notice calling upon him to submit an explanation is dated the 12th July but it was served upon the petitioner only within about an hour of the commencement of the proceedings. The petitioner swears that only a summary of the deposition of each witness was translated to that witness and there is nothing in the evidence before us to show that the petitioner was supplied with a copy of the depositions. The learned Standing Counsel has very properly not attempted to support the order of the second respondent that leading questions could not be put in cross-examination, but he has argued that the petitioner could probably have successfully cross-examined the witnesses without putting any leading questions to them. It is possible that he might have done so had he been skilled in the art of cross-examination, but even a skilled cross-examiner would be deprived of his most useful weapon if he is deprived of the right to put leading questions.

(9) It appears to me that the fact that the petitioner had no adequate warning that an enquiry was about to be held against him, coupled with the fact that he was required to cross-examine the witnesses on the basis of a summary of their depositions and that he was not allowed to put leading questions to the witnesses placed him in a very difficult position. It is certainly desirable that departmental enquiries should be conducted without any unnecessary delay, but the person whose conduct is being enquired into must be given a reasonable opportunity of defending himself not merely by calling defence witnesses but by testing the value of the prosecution evidence by cross-examination. I find it difficult in this case to resist the conclusion that the petitioner did not have a fair hearing, and that the conduct of the enquiry may have proceeded on the assumption that the petitioner was guilty and could have no answer to the charges. Upon the whole I have come to the conclusion that the petition should be allowed on these grounds, and

it is therefore unnecessary for me to consider the further objection that the charge against a police officer can only be enquired into by an officer having magisterial powers.

(10) I would therefore direct the issue of a writ in the nature of 'certiorari' quashing the order of the Deputy Inspector General of Police dated 12-10-1951, and of the Inspector General of Police dated 4-6-1952.

(11) The petitioner is entitled to his costs.

SAPRU J.:

(12) While agreeing with the order proposed by my brother Mootham, I would like to point out a feature of this case which in arriving at my conclusion I have not overlooked. I may say that I consider it unnecessary to recite the facts which have given rise to this application as that task has been done by my brother Mootham. I shall, therefore, go straight to the points to which I wish to draw special attention.

(13) Section 7, Police Act (Act 5 of 1861) authorises the Inspector-General, Assistant Inspector General and District Superintendents of Police under such rules as may be framed by the Local Government to dismiss, suspend or reduce any police officer "whom they shall 'think' remiss or negligent in the discharge of his duty or unfit for the same." Paragraphs 489 and 490 of the Police Regulations published under the authority of the United Provinces Government (as it then used to be called) lay down the procedure which must be followed in order to establish a charge under the section of the Act mentioned above.

It strikes me that the use of the word 'think' in S. 7 is somewhat deliberate. One of its dictionary meaning is "to judge, to form or hold as an opinion, to consider." It would thus appear to be milder than the expression 'found' or 'established', for, it requires a less degree of positive certainty than those words as regards the fact in controversy or dispute. I am mentioning this in order to indicate that I am not basing my conclusions in this case in ignorance of the wider latitude that has been given to the officers concerned in arriving at their decision by this word. The processes, however, by which they must 'think' have been indicated by the regulations and it is because I think that an essential process by which they are required to arrive at their thought has been disregarded that I have come reluctantly to the conclusion that intervention in this case by means of a writ of 'certiorari' quashing the order of the Deputy Inspector-General of Police dated 12-10-1951, and of the Inspector-General of Police dated 4-6-1952, is called for. To make this position clear I would invite attention to R. 1 under para. 490 of the Police Regulations which is to the following effect:

"1. As much evidence must first be placed on record as the Superintendent of Police considers necessary to establish a charge under S. 7, Police Act. This evidence may be either oral or documentary and must be material to the charge. If oral—

(a) it must be direct, i.e., if it is fact which could be seen or otherwise perceived it must be the evidence of the person who said he saw or otherwise perceived it;

(b) it must be recorded by the Superintendent of Police himself in the presence of the officer charged, who must be allowed to cross-examine the witnesses; provided that the statements recorded by a magistrate or a gazetted police officer in the course of a preliminary enquiry into the conduct of the officer charged will be admissible and need not be recorded again, if

(i) they were originally recorded in the presence of the officer charged and an opportunity was given to him to cross-examine the witnesses; or if

(ii) though not originally recorded in his presence, they are later by a gazetted police officer read out to and admitted by the witnesses in the presence of the officer charged, and the officer charged is willing that they should be so read out instead of being recorded anew, and 'the officer charged is then given an opportunity to cross-examine the witnesses'."

(14) Now, while it was no doubt for the Superintendent of Police to decide how much evidence was necessary to establish the charge it was also essential for him to allow a cross-examination of the witnesses produced. Section 143, Evidence Act lays down that leading questions may be asked in cross-examination. The reason why leading questions are allowed to be put to an adverse witness in cross-examination is that the purpose of a cross-examination being to test the accuracy, credibility and general value of the evidence given, and to sift the facts already stated by the witness, it sometimes becomes necessary for a party to put leading questions in order to elicit facts in support of his case, even though the facts so elicited may be entirely unconnected with facts testified to in an examination-in-chief.

Now, as has been pointed out by my brother Mootham, after the petitioner had cross-examined the first witness an application was made to the second respondent pointing out that certain questions put to Mst. Punia and their answers had not been recorded by him. On this application the second respondent, 'inter alia', made the very general and wholly wrong order, that 'no leading questions shall be allowed'. I think the order passed by the second respondent betrays an ignorance of the principles on which a cross-examination should be allowed to be conducted. It is not suggested that it was not open to the officer conducting the enquiry to disallow a particular question when that question is composite, irrelevant or confusing. But a general order restricting the right of the petitioner to put any leading question at all stands on a completely different footing. The questions disallowed are not before us and it is impossible for us to say what their exact nature was or would have been had they been allowed to be put, but it does strike me that the order was of a much too sweeping character and cannot be justified, regard being had to the basic meaning to be attached to the word 'cross-examine'.

I am, therefore, not in a position to say that the petitioner was not handicapped by the general order placing a complete restriction on the mode in which his cross-examination was to be conducted. For this reason I have been driven to the conclusion that it is essential in the interests of justice to interfere in this case. It may well be that the petitioner was abusing his right of cross-examination, but there is no material which would justify us in holding that that was the case. The authorities were under a statutory obligation to give to the applicant an opportunity to cross-examine the witnesses and I cannot escape the feeling that a correct view was not taken of the right of a person charged with an offence under S. 7 in regard to cross-examination.

(15) On this ground I have come to the reluctant conclusion that, important as the disci-

pline of the police force is and desirable as it is for this Court not to interfere lightly with orders of disciplinary action against police officers, there is no escaping the position that the procedure adopted in disallowing all leading questions in cross-examination was such as could prejudice a fair hearing of the case against the petitioner. The case, therefore, is one which calls for intervention by this Court and I agree with my brother Mootham that a writ should issue quashing the order of the Deputy Inspector-General of Police dated 12-10-1951, and of the Inspector-General of Police dated 4-6-1952.

A/H.G.P. Order accordingly.

AIR 1954 ALLAHABAD 441 (Vol. 41, C. N. 182)

(LUCKNOW BENCH)

KIDWAI AND BEG JJ.

Chet Ram and others, Appellants v. Manzoor Hasan and another, Respondents.

Appeal No. 6 of 1951, D/- 12-10-1953, against order of Malik C. J., Allahabad D/- 27-7-1950.

(a) Civil P. C. (1908), Ss. 100-101 — New Case — Oudh Courts Act (4 of 1925), S. 12 (2).

A point not raised in the Courts below or before the Single Judge in second appeal cannot be allowed to be raised in an appeal under S. 12 (2), Oudh Courts Act, especially when the point is not a pure question of law but would raise questions which might necessitate fresh evidence on a number of questions of fact. AIR 1947 Oudh 71; AIR 1948 Oudh 262, Ref.; AIR 1953 All 607, Distinguished. (Paras 9, 10)

Anno: Civil P. C., Ss. 100-101 N. 55.

(b) Evidence Act (1872), S. 114 — Scope.

The question of presumption has to be kept distinct from the question of proof. For the purpose of raising the presumption what one has to see is the state of affairs prevailing on the date on which the presumption is sought to be invoked. On the other hand, in order to prove a certain legal relationship between the parties, the Court is not only concerned with the state of affairs prevailing at the time when the question arose, but also with the state of affairs prevailing when the alleged legal relationship is said to have arisen. (Para 12)

Anno: Evidence Act, S. 114 N. 1.

(c) Landlord and tenant — Custom —Transfer of house by riaya.

In spite of the change brought about by the conversion of an agricultural village into a town, it is still open to a party to show that the pre-existing custom of non-transferability of portion of village as has ceased to be agricultural continued to exist and remained alive. In such a case the party cannot avail itself of the general presumption of law, but it can adduce any oral or documentary evidence in support of the legal relationship that it seeks to establish in order to prove its case:

(Held on the facts of the case that the wajib-ul-arz in question forbade everyone including a riaya from building a house without obtaining the permission of the Zamindar, once a house has fallen in ruins). AIR 1953 All 607, Explained and relied on. (Paras 12, 16)

B. K. Dhoan, for Appellants; N. Banerji and Shahanshah Husain Rizvi, for the State.

CASES REFERRED: Paras

(A) (V40) AIR 1953 All 607: 1953 All LJ 303 6, 11, 12, 13
(B) (V34) AIR 1947 Oudh 71: 22 Luck 19 9
(C) (V35) AIR 1948 Oudh 262: 23 Luck 291 9
(D) (V17) AIR 1930 Oudh 235: 7 Oudh WN 271 13
(E) (V36) AIR 1949 All 410: ILR (1949) All 888 13
(F) (V27) AIR 1940 All 317: 189 Ind Cas 623 14
(G) (V15) AIR 1928 Oudh 438: 110 Ind Cas 309 15

BEG J.

This is a defendants' third appeal. It arises out of a suit brought by the plaintiff for possession of a plot appertaining to Ahata No. 957 situate in Mohalla Kashif Ali Sarai in the town of Unnao. The plaintiff brought the suit on the allegations that he was the owner of the plot in question, that Dhani Ram defendant no. 3 was his 'riaya', that the house occupied by Dhani Ram fell into ruins about ten years prior to the suit, that the 'arazi' thereafter became 'parti' and the house was abandoned by Dhani Ram. It was further alleged by the plaintiff that subsequently on 29-3-1945, he had given permission to defendant No. 4 Tara Prasad to put up constructions on the said plot, that Tara Prasad started the work of putting up constructions, that he was resisted by defendants nos. 1 and 2 on 31-3-1945, who alleged that Dhani Ram was their uncle and they were constructing their own house on the said plot. The unlawful resistance by defendants nos. 1 and 2 gave rise to the plaintiff's suit for possession. Dhani Ram, the previous tenant was impleaded as defendant no. 3 in the suit.

(2) A joint written statement was filed on behalf of defendants 1 to 3. In this written statement all the defendants alleged that the house had throughout remained in the possession of Dhani Ram defendant no. 3, that it had fallen down about two years prior to the suit, that all the defendants had started constructing a house on the said site, that the site had never become 'parti' and that for the aforesaid reasons the plaintiff's suit was liable to be dismissed. Defendant no. 4 did not contest the suit.

(3) On the basis of the above pleadings, the trial Court framed the following three issues in the case:

1. Did the plot escheat to the landlord because the house of Dhani Ram fell into ruins?
2. Is the plaintiff the landlord of the plot?
3. To what relief is the plaintiff entitled?

(4) Defendant no. 3 died during the pendency of the suit in the trial Court and his heirs were brought on the record in his place.

(5) The trial Court found all the three issues in favour of the plaintiff and decreed the plaintiff's suit in toto. The contesting defendants filed an appeal against the decree of the trial Court. Their appeal having been dismissed, they filed a second appeal in the High Court. The second appeal of the said defendants having been dismissed, they have now appealed to the Division Bench under S. 12(2), Oudh Courts Act and this appeal has come up for hearing before us.

(6) The main argument of the learned counsel for the appellants before us is that the site in dispute is situate in a town and as such the right of escheat cannot accrue in favour of the landlord. In this connection he has placed strong reliance on the case of — 'Amba Sahai v. Gopeshwar Babu', AIR 1953 All 607 (A), in which a Bench of this Court has laid down that the general presumption about the prevalence of a custom in agricultural village that no riaya can transfer the site of a house does not apply to the said

area when it ceases to be agricultural. If, however, only a portion of the village ceases to be agricultural, the non-applicability of the general presumption mentioned above is confined to the particular area which has ceased to be agricultural and the general presumption would continue to apply to the portion which has remained agricultural.

(7) At the very outset it may be mentioned that this plea was not taken by the defendants nos. 1 to 3 at all in their written statement. It was nowhere alleged that the right of escheat claimed by the plaintiff could not accrue in respect of the site in question, as it lay in an area which was a part of a town or in a portion which had ceased to be agricultural. On the other hand, the nature of pleadings clearly indicates that both the parties assumed that the right of escheat did exist and that the landlord would be entitled to the possession of the site if the house had fallen into ruins as alleged by the plaintiff, and defendant no. 3 had abandoned it. In their joint written statement, the only ground on which defendants nos. 1 to 3 seem to have contested the right of the landlord to the possession of the suit was that the facts relating to the falling of the house into ruins, as alleged by the plaintiff, were not correct. In other words, the sole ground on which the plaintiff's case of abandonment was resisted by the said defendants in their written statement was that the house had not fallen into ruins about ten years ago, as alleged by the plaintiff, but that it had fallen down only about two years ago and that the possession of the site had throughout remained with defendant no. 3.

(8) Turning to the oral pleadings, the plea on which the learned counsel for the defendants-appellants so strongly relies now was not taken at that stage either. For the same reason no issue was framed on it, nor was any evidence led on that point. No such plea was taken by the contesting defendants even at the stage of arguments or at any stage in the trial Court. Further, no such ground was taken by the said defendants in their grounds of appeal to the first appellate Court or in their grounds of second appeal in the High Court. The memorandum of second appeal filed in the High Court on behalf of the appellants show that only one ground of appeal was taken and it was as follows:

> "(1) That on the facts found, no case of abandonment has been made out and the court below erred in decreeing the suit for possession."

This plea has been taken for the first time in the grounds of appeal to the Division Bench and argued before us.

(9) The learned counsel for the respondent has taken a strong objection to it and has urged that under the circumstances the plea should not be entertained by us at this late stage. In this connection he has invited our attention to the cases of — 'Beni Madho v. Harihar Prasad', AIR 1947 Oudh 71 (B) & — 'Chhatanki v. B. Avadh Narain', AIR 1948 Oudh 262 (C). In the said cases it was laid down by the late Chief Court of Oudh that a point not raised in the courts below or before the Single Judge in second appeal cannot be allowed to be raised in an appeal under S. 12(2), Oudh Courts Act. For the above proposition a number of previous cases referred to therein were relied on in the said cases. On this point we are inclined to agree with the learned counsel for the respondent.

(10) In the present case, however, there is every reason for not allowing this point to be raised at this late stage. The point is not a pure question of law but would raise questions which might necessitate fresh evidence on a number of questions of fact. If such a plea had been raised by the contesting defendants, it might have been open to the plaintiff to meet it in a number of ways. For example, the plaintiff might have set up a case that the site in dispute lay in a portion or in an area of the village which had continued to be agricultural or had not become a part of the town. This plea obviously opens up a new avenue of inquiry and investigation not warranted by the pleadings of the parties. Thus the grievance made on behalf of the respondent that he would be taken by surprise and seriously prejudiced if this plea is allowed to be raised at this stage is not without foundation. Under the circumstances, we are clearly of opinion that it would be improper and unfair to entertain it at this stage.

(11) In view of the above position, it appears to us that — 'AIR 1953 All 607 (A)', which is the sheet anchor of the appellants' argument has no application to the facts and circumstances of the present case. In — 'AIR 1953 All 607 (A)', it was explicitly pleaded by the defendants in their written statement that the portion of the village in which the site lay had ceased to be agricultural and had become a part of the city. This question was the subject-matter of an issue. Evidence was led on it. It was hotly debated by the parties at all stages of the suit. Further, in — 'AIR 1953 All 607 (A)', there was a concurrent finding of fact of both the lower courts in favour of the defendants to the effect that the particular locality in which the site lay had ceased to be agricultural and had become a part of the city about twenty years prior to the suit.

Moreover, in the case reported in — 'AIR 1953 All 607 (A)', the site originally lay in an agricultural village when the wajibularz was framed, and it became a part of the city subsequently about twenty years prior to the suit. In the present case the site admittedly lay in town at the time when wajibularz reciting the custom of non-transferability was prepared. Thus the question in — 'AIR 1953 All 607 (A)' was as to what was the effect of the subsequent change effected by the inclusion of an area within the city on the general presumption of non-transferability that initially applied to the area when it was a part of the agricultural village. No such question arises in the present case.

It is also to be noticed that in — 'AIR 1953 All 607 (A)', the person (Rajju Lal) who was alleged to be his riaya by the plaintiff denied the said allegation and was found by the lower courts to be not a riaya at all but a person holding by adverse possession. It was further held that he had acquired proprietary title to the land in dispute after completing his adverse possession for a period of 12 years. This finding was considered by the High Court as by itself quite enough for the dismissal of the plaintiff's suit. On the other hand, in the present case, the riyaya i. e. defendant no. 3 conceded that he had no proprietary title but was only a tenant. For the above reasons, we are clear in our mind that — 'AIR 1953 All 607 (A)' can provide no parallel to the present case, and is inapplicable to it.

(12) The learned Counsel for the appellants further argued that the effect of the conversion of an agricultural village into a town is to bar a party from adducing any evidence in support of the existence of such a custom. This point is merely ancillary to the main argument of the learned counsel mentioned above. It can be disposed of

with it on the preliminary ground that it was not raised at any earlier stage of the case and should not, therefore, be allowed to be raised at this stage. We have, however, examined it on merits and we find ourselves unable to subscribe to the view contended for by the learned Counsel. In our opinion, where a village or a certain portion of it has ceased to be agricultural, the effect of such a change is merely to bar the raising of a general presumption in favour of a custom of non-transferability in respect of the village or such portion of the village as has ceased to be agricultural. In spite of the change that has taken place in the area, it is still open to a party to show that the pre-existing custom continued to operate and did not become extinct.

The question of presumption has to be kept distinct from the question of proof. For the purpose of raising the presumption what one has to see is the state of affairs prevailing on the date on which the presumption is sought to be invoked. On the other hand, in order to prove a certain legal relationship between the parties, the court is not only concerned with the state of affairs prevailing at the time when the question arose, but also with the state of affairs prevailing when the alleged legal relationship is said to have arisen. Once the existence of such a legal relationship is proved, it can only come to an end either by operation of law or by a contract between the parties. The mere change in the local condition of the area does not fall under either category and cannot have the effect of altering, extinguishing or abolishing pre-existing rights or liabilities of persons residing within the ambit of such an area. No doubt, the existence of a change in the local conditions might be a relevant factor for the purpose of showing that a custom which previously prevailed in that area fell into disuse as a result of the change brought about in the local conditions.

In other words, it is a relevant factor for the purpose of showing that continuousness which is one of the necessary ingredients of a custom was lacking after a certain stage with the result that what was a custom at one time had ceased to be so at a subsequent time. This, however, is quite different from saying that change in the local conditions or inclusion within municipal area at a stroke of the pen has the effect of sweeping away or liquidating the pre-existing rights of parties thereby disabling them completely from setting up the custom in question. In other words, in spite of the change brought about by the conversion of an agricultural village into a town, it is still open to a party to show that the pre-existing custom continued to exist and remained alive. In such a case the party cannot avail itself of the general presumption of law, but it can adduce any oral or documentary evidence in support of the legal relationship that it seeks to establish in order to prove its case. This would be supported by the observations of the learned Judges in — 'AIR 1953 All 607 (A)', to the following effect:

> "Even in a non-agricultural area, a custom of non-transferability can be established, if satisfactory evidence be adduced."

(13) It is further to be noticed that in — 'AIR 1953 All 607 (A)', the main question related to the existence of a custom of non-transferability. In that connection, the learned Judges considered the further question as to how far a Wajibularz can be taken to be an evidence of such a custom & any observation made therein in respect of this matter should be construed in that context. There is, however, another aspect of the matter. Apart from Wajibularz being an evidence of custom, it can also be treated as a record of conditions governing the grant of residential sites in an area at the time when it was prepared. This aspect of the matter is exhaustively dealt with in — 'Kanhaiya Lal v. Hamid Ali', AIR 1930 Oudh 235 (D), in which a Bench of the late Chief Court of Avadh observed as follows:

> "We agree with the learned Judge of the lower appellate Court that this Wajib-ul-arz will govern the case unless it is controverted and rebutted. Sir Tej Bahadur Sapru, who represented the defendants-appellants before us, has argued that the Wajib-ul-arz has no effect because Pihani is a town. We find against this view. A Wajib-ul-arz is as effective in a town as it is in a village. This particular Wajib-ul-arz is not according to our view so much a record of custom as a proof of the conditions governing the grant of residential sites in Pihani, and, as such, is effective to establish that Ichcha had no right of transfer in the land, and that when the land was vacated, the family had not even the right to sell the thatch of which, on the finding of fact, their house was composed..... But apart from that in our opinion it would be impossible to establish a custom against what to us is a grant. It is not a question of evidence as to two conflicting customs. The Wajib-ul-arz lays down the conditions on which these sites were granted." (240).

The principle enunciated in the above case was approved by a Bench of the Allahabad High Court in a case reported in — 'Ratan Ram v. Dhanushdhariji Bhagwan Birajman Bara Asthan', AIR 1949 All 410 (E), a case which is also referred to and relied upon in — 'AIR 1953 All 607 (A)'.

(14) The learned counsel for the appellants further relied on — 'Misri Lal v. Durga Narain Singh', AIR 1940 All 317 (F). In this case the learned Judge has approached the same question from the point of view of lost grant and made the following significant observations:

> "It follows therefore that the question whether a particular site is transferable or not does not strictly depend upon the existence of a custom in the sense of a custom having the force of law but upon our knowledge of a custom in the sense of a prevailing practice. What I mean is that no custom is crystallized into a rule of law which compels the owner of a site to make a grant of a particular nature but that the custom in the sense of a prevailing practice has been such that we can assume from our knowledge that lost grants were made in a particular form. It is useful to consider this aspect of the matter because it seems to me to follow that we have to examine the conditions as far as possible existing at the probable time of the grant in order to determine what the nature of the grant is and that no practice which has grown up after the grant has been made and no extraneous circumstances such as the conversion of a rural area into a town area at later period, can affect the terms of a grant already made."

The above observations far from supporting the contention of the learned counsel for the appellants go against him.

(15) On behalf of the respondents our attention has been invited to the case of — 'Mahomed Ali Khan v. Mt. Badrunnissa', AIR 1928 Oudh 438 (G), in which a Bench of the late Chief Court of Oudh observed as follows:

"As it is a town any presumptions which are in Oudh applicable to the rights of landed proprietors in agricultural villages have no application; but we have a Wajib-ul-arz which lays down the special rights of the proprietors of the town and of the occupier in houses in Malihabad and specially in Mirzaganj..... Under the terms of the wajib-ul-arz the occupier pays no ground rent and is at liberty to remove the materials of his house. If he were of the inferior riaya he would have to pay to the plaintiff one-quarter of the price of the matters as 'haq chaharum' under the terms of the wajib-ul-arz, but being one of the superior riaya he is permitted to retain the whole of the proceeds of such material himself. So long as the licence exists, the only benefit that the plaintiff could really gain would be if the occupier died without heirs. In these circumstances, the materials would escheat in part to the plaintiff-appellant."

(16) Approaching the present case from this aspect, we have in evidence in the present case Ex. 3, the wajib-ul-arz, which already defines the rights of the landlord in this regard and records the conditions governing such grants. According to this wajib-ul-arz if the house of a riaya falls in ruins and there is nothing left of the house, no one can build a house on the site without obtaining the permission of the Zamindar. The learned counsel for the appellants argues that in the said wajib-ul-arz the words 'no one' (koi) were not intended to cover a tenant. We are unable to accept this argument. The wajib-ul-arz clearly contains a general prohibition. The learned counsel for the appellants would like us to add the words 'except the tenant' after the words 'no one' in the above wajib-ul-arz. The importation and addition of words in a document which has the effect of altering its obvious meaning is not warranted by any principle of construction. The document on the face of it is clear and unambiguous and there is no reason for us to depart from the obvious tenor of its terms. The wajib-ul-arz in question clearly forbids everyone including a riaya from building a house without obtaining the permission of the zamindar, once a house has fallen in ruins.

(17) For the above reasons we are of opinion that the proposition contended for by the learned counsel for the appellants is not legally sound. We accordingly overrule it.

(18) The next argument of the learned counsel for the appellants was that the finding given by the lower Courts on the question of abandonment and escheat is perverse and should be set aside. In this connection he invited our attention to issue no. 1 which is as follows:

"Did the plot escheat to the landlord because the house of Dhani Ram fell into ruins?"

He further argued that the issue itself was wrongly framed, as it implied that the mere fact that the house had fallen into ruins was according to the trial Court enough to prove that the site had been abandoned by the tenant. He accordingly, prayed for a remand of the case after framing proper issues. The frame of issues in a case depends upon the pleadings of the parties. An examination of the pleadings of the parties in the present case shows that the landlord had brought the suit on the ground that the land had reverted to him as the house had fallen into ruins and was abandoned by the tenant. The only ground on which the defendants contested the suit was that the house had not fallen into ruins. Thus both the parties impliedly accepted the position that if the house had fallen into ruins, as the plaintiff alleged, the plaintiff would be entitled to the relief claimed by him. Under these circumstances we do not see anything wrong in the frame of the said issue.

In this connection it may also be mentioned that no such grievance was made on behalf of the appellants at any stage prior to the appeal before the Division Bench. Even in the grounds of appeal before the Division Bench no such ground has been taken. The prayer of the learned counsel for remand was made for the first time at the close of his oral arguments before us. It comes at a very late stage and cannot be allowed by us.

(19) It may, however, be noted that in spite of the fact that in view of the position taken up by the parties, the issue was framed in the above form by the trial court, it had adverted to a number of circumstances which conclusively proved that the defendants had abandoned the house. These circumstances have come out from the documentary as well as oral evidence of the defendants themselves. Thus it has been admitted that Dhani Ram left the Mohalla and was living with his brothers, sons and grandsons in a different mohalla called Budhwari. It has further been admitted by defendant no. 1 as D. W. 7 that Dhani Ram let out a Kothri on a modest rental of -/12/-, that this kothri fell down and that only a sum of Rs. 4/- or Rs. 5/- was needed to reconstruct it. Even this paltry sum was not spent to put up the fallen kothri. Further in an application given by Ram Prasad defendant no. 2 to the Municipality he clearly stated that the house in question was his property "Mujh sail ka ek makan hai". Dhani Ram died during the pendency of the suit.

D. W. 5 Rameshwar, his grand-son, admitted in evidence that Dhani Ram was unfit to do pairavi in his lifetime. This witness namely Rameshwar is said to be financing the constructions, yet he admitted that he did not do any pairavi in the case. He also admitted that Dhani Ram's brother Durga was alive and he also did nothing in regard to the house. It is also in evidence that defendants nos. 1 and 2 live closeby. There is one more factor which is of importance and that has also come out in defendants' own evidence. It appears that after the suit was started, defenposthaste probably with a view to present the court with a 'fait accompli'. In their feverish haste to put up the constructions, they did not even wait for Municipal sanction. They were, accordingly, prosecuted by the Municipality. Even when faced with a criminal prosecution, they did not plead that the constructions did not belong to them and really belonged to defendant no. 3 Dhani Ram. They did not even plead that they were putting them up merely as agents of Dhani Ram or that they were in any way acting on his behalf. On the other hand, they took the whole burden on themselves and paid the fine without demur. This strongly points to the conclusion that the persons who are really responsible for the constructions and who are its real owners are defendants nos. 1 and 2.

It is evident that in this case the lapsed interest of defendant no. 3 was used by them as a smoke screen for the attack launched on the right and title of the plaintiff and the defence set up by them is merely a barricade put up as a part of their strategy. Relying on the above circumstances the lower Courts rightly came to the conclusion that Dhani Ram defendant no. 3, the

original tenant, had lost all interest in the house and in any case defendants nos. 1 and 2 were mere strangers who had no right to put up any constructions thereon. The lower Courts further believed the plaintiff's case that the house had fallen into ruins as long as ten years ago and disbelieved the defendants' case that the house had fallen down only two years ago. The two Courts below also believed the plaintiff's oral evidence and disbelieved the defendants' oral evidence on the various points relating to the case. In view of the above facts we are of opinion that the findings given by the lower Courts on the issue of abandonment and escheat cannot be characterized as perverse or improper. On the other hand, they are quite reasonable and fair and immune from any error of law or procedure. We have no jurisdiction to interfere with them at this stage. They are final between the parties and binding on us.

(20) For the aforesaid reasons we are of opinion that there is no force in any of the contentions advanced by the learned counsel for the appellants. This appeal must accordingly fail and is hereby dismissed with costs.

B/H.G.P. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 445 (Vol. 41, C.N. 183)

CHATURVEDI J.

Girdhari Lal, Plaintiff-Applicant v. Sunder Lal, Defendant, Opposite Party.

Civil Revn. No. 1231 of 1951, D/- 12-12-1953, from decree of Addl. Civil J., Bareilly, D/- 14-5-51.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (4) — "Provided that the Court.... was unfair" — Proviso does not apply to suit by landlord.

By S. 5 (4) so far as the agreed rent is concerned, only the tenant has been given a right to bring a suit for its reduction, if it happens to be more than the annual reasonable rent; and, in that case, he will have to show that the transaction at which the rent was arrived at was unfair. If the annual reasonable rent is higher than the agreed rent, the agreed rent can be reduced only if the transaction at which it was arrived at was an unfair one. It was never in the contemplation of the Legislature that the landlord could be improperly persuaded or coerced to fix a lower rent. The landlord is not, in the suit brought by him for enhancement of rent, called upon to prove at all that the agreed rent was the result of any unfair transaction. AIR 1953 All 238, Foll. (Para 8)

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (2) — Notice of increment of rent — Validity of.

Where a landlord attempts to raise the rent, by giving notice, to a figure more than the annual reasonable rent, the notice of enhancement is invalid, with the result that the rent cannot be increased even upto the figure of the annual reasonable rent. AIR 1950 All 61 and AIR 1950 All 289, Relied on. (Para 10)

(c) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (4) — Competency of suit.

Where the agreed rent is lower than the annual reasonable rent, it is not open to the landlord to file a suit under S. 5 (4) without, in the first instance, enhancing the agreed rent to the figure of the annual reasonable rent. (Paras 11, 12)

Gopalji Mehrotra, for Applicant; N. P. Asthana, for Opposite Party.

CASES REFERRED:	Paras
(A) (V40) AIR 1953 All 238: 1951 All LJ 657	9
(B) (V37) AIR 1950 All 61: 1949 All LJ 451	10
(C) (V37) AIR 1950 All 289: 1950 All LJ 8	10

JUDGMENT: This is a plaintiff's revision directed against the judgment and decree of the learned Civil Judge of Bareilly refusing to enhance the rent, and also disallowing the claim for the recovery of rent at the enhanced rate from a back date.

(2) The facts of the case in brief are that the defendant opposite party has been a tenant of the plaintiff applicant for more than 15 years, and the rent previously fixed was at the rate of Rs. 38/- per month. This rent was reduced in 1936 and again in 1938. After the deduction in 1938 the rent was fixed at Rs. 31/- per month with an additional annual payment of Rs. 36/-, the total rent thus being Rs. 34/- per month. On 4-5-1948 the plaintiff gave a notice to the defendant enhancing the rent by 50 per cent. The defendant did not accept this enhancement, but agreed to the enhancement of 25 per cent. only. The present suit was consequently filed for fixation of rent at Rs. 51/- per month, which would be the rent payable if the enhancement by 50 per cent. were valid. The plaintiff claimed the arrears at the enhanced rate with effect from 18-5-1948, as the enhancement according to the notice, came into effect on this date. The total rent thus due was said to be a sum of Rs. 646/- out of which Rs. 387/8/- had been paid by the defendant, and the balance claimed was a sum of Rs. 258/8/-.

(3) The defendant pleaded that he was liable to pay rent at the rate of Rs. 31/- per month only, and the annual Nazrana of Rs. 36/-, was an illegal claim; and that the defendant was ready to enchance the rent by 25 per cent. and he and the plaintiff agreed to this enhancement about the end of February 1949, so that the rent that was payable by the defendant was Rs. 38/12/- per month with effect from the above date. It was further pleaded that Rs. 38/12/- was the agreed rent and it could not be enhanced.

(4) The learned Civil Judge, who tried the suit, held that the rent payable after 1938 was Rs. 34/- per month, as the additional payment of Rs. 36/- a year was also in the nature of rent and there was no illegality in fixing this additional sum to be payable annually. He thus held that the rent payable after 1938 was Rs. 34/- per month. He did not accept the defendant's case that there was any agreement between the parties, in February or March 1949, enhancing the rent by 25 per cent. and agreeing to fix it at Rs. 38/12/- per month. His finding on the point is that the plaintiff never agreed to this enhancement of 25 per cent. only.

(5) The plaintiff had not alleged that the transaction fixing the rent at Rs. 34/- per month was an unfair transaction, and it appears to have been argued by the learned counsel for the defendant that, in the absence of any such allegation and proof, the agreed rent could not be enhanced. The learned Civil Judge accepted this contention of the defendant and held that it was necessary for the plaintiff to allege and prove that the transaction fixing the rent at Rs. 34/- per month was an unfair transaction and, in the absence of any such proof, the plaintiff was not entitled to have the rent enhanced.

He then considered the question as to what was the proper rent payable for the shop in question and, after observing that the rent of a similar shop in the vicinity was Rs. 90/- per month, came to the conclusion that, taking into consideration the situation of the shop and other circumstances, the proper rent for the shop was Rs. 51/- per month, as claimed by the plaintiff; but if for some reason this amount was considered to be excessive, then the sum of Rs. 46/12/- per month would not be excessive or inadequate as the rent of the shop. He further held that the notice for enhancement given by the plaintiff in 1948 was invalid, because the plaintiff had no right to enhance the agreed rent to a figure above the annual reasonable rent, and the annual reasonable rent of the shop was Rs. 42/8/- per month. I accept these findings as findings of fact, supported as they are by evidence on the record.

(6) It would appear from the above narration of facts that, according to the findings of the learned Civil Judge, the agreed rent was Rs. 34/- per month, the reasonable rent came to Rs. 42/8/- per month, and the proper rent was Rs. 51/- per month or Rs. 46/12/- per month. The question of law, however, that arises in the case is whether the plaintiff was bound to prove that the transaction, fixing the rent at Rs. 34/- per month, was an unfair transaction, as it is only on this ground that the learned Civil Judge has refused to enhance the rent. The learned counsel for the applicant has argued that the plaintiff need not have alleged or proved that the transaction fixing the rent was, in any way, unfair, and if he is able to show that the reasonable rent is inadequate, he is entitled to a decree for the enhancement of rent without proving that the agreed rent was the result of an unfair transaction.

(7) I am inclined to agree with this contention of the learned counsel for the plaintiff-applicant. Section 5(4), U. P. Control of Rent and Eviction Act is in the following words :

"If the landlord or the tenant as the case may be, claims that annual reasonable rent of any accommodation to which the Act applies, is inadequate or excessive, or if the tenant claims that the agreed rent is higher than the annual reasonable rent he may institute a suit for fixation of rent in the court of the Munsif having territorial jurisdiction, if the annual rent claimed or payable is Rs. 500 or less; and in the court of the Civil Judge having territorial jurisdiction, if it exceeds Rs. 500/- provided that the court shall not vary the agreed rent unless it is satisfied that the transaction was unfair, and in the case of lease for a fixed term made before 1-4-1942 that the term has expired."

(8) The above provisions clearly show that the landlord has been given a right to have the annual reasonable rent enhanced on the ground that it was inadequate, and the tenant has been given a right to have the annual reasonable rent reduced on the ground of its being excessive. But so far as the agreed rent is concerned, only the tenant has been given a right to bring a suit for its reduction, if it happens to be more than the annual reasonable rent; and, in that case, he will have to show that the transaction at which the rent was arrived at was unfair. If the annual reasonable rent is higher than the agreed rent, the agreed rent can be reduced only if the transaction at which it was arrived at was an unfair one. It was never in the contemplation of the legislature that the landlord could be improperly persuaded or coerced to fix a lower rent.

As far as the landlord is concerned, S. 5(2) of the Act permits the landlord to enhance the agreed rent by his own act by giving a notice, in the case of tenancies continuing from before 1-10-1946, and thus raising the agreed rent up to the annual reasonable rent or by 50 per cent. whichever happens to be less. In case of old tenancies, it would obviously be unfair to prohibit the landlord from raising the agreed rent, and it has, therefore, been provided that in the case of tenancies continuing from before the date of the commencement of the Act, the landlord can enhance it by his own act of giving a notice, upto the annual reasonable rent of by 50 per cent. whichever happens to be the lesser figure. After this enhancement by notice, if the landlord feels that even the annual reasonable rent is inadequate, he has been given a right by S. 5(4) to bring a suit for its enhancement, and the court is entitled to enhance it to a proper figure, if it thinks that the annual reasonable rent was inadequate. The landlord is not called upon to prove at all, in such a case, that the agreed rent was the result of any unfair transaction. The decision of the learned Civil Judge on this point appears to be incorrect.

(9) A Division Bench of this Court in the case of — 'Bhim Sen v. Murari Lal', AIR 1953 All 238 (A), has also come to the same conclusion, and had held that the proviso to sub-section (4) of S. 5 has reference only to cases in which the tenant claims that the agreed rent is higher than the annual reasonable rent, and not to cases in which the landlord seeks to increase the annual reasonable rent if there already is an agreed rent between the parties. In view of the clear authority of the Division Bench mentioned above, it is not necessary to pursue the matter any further, and the decision of the learned Civil Judge that the plaintiff should have proved the agreed rent to be unfair has to be set aside.

(10) A new point, however, arose in this case during the arguments, and that point was that the agreed rent in this case being lower than the annual reasonable rent, whether it was open to the plaintiff to file a suit under S. 5(4) without, in the first instance, enhancing the agreed rent to the figure of the annual reasonable rent. In this case the plaintiff had attempted to raise the rent, by giving notice, to a figure more than the annual reasonable rent of Rs. 42/8/- a month, but this not being permitted by the law, the notice of enhancement has to be held to be invalid, with the result that the rent was not increased even upto the figure of the annual reasonable rent. See — 'Someshwar Dayal v. Shri Dwarkadhish Ji Maharaj', AIR 1950 All 61 (B) and — 'Lalji Tandon v. Mrs. F. G. Rufus', AIR 1950 All 289 (C).

(11) On the date of the suit, therefore, the agreed rent had not been validly raised to the amount of the annual reasonable rent, and the question arose whether, under the circumstances, a suit under S. 5(4) was maintainable at all. This sub-section, as it is worded, permits a suit by the landlord only on the ground that the annual reasonable rent is inadequate, and it gives no right to the landlord to sue for the enhancement of the agreed rent, because he can enhance it himself by giving a notice under S. 5(2).

The plaintiff, however, in this case may have thought that, if he merely raised the rent to the amount of the annual reasonable rent and the defendant agreed to that amount, then this rent might become the agreed rent between the parties, and the agreement having been arrived at after 1-10-1946, he may not be able to have the

agreed rent enhanced, even though it happened to be also the annual reasonable rent. But this difficulty, in my opinion, was really no difficulty because having enhanced the agreed rent to Rs. 42/8/- a month, he could still sue for its enhancement under S. 5(4), as the agreed rent was also the annual reasonable rent, and he has been given a right to have the annual reasonable rent enhanced.

In most of the cases, the annual reasonable rent is being paid by express or implied agreement of the parties. But this does not mean that the landlord cannot have it enhanced if it is found to be inadequate. The proper course for the plaintiff in this case was first to have the agreed rent enhanced to the figure of the annual reasonable rent of Rs. 42/8/- a month, by giving a notice under S. 5(2), because the rent payable would then have become the annual reasonable rent, and even though the defendant may have accepted the figure, the plaintiff could still sue to enhance even this rent of Rs. 42/8/- by bringing a suit under S. 5(4). This sub-section does not permit the landlord to bring a suit for the enhancement of the agreed rent, and only permits him to sue for the enhancement of the annual reasonable rent. But if the annual reasonable rent is really not payable by the tenant, there appears to be no point in permitting such a suit to be instituted.

(12) The view that I have taken is somewhat technical but, in the face of the clear words of the statute, I do not think it is open to me to interpret the section in the manner so as to lay down that, even in a case where the agreed rent is below the annual reasonable rent, the landlord can bring a suit for the enhancement of the annual reasonable rent though the rent actually payable is the agreed rent.

I am conscious of the fact that this interpretation would cause hardship in a case where the annual reasonable rent is more than 50 per cent. above the agreed rent, because by his notice the landlord cannot enhance the rent to more than 50 per cent. and in such a case he cannot bring the amount to the amount of the annual reasonable rent by his own act. He would, therefore, be completely barred from bringing a suit under S. 5(4) of the Act. But this position appears to have been brought about by the fact that the legislature never contemplated the enhancement of rent by more than 50 per cent. of the agreed rent. In any case, if there is a defect in the Act causing hardship in the case mentioned above, it is not for the courts to remove that defect.

(13) For the reasons given above, I am constrained to hold that the present suit was not maintainable, as the procedure provided by law was not followed by the plaintiff. If the suit for enhancement was not maintainable under S. 5(4), the suit for the recovery of rent would also have to be dismissed, as the suit was expressly brought under that sub-section.

(14) I, therefore, dismiss this revision and also dismiss the applicant's suit. But the applicant having succeeded on the point which the learned Civil Judge had decided against him, I direct that the parties shall bear their own costs in both the courts.

B/V.S.B. Revision and suit dismissed.

AIR 1954 ALLAHABAD 447 (Vol. 41, C. N. 184)

DESAI AND ASTHANA JJ.

Basant Singh, Applicant v. Janak Singh, Opposite Party.

Criminal Revn. No. 569 of 1951, D/- 16-11-1953, from order of Addl. Dist. Magistrate, Agra, D/- 27-12-1950.

(a) **Constitution of India, Art. 226 — Order under S. 45 (3) — (Criminal P. C. (1898), S. 45(3)).**

No writ of certiorari can be issued against administrative or executive orders.

The criterion for deciding whether an order is a judicial order or an administrative one is not whether the authority acts under a statute; it is whether it is required to act judicially in passing the order or not. If it is required to act judicially, the order is judicial or quasi judicial and if it is not, it is administrative. The question whether an order is a quasi judicial order or not, arises only in respect of non-judicial authorities and cannot arise in respect of judicial authorities. In case of judicial authorities, their orders can only be either judicial or administrative and cannot possibly be quasi judicial. Since other authorities are not judicial authorities their orders cannot possibly be judicial if they are to be passed judicially; they can be only quasi judicial. A sub-divisional Magistrate is a judicial authority and therefore, his order would be either judicial or executive. As an order passed by him under Section 45 (3), Criminal P. C. has been held to be not a judicial order, it can only be administrative order. Any interference or revision or modification of an administrative order by a superior authority is itself an administrative order. The order of the Sub-divisional Magistrate is administrative, and so also the order of the Additional District Magistrate passed in revision. The order of the Additional District Magistrate does not become judicial merely because it was passed illegally. AIR 1953 All 739; (1932) 289 US 266, Rel. on. (Paras 2, 3, 4)

Anno: Criminal P. C., S. 45 N. 17.

1953 Mitra: S. 45 P. 122 N. 107 "Sub-s. (3)."

(b) **Constitution of India, Art. 226 — New point — (Evidence Act (1872), S. 115).**

When the Additional District Magistrate heard the revision against an order passed under S. 45 (3), Criminal P. C. the applicant did not challenge his jurisdiction to hear it. Held that he could not be permitted to challenge it for the first time through an application for a writ of certiorari. If he acquiesced in the Additional District Magistrate's jurisdiction in the hope of getting a favourable decision from him, the doctrine of estoppel should be applied against him and the discretionary writ of certiorari should not be issued at his instance when he was disappointed. AIR 1954 Bom 202, Rel. on. (Para 5)

Anno: Evidence Act, S. 115 N. 5.

B. S. Darbari, for Applicant; N. P. Asthana, for Opposite Party; T. N. Madan, Brief Holder, for Dy. G. A., for the State.

CASES REFERRED: Paras

(A) (V40) AIR 1953 All 739: ILR (1952) 1 All 880 2
(B) (1932) 77 Law Ed 1166: 289 US 266 4
(C) (V41) AIR 1954 Bom 202: 55 Bom LR 922 5

DESAI J.:

This is an application under Section 439, Criminal P. C. and Article 226 of the Constitution for the quashing of an order passed by the Addi-

tional District Magistrate Agra, setting aside an order of a Sub-divisional Magistrate. The Sub-divisional Magistrate had passed the order appointing the applicant as a mukhia under Section 45 (3) of the Code of Criminal Procedure. The Additional District Magistrate revised that order and appointed the opposite-party as the mukhia in place of the applicant.

(2) An order passed under Section 45 (3) appointing a mukhia or an order removing a mukhia has been held by this Court to be an administrative (or executive or ministerial) order and not a judicial order against which any remedy can be had under the Code of Criminal Procedure. That the power to appoint a Mukhia is conferred upon a Magistrate does not make an exercise of the power a judicial proceeding. Whatever a Magistrate does or orders in exercise of a power conferred upon him is not necessarily a judicial proceeding or order. Nor is it a judicial proceeding or order just because the power is conferred by a statute. A District Magistrate is empowered under Section 3 of the Temporary Control of Rent and Eviction Act to grant permission to a landlord to eject a tenant; still it has been held by this Court that a District Magistrate's granting permission to a landlord to eject a tenant is not a judicial order against which any writ of certiorari can lie.

The criterion for deciding whether an order is a judicial order or an administrative one is not whether the authority acts under a statute; it is as pointed out recently by Sapru J. in — 'Mohammad Buksh v. Govt. of the State of Uttar Pradesh', AIR 1953 All 739 (A) whether it is required to act judicially in passing the order or not. If it is required to act judicially, the order is judicial or quasi-judicial and if it is not, it is administrative. The law has simply empowered District or Sub-divisional Magistrates to appoint mukhias subject to rules framed by the State Governments. The rules framed by U. P. Government mention some matters to be considered by them but not all and otherwise leave anything to their absolute discretion

It is stated by Ferris in the Law of Extraordinary Legal Remedies, 1926, p. 238:

> "The distinction between ministerial and judicial and other official acts is, that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial."

(3) On page 182 he has said that judicial action "is inconsistent with discretion for the judicial body must decide according to law and the rights of the parties". It was contended on behalf of the applicant that an order appointing a mukhia is a quasi-judicial order. The question whether an order is a quasi-judicial order or not, arises only in respect of non-judicial authorities and cannot arise in respect of judicial authorities. In case of judicial authorities, their orders can only be either judicial or administrative and cannot possibly be quasi-judicial. Since other authorities are not judicial authorities, their orders cannot possibly be judicial if they are to be passed judicially they can be only quasi-judicial. A sub-divisional Magistrate is a judicial authority and therefore, his order would be either judicial or executive. As an order passed by him under section 45(3), Criminial P. C. has been held to be not a judicial order, it can only be an administrative order.

(4) No writ of certiorari can be issued against administrative or executive orders. It was argued that the Additional District Magistrate had no power to interfere with the order of the Sub-divisional Magistrate. Under section 45(3) of the Code, a mukhia can be appointed by a District Magistrate or a Sub-divisional Magistrate. Since a Sub-divisional Magistrate and a District Magistrate have co-ordinate powers, it was contended that once the powers are exercised by a Sub-Divisional Magistrate, the same cannot be exercised by the District Magistrate. We do not wish to enter into that question because we are of the opinion that any interference or revision or modification of an administrative order by a superior authority is itself an administrative order. The order of the Sub-divisional Magistrate was administrative, and so also the order of the Additional District Magistrate; The order of the Additional District Magistrate does not become judicial merely because it was passed illegally. It is said not to have been passed under any provision of law and therefore, it cannot possibly be judicial. We think that the Additional District Magistrate being superior to the Sub-divisional Magistrate could revise his administrative order in his executive capacity; — 'See Federal Radio Commissioner v. Nelson Brothers Bond and Mortg. Co., (1932) 77 Law Ed 1166 (B). But even if he had no power to revise his order, we think that the question is one that concerns executive authorities, and this court has no authority to interfere with usurpation of executive power. The applicant may seek his remedy from superior executive authorities such as the Commissioner, but not from us.

(5) When the Additional District Magistrate heard the revision, the applicant did not challenge his jurisdiction to hear it. If he had no jurisdiction to hear the revision application, his jurisdiction ought to have been challenged there and then by the applicant. When he failed to challenge it, he cannot be permitted to challenge it for the first time through an application for a writ of certiorari. The latest authority in support of this view of ours is — 'Gandhinager Motor Transport Society v. The State of Bombay', AIR 1954 Bom 202 (C)'. If he acquiesced in the Additional District Magistrate's jurisdiction in the hope of getting a favourable decision from him the doctrine of estoppel should be applied against him and the discretionary writ of certiorari should not be issued at his instance when he is disappointed.

(6) We hold that no certiorari can be issued against the Additional District Magistrate's order. The application is dismissed.

A/D.H.Z. Application dismissed.

AIR 1954 ALLAHABAD 448 (Vol. 41, C. N. 185)

V. BHARGAVA J.

Chander Bhan Agarwal, Applicant v. Sales Tax Officer II, Agra and another, Opposite Parties.

Civil Misc. Writ No. 29 of 1954, D/- 12-1-1954.

Constitution of India, Art. 226 — Prohibition, writ of — (Sales Tax — U. P. Sales Tax Act (15 of 1948)).

A notice was issued by the Sales Tax Officer calling upon the assessee to file the returns of his turnover for the year 1952-53 and at the same time to appear and produce the account books before him on 30-12-1953. The assessee

in reply to this notice sent an application to the Sales Tax Officer asking to be relieved from the order directing him to file the account books. This application was rejected by the Sales Tax Officer and consequently, the assessee filed a petition under Art. 226 praying for issue of a writ of prohibition directing the Sales Tax Officer not to proceed with the assessment:

Held that the application was not maintainable as it was competent for the Sales Tax Officer to call for the account books to verify the correctness of the turnover. No assumption could be made that the Sales Tax Officer would not correctly apply the law as laid down in AIR 1952 All 764. (Para 2)

G. P. Bhargava, for Applicant; J. Swarup, Junior Standing Counsel, for Opposite Parties.

CASE REFERRED: Para
(A) (V39) AIR 1952 All 764: 1952 All LJ 332 2

ORDER: I have heard learned counsel for the petitioner in support of this petition under Art. 226 of the Constitution praying for the issue of a writ of prohibition directing the Sales Tax Officer, Agra, not to proceed further with the assessment proceedings relating to the assessment of the petitioner under the U. P. Sales Tax Act. A notice was issued by the Sales Tax Officer calling upon the petitioner to file the returns of his turnover for the year 1952-53 and at the same time to appear and produce the account books before him on 30-12-1953. The petitioner in reply to this notice sent an application to the Sales Tax Officer on 30-12-1953 asking to be relieved from the order directing him to file the account-books. This application was rejected by the Sales Tax Officer on 4-1-1954, and consequently this petition has been moved before this Court.

(2) The first point to be noticed is that the notice dated 21-12-1953 required the petitioner to do two things. He was required to file a return of his turnover and secondly he was required to produce his account books. The petition filed before the Sale Tax Officer on 30-12-1953 did not in any way deal with the question of the filing of the returns of the turnover. The only prayer was that the petitioner be not asked to produce his account-books. If the returns of the turnover can be competently called for, I cannot see why the Sales Tax Officer cannot call for the account-books to verify their correctness.

Of course, if the petitioner considers that he has no turn-over which is liable to assessment under the Sales Tax Act, he can file a return showing that there is no turnover at all. Even in such a case, the Sales Tax Officer would be competent to call for the account-books in order to verify the correctness of the return and to find out whether there was any income liable to tax or not. The order of the Sales Tax Officer dated 4-1-1954 is naturally silent about the question of filing the return as there was no prayer before him in the application dated 30-12-1953 for exemption from filing the return.

Besides this, even in cases where the petitioner claims that he cannot be called upon to file a return or to produce account-books on the ground that he has no turnover liable to sales tax, it cannot be said that the Sales Tax Officer is exercising jurisdiction not vested in him if he calls for the production of the account-books to satisfy himself that there is no taxable turnover of that person. The petition proceeds on the assumption that the Sales Tax Officer, when he examines the return of the turnover and the account-books, would give a decision which would be contrary to the decision of this Court in — 'Budh Prakash Jai Prakash v. Sales Tax Officer', AIR 1952 All 764 (A).

No such assumption is justified. It may be that the Sales Tax Officer has called for the account-books to satisfy himself that the petitioner has no turnover at all besides the turnover which is exempted in the light of the decision of this Court, in which case, following the decision of this Court, he may have to drop the assessment proceedings and cancel the notice. No assumption can be made that the Sales Tax Officer will not correctly apply the law. The proceedings which he is taking at this stage are competent and appropriate. The petition, therefore, does not lie and is rejected.

A/K.S.B. Petition rejected.

A.I.R. 1954 ALLAHABAD 449 (Vol. 41, C.N. 186)

MALIK, C. J. AND AGARWALA, J.

Govind Dass and others, Applicants v. Smt. Sarju Bai, Opposite Party.

F.A.F.O. No. 156 of 1951, D/- 25-2-1953; against order of Dist. J. Jhansi; D/- 10-3-1951.

Provincial Insolvency Act (1920), S. 9 — Abatement of application under — (Hindu Law — Joint family — Separation) — (Civil P. C. (1908), O. 22 (Gen.)).

Application under S. 9, Provincial Insolvency Act, was filed against 'D' by 'A', 'B' and 'C', brothers, as proprietors of a joint Hindu family concern carrying on cloth business. 'B' died and the application to bring his sons on record was rejected as made beyond time. The application under S. 9 was also held to have been abated as a whole. In appeal against the order by 'A' and 'C'.

Held that the presumption of law was that the persons who are own brothers are members of a joint Hindu family. The mere fact that they are living and messing separately does not establish that they were separate in status. Separation in status comes about by proof of separate enjoyment of the income of the property. There was no evidence on record that the brothers were separate and the application was filed by 'A' as manager of the joint family. (Para 3)

Further that even if the brothers were assumed to have been separate, 'A' and 'C' satisfied the requirements of S. 9 and could apply under it in their own rights. The application, therefore, did not abate by the death of 'B'. AIR 1928 Pat. 250, and AIR 1945 Oudh 60, Disting. (Paras 5 & 6)

Anno: Prov. Insol. Act, S. 9 N. 1.

Civil P. C. O. 22 (Gen.) N. 2.

Krishna Shankar, for Applicants; N. D. Pant, for Opposite Party.

CASES REFERRED: Paras
(A) (V15) AIR 1928 Pat 250: 7 Pat 285 2
(B) (V32) AIR 1945 Oudh 60: 1944 OWN 490 2

AGARWALA J.:

Govind Das, Bansidhar and Ram Das, brothers, as proprietors of the joint firm Bansidhar Ramdas, carrying on cloth business at Jhansi, made an application before the District Judge of Jhansi under S. 9, Provincial Insolvency Act praying that Shrimati Sarju Bai, opposite party, be declared as insolvent. In the application it was alleged that

the debts due to the applicants from the opposite party amounted to a sum of Rs. 1,43,187/8/6, that the opposite party had not made any arrangements for the payment of the debt, but on the contrary had transferred six houses for Rs. 98,284/-/6 on 11-7-1949, in order to defeat the claim of the applicants and further that she was secluding herself so as to deprive the applicants of the means of communicating with her. The applicants further mentioned that they were carrying on cloth business as members of a joint Hindu family. One of the applicants, Bansidhar died during the pendency of the application on 25-5-1950. An application for bringing the sons of Bansidhar on the record was made beyond time and was dismissed. The question raised was whether the application as a whole had abated. The learned Judge held that it had, and dismissed the insolvency application.

(2) Two grounds were urged before the learned Judge on behalf of the applicants for maintaining that the application had not abated : (1) that the applicants were members of a joint Hindu family and (2) that even in the absence of the heirs of Bansidhar the remaining two applicants could continue to maintain the application. On behalf of the opposite party it was alleged that the applicants did not form a joint Hindu family. They produced a copy of an affidavit which had been filed on behalf of Govind Das and others in this Court in Civil Revision No. 133 of 1950 which we have disposed of a short while ago in which the heirs of Bansidhar deceased were described as his four sons and it was stated that Bansidhar deceased formed a joint Hindu family with them. In this affidavit it was not stated that Bansidhar deceased was also a member of the joint Hindu family with the other two applicants, namely Govind Das and Ram Das, his brothers. From the omission to mention this fact in the affidavit that Bansidhar was joint with his brothers, Govind Das and Ram Das, the learned District Judge drew an inference that Bansidhar was not joint with them and held that it appeared "somewhat doubtful" that Bansidhar formed a joint Hindu family with Govind Das and Ram Das. Then the learned Judge went on to say that, even if it was assumed that they formed a joint Hindu family, the question for consideration was whether the petition for insolvency was made by Govind Das as manager and Karta of the joint Hindu family. The learned Judge expressed his opinion that it was not made as such, because, in his view, if it had been so made, there was no necessity of impleading the two brothers Ram Das and Bansidhar, also as petitioners in the case. Lastly the learned Judge considered whether the application had abated as a whole, and relying upon two cases in — 'Basist Narayan Singh v. Mod Nath Das', AIR 1928 Pat 250 (A) and — 'Rajendra Prasad v. Ganga Bux Singh', AIR 1945 Oudh 60 (B), held that the application had abated.

(3) In this appeal it has been urged that the learned Judge was wrong both on questions of fact as well as of law involved in the case. After hearing learned counsel for the parties, we have come to the conclusion that the learned Judge was wrong in the views that he has expressed on all the points raised before him. In the petition it was specifically mentioned that the applicants were members of a joint Hindu family carrying on business as a joint family firm. Two witnesses Govind Das and Seth Raghubar Dayal were produced on behalf of the appellants to prove that they formed a joint Hindu family and carried on business as such. On behalf of the debtor, a Munim, Munna Lal was produced whose evidence was that all the three brothers were living in separate houses, and their mess was also separate. In his cross-examination he stated that he could not say definitely if Ram Das was separate from Govind Das or not but he said that Bansi Dhar was separate. This evidence is wholly inadequate to establish separation between the three brothers. The presumption of law was that the three applicants being own brothers were members of a joint Hindu family. The mere fact that they were living and messing separately did not establish that they were separate in status. Separation in status comes about by proof of separate enjoyment of the income of the property. There was no such proof on the record.

(4) The affidavit filed by the applicants in another case in which the heirs of Bansidhar were sought to be brought on the record did not show that Bansidhar was not joint with his brothers Govind Das and Ram Das. Because the sons of Bansidhar were sought to be brought on the record, it was not necessary to make any allegation about Bansidhar's jointness with his brothers. Again, the fact that in the application under S. 9 of the Insolvency Act, the manager of the joint Hindu family had included his younger brothers also as applicants, does not show that the application was not made on behalf of a joint Hindu family, especially when a mention of the fact was made in that application itself.

(5) Lastly assuming that the applicants were separate they would be assumed to own the debt of Rs. 1,42,000/- and odd which they claimed was due to them from the opposite party, in equal shares. The two remaining applicants Govind Das and Ram Das would in any event be entitled to more than Rs. 500/- from the opposite party. It could not, therefore, be said that the remaining applicants Govind Das and Ram Das were not competent to maintain the application against the opposite party under S. 9 of the Act. All that the section requires is that the applicants should be creditors to whom a debt of Rs. 500/- or more is due from the debtor. Govind Das and Ram Das, the remaining two applicants, fully satisfied this condition. There was no reason to hold that the application had abated. The rulings relied upon by the learned Judge do not relate to applications for insolvency. They were wholly inapplicable to the facts of this case.

(6) The result, therefore, is that we allow this appeal, set aside the order of the learned District Judge and direct that by the death of Bansidhar the application under S. 9 did not abate. The learned Judge will now proceed to decide the case according to law. The record of the case shall be sent down to the court below forthwith.

(7) The applicants will have their costs of both the courts from the opposite party.

B/D.R.R. Appeal allowed.

A.I.R. 1954 ALLAHABAD 450 (Vol. 41, C.N. 187)

MALIK C. J. AND SAPRU J.

Munshi Lal and another, Appellants v. Vishnu Das and others, Respondents.

Second Appeal No. 1750 of 1945, D/- 1-12-1953, from decision of Addl. Civil J., Bulandshahr, D/- 10-7-1945.

U. P. Encumbered Estates Act (25 of 1934), Ss. 7 (4), 20, 43 and 44 — Transfer void under S. 7(4) does not become valid by quashing of proceedings under S. 20.

After an order under S. 6 is passed the landlord has by reason of S. 7 (3) no right to transfer his proprietary rights in the property or any portion thereof. Any transfer so made becomes void by virtue of S. 7 (4). And the provisions of Ss. 43 and 44 clearly show that the quashing of the proceedings under S. 20 does not have the effect of validating a sale which is void under sub-sections (3) and (4) of S. 7. (Para 8)

(b) Contract Act (1872), S. 65 — Suit for specific performance — Contract becoming void — Refund of earnest money and damages — (Specific Relief Act (1877), S. 19)

Where after the suit for specific performance was decreed by the lower Court, the rights in the property sold itself came to an end and vested in the State under the Zamindari Abolition and Land Reforms Act, in an appeal from the decree passed by the lower Court:

Held that the contract of which specific performance was sought must be deemed to have become void and that refund of the earnest money and compensation by way of damages would be an appropriate relief to be granted to the plaintiff. (Para 10a)

Anno: Contract Act, S. 65 N. 4, 6; Specific Relief Act, S. 19 N. 2.

Satis Chandra, for Appellants; J. S. Gupta, for Respondents.

MALIK C. J.:

This is a defendant's appeal against a decree passed by the lower courts for specific performance of a contract dated 10-4-1942. The property agreed to be sold consisted of shares in Khewat No. 1 in Mauza Kishorepur, Mahal Durga Prasad, Pargana Jewar, and in Mauza Alawalpur, Mahal Durga Prasad, in the same Pargana. The facts are that defendant No. 5, Lala Raghubar Dayal, had applied under the Encumbered Estates Act and on 7-4-1942, he filed an application under S. 20 for the quashing of the proceedings. On 10-4-1942, he entered into an agreement with the plaintiffs to sell the property to them for Rs. 2,600/-. The plaintiffs paid a sum of Rs. 1,600/- as earnest money and the balance was to be paid at the time of the execution of the sale deed. On 18-7-1942, the application under S. 20 was granted and the proceedings under the Encumbered Estates Act were quashed. The plaintiffs served a notice on 13-8-1943, for specific performance of the contract and on 18-12-1943, filed the suit. They claimed specific performance of the contract, and in the alternative, refund of Rs. 1,600/-, the amount of earnest money, and a sum of Rs. 300/-, excess price which defendant No. 5 had received from defendants Nos. 1 and 2 to whom the property had been sold.

(2) On 5-5-1942, defendant No. 5, Lala Raghubar Dayal had sold the property in village Alawalpur to Munshi Lal, defendant No. 1, for Rs. 2,000/-; and on 6-5-1942, the same defendant has sold the property in Kishorepur to Musammat Gendo, defendant No. 2, wife of Munshi Lal.

(3) It has been held by the lower courts, and the finding does not appear to have been challenged that Musammat Gendo was a 'Benamidar' for Munshi Lal. So in fact the vendee of both the sale deeds was Munshi Lal.

(4) On 31-7-1943, Munshi Lal sold a portion of the property in village Kishorepur to defendants Nos. 3 and 4, Ghanshiam Singh and Rup Singh, for Rs. 3,500/-.

(5) Defendants 1 and 2 contended that the agreement to sell in their favour was earlier, being of the dates 28-3-1942 and 7-4-1942, and the plaintiffs, therefore, had no preferential right as against them. It was also pleaded by those defendants and defendant No. 4 that they were 'bona fide' purchasers of the property for value and that the plaintiffs could not get a decree for specific performance against them.

(6) The first question, therefore, that arises is whether the contesting defendants 1, 2 and 4 are 'bona fide' purchasers of the property in suit and that they purchased the same for consideration and in good faith after proper enquiry without notice of the contract in plaintiff's favour.

(7) Learned counsel strenuously urged that there was no finding that these defendants were not 'bona fide' transferees or that they had notice of the agreement in plaintiffs' favour. The plea, however, could be raised by these defendants only if they were transferees. If they were not transferees of the property, the question whether they were 'bona fide' transferees would not arise. The lower courts have found that transfers in favour of these defendants were void by reason of the provisions of S. 7(4), U. P. Encumbered Estates Act. Section 7(3) provides that after an order under S. 6 is passed and until the Collector has declared in accordance with S. 44 that the landlord has ceased to be subject to the disabilities of that sub-section or until the passing of the order by the Special Judge under sub-section (2) of S. 44, the landlord will have no right to make any exchange or to gift away or sell or mortgage or lease his proprietary rights in the property or any portion thereof. Sub-section (4) of S. 7 provides that :

"Any transfer made in contravention of the provisions of this section shall be void."

(8) Learned counsel has urged that by reason of the quashing of the proceedings under S. 20 of the Act the entire proceedings must be deemed to have been wiped out and the disabilities must be deemed to have come to an end, with the result that a transfer which was void for the reason that it was executed at a time when the Encumbered Estates Act proceedings were pending must be deemed to become valid after the quashing of the proceedings. We do not think it is possible to accept this contention in view of the provisions of Ss. 43 and 44 of the Act.

Section 43 gives the consequences of quashing proceedings under S. 20 of the Act and sub-section (b) of this section is to the effect that :

"Notwithstanding anything contained in S. 18 all rights and remedies and proceedings stayed and all attachments of properties mentioned in statements filed under S. 8, which had become null and void under sub-section (1) of S. 7 shall revive to the creditors as if no action had been taken under this Act."

The provision that no transfer shall be made after an order under S. 6 has been passed is contained, as we have pointed out, in sub-section (3) of S. 7, and the provision relating to that is also contained in S. 44, sub-section (2), which is to the following effect :

"When an application is dismissed or when proceedings under the Act have been quashed, the landlord shall cease to be subject to the disabilities mentioned in sub-section (3) of S. 7 'from the date of the order of the Special Judge' dismissing the application, or quashing the proceedings."

It is clear, therefore, from the provisions of Ss. 43 and 44, quoted above, that the quashing

of the proceedings does not have the effect of validating a sale which was void under sub-sections (3) and (4) of S. 7.

(9) The finding of the lower courts, therefore, that the sale deeds in favour of defendants 1 and 2 were void was correct. Defendants 1 and 2 having no interest in the property could not convey any title to defendants 3 and 4 and none of these defendants can be said to be owner of the property by reason of the sale deeds executed in their favour.

(10) The lower appellate court has held that there was an agreement with the plaintiffs on 10-4-1942, to sell the property to them for Rs. 2,600/- and that the plaintiffs had paid a sum of Rs. 1,600/- as earnest money. This finding is a finding of fact. The lower courts decreed the plaintiffs' suit for specific performance, but since the decision of the lower appellate court the position has entirely changed by reason of the passing of the Zamindari Abolition and Land Reforms Act (1 of 1951). The zamindari property is now vested in the State and it is not possible to direct the sale of that property to the plaintiffs.

(10a) Section 65, Contract Act provides that:

"When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

By reason of the Zamindari Abolition and Land Reforms Act it is now impossible to direct the sale of the property by the defendants to the plaintiffs. The rights in the property itself having come to an end and having vested in the State, the contract of which specific performance is now being sought must be deemed to have become void. The defendants, therefore, or such of them, who have received any advantage under such agreement or contract are bound to restore it and to make compensation to the plaintiffs from whom they received the amount. We consider, therefore, that instead of granting the first relief, which was granted by the lower court, it would be more appropriate to grant to the plaintiffs the alternate relief, that is, refund of the earnest money and compensation by way of damages.

(11) The finding of the lower appellate court is that the plaintiffs paid a sum of Rs. 1,600/- to defendant No. 5 on 10-4-1942. The plaintiffs are, therefore, entitled to get this money from defendant No. 5 with compensation as the plaintiffs have been kept out of possession of the property. The usual rate at which interest is now allowed being 3 per cent. we direct that the plaintiffs, be given a decree for Rs. 1,600/- with interest at the rate of 3 per cent. from 10-4-1942, to the date of payment. This amount would be deemed to be a charge on the compensation money that may be payable by the State to the defendants under the Zamindari Abolition and Land Reforms Act. Since the plaintiffs are not represented in this Court we make no order as to costs of this appeal.

B/V.S.B. Order accordingly.

A.I.R. 1954 ALLAHABAD 452 (Vol. 41, C.N. 183)

(LUCKNOW BENCH)

RANDHIR SINGH J.

Sheo Ram and others, Appellants v. Gauri Shankar and others, Respondents.

Second Civil Appeal No. 363 of 1946. D/- 1-12-53, from decree of Addl. Civil Judge, Hardoi, D/- 14-3-1946.

(a) T. P. Act (1882), S. 43 — Scope.

In order to get the benefit of S. 43, two of the conditions which must be satisfied are (i) that the contract of transfer was entered into by a person who was competent to contract; (ii) that the contract should subsist at the time when a claim for recovery of the property is made. (Para 4)

Anno: T. P. Act, S. 43 N. 2.

1949 Mulla: S. 43, P. 207 N. "(2) Feeding the estoppel" (3 Pts. extra in N. 2 to S. 43 in A.I.R. Com. — View of Mookerjee J. in 7 Cal L Jour 387 (393) commented upon in N. 2 to S. 43 in A.I.R. Com. — 1 Pt. extra in Mulla).

T. P. Act, S. 43 N. 4.

1949 Mulla: S. 43, P. 210 N. "(6) Invalid transfer" (2 Pts. extra in Mulla—Conflict between Madras and Allahabad views noticed in Pts. (t), (u) and (v) in Mulla, not noted in N. 4 to S. 43 in A.I.R. Com.).

T. P. Act, S. 43 N. 11.

1949 Mulla: S. 43 P. 214 N. "(14) At..... subsists" (2 Pts. extra in N. 11 to S. 43 in A.I.R. Com. — AIR 1941 Oudh 123, commented upon in N. 11 to S. 43 in A.I.R. Com.).

(b) T. P. Act (1882), S. 43 — "At any time during which the contract of transfer subsists" — (Pre-emption decree for — Effect of).

A pre-emptor who has obtained a decree for pre-emption and deposited the pre-emption amount in Court but who is unable to obtain possession of the property due to defect in title of the vendor, is entitled to obtain possession from the vendor by invoking the benefit of S. 43 when the latter subsequently becomes the owner of the property and enters into possession. It cannot be contended in such a case that the contract of sale does not subsist when the decree for pre-emption has been passed. The right of pre-emption is a right of substitution, and the effect of a decree for pre-emption is to substitute the pre-emptor for the vendee. All rights available to, and all duties cast upon, the vendee, are taken over by the pre-emptor. Beyond this substitution, there is no other change in the contract of transfer evidenced in the sale-deed. Rights which were available against the transferee or vendee will also be available to the vendor against the pre-emptor. In effect, therefore, the contract of sale which existed previously between the vendor and the vendee would now be deemed to be subsisting between the vendor and the successful pre-emptor. A contract of transfer would therefore subsist even after a decree for pre-emption is passed and the pre-emption money is paid. (Paras 4 and 5)

Anno: T. P. Act, S. 43 N. 11.

1949 Mulla: S. 43 P. 214 N. "(14) At..... subsists" (2 Pts. extra in N. 11 to S. 43 in A.I.R. Com. — AIR 1941 Oudh 123 commented upon in N. 11 to S. 43 in A.I.R. Com.).

T. P. Act, S. 43 N. 12.

1949 Mulla: S. 43 (Topic discussed in N. 12 to S. 43 in A.I.R. Com., extra).

(c) Civil P. C. (1908), S. 47 — Bar of suit.

A decree-holder for pre-emption cannot obtain any relief in execution against the vendor who was not a party to the decree and, therefore, a separate suit for possession against him is not barred by S. 47. (Para 6)

Anno: Civil P. C., S. 47 N. 72.

1953 Mulla: S. 47, P. 180, N. "And..... defence" (Calcutta view in AIR 1932 Cal 825 and AIR 1929 Cal 247 and views of Bombay, Nagpur and Oudh not noticed in Mulla — 7 Pts. extra in N. 72 to S. 47 in A.I.R. Com.).

R. N. Shukla, for Appellants; Hyder Hussain, for Respondent No. 1.

JUDGMENT: This is a plaintiffs' appeal against the concurrent findings of the trial court and the Civil Judge in a suit for possession.

(2) Gauri Shankar defendant executed a sale deed in favour of Ram Bir on 31-5-1935 in respect of the property which was the subject of the suit which has given rise to this appeal. On the basis of this sale deed a suit for pre-emption was instituted by the appellants and this suit was decreed on 3-1-1936. The amount found to have been paid by the vendee as consideration was deposited by the plaintiffs, but they were unable to obtain possession as vendee was not in possession. On 3-1-1936, Smt. Ram Piari a member of the family of Gauri Shanker, instituted a suit against Gauri Shanker for a declaration that the property belonged to her and could not be subject of transfer by Gauri Shanker. The allegations on which the suit for a declaration was based are not material for the purposes of this appeal, and they need not be mentioned. This suit resulted in a compromise decree by means of which Ram Piari was declared to be the owner of the property.

On 8-4-1936, the plaintiffs instituted another suit for a declaration that the compromise decree obtained by Ram Piari against Gauri Shanker was a collusive decree, but the suit was finally dismissed, and the compromise was held to be good. Ram Piari, however, died during the pendency of the appeal and was substituted by Smt. Jasoda mother of Ram Piari's husband. Litigation then ensued between Smt. Jasoda and Gauri Shanker with regard to the property declared to be the property of Ram Piari under the terms of the compromise decree and this litigation also ended in a compromise between Jasoda and Gauri Shanker and both of them agreed to have the property in equal shares. This compromise was made on 21-1-1944.

On 2-1-1945, Jasoda sold her half share, which she obtained under the compromise decree, to Gauri Shanker and Gauri Shanker became the full proprietor of the property in suit. On 22-5-1945, the plaintiffs instituted the present suit which has given rise to this appeal for possession on the allegation that Gauri Shanker having acquired an interest in the property in suit the plaintiffs were entitled to recover it from Gauri Shanker under S. 43, T. P. Act.

(3) The suit was resisted on several grounds. It was contended that the plaintiffs had not become entitled to the property simply because Gauri Shanker had become owner of it subsequently. It was also pleaded that S. 47, Civil P. C. barred the suit. The learned Munsif who tried the case held that the plaintiffs were not entitled to recover possession of the property and that the suit was barred by S. 47, Civil P. C. The plaintiffs then went in appeal to the District Judge and the Additional Civil Judge of Hardoi, who heard the appeal, concurred with the findings of the trial Court and dismissed the appeal. The plaintiffs have now come up in second appeal.

(4) The only point which arises for consideration in this appeal is whether in view of the provisions of S. 43, T. P. Act the plaintiffs are now entitled to recover the property from Gauri Shanker. It is not disputed that Gauri Shanker has become the owner of the entire property which was the subject of sale in the sale deed dated 31-5-1935, and which was also the subject of pre-emption by the plaintiffs. It is also obvious that when Gauri Shanker executed the sale deed in favour of Ram Bir on 31-5-1935, he represented that he was the owner of the property while in fact, he was not. If, therefore, he subsequently acquires an interest in this property, the vendee shall be entitled to recover the property from Gauri Shanker. There are, however, two conditions which should be fulfilled before this relief can be granted, and they are firstly that the contract was entered into by a person who was competent to contract and secondly that the contract of transfer subsists. It cannot be disputed that Gauri Shanker was otherwise competent to make a transfer.

As regards the second condition, that the contract of transfer should subsist when a claim for recovery of the property on the principle of feeding the estoppel can be made, it has been contended on behalf of the respondents that the sale deed executed by Gauri Shanker in favour of Ram Bir no longer subsisted inasmuch as a decree for pre-emption on the basis of the sale deed had been passed in favour of the appellants. It appears that this contention has no force. The right of pre-emption is a right of substitution, and the effect of a decree for pre-emption is to substitute the pre-emptor for the vendee. All rights available to, and all duties cast upon, the vendee, are taken over by the pre-emptor. Beyond this substitution there is no other change in the contract of transfer evidenced in the sale deed. Rights which were available against the transferee or vendee will also be available to the vendor against the pre-emptor. In effect, therefore, the contract of sale which existed previously between the vendor and the vendee would now be deemed to be subsisting between the vendor and the successful pre-emptor. A contract of transfer would therefore subsist even after a decree for pre-emption is passed and the pre-emption money is paid.

(5) It is admitted that the plaintiffs deposited the pre-emption money in time and were thus substituted in place of the vendee in the transaction of sale entered into by Gauri Shanker and Ram Bir. All the essential conditions which entitle a person to seek relief on the principle of feeding the estoppel have therefore been fulfilled & the plaintiffs are evidently entitled to recover possession of the property which Gauri Shanker transferred on 31-5-1935, but in which he acquired interest on 2-1-1945.

(6) It has also been found by the trial Court as also by the lower appellate Court that S. 47, Civil P. C. barred the present suit inasmuch as possession could have been obtained by the appellants in execution of the decree for pre-emption passed in the pre-emption suit. It is unnecessary to discuss the question as to whether a suit would or would not be barred under S. 47, Civil P. C. in view of the fact that Gauri Shanker was not a party to the pre-emption decree. As he was not a party to the pre-emption decree, no relief by way of execution could have been obtained by executing the decree and S. 47, Civil P. C. cannot bar the present suit. It appears that both the Courts below overlooked the fact that Gauri Shanker was not a party to the pre-emption decree.

(7) As a result the plaintiffs are entitled to recover possession of the property in suit. The

appeal is, therefore, allowed and the suit for possession is decreed with costs in all the Courts.

B/K.S.B. Appeal allowed.

A.I.R. 1954 ALLAHABAD 454 (Vol. 41, C.N. 189)

V. BHARGAVA J.

Mukhtar Singh, Applicant v. Board of Revenue U. P. at Allahabad and another, Opposite Party.

Civil Misc. (Writ) No. 20 of 1954, D/- 12-1-1954.

(a) Constitution of India (1950), Art. 226 — Certiorari.

An incorrect decision of a Court on a controversial point of law which is within its competence to decide cannot be said to be an error of law apparent on the face of the record. An error, even if it is found to be such after argument, as to the incorrect application of any law or as to its incorrect interpretation is not the type of error apparent on the face of the record which can be considered a ground for exercising the powers of issuing a writ of certiorari. (Para 1)

Anno: C. P. C., App. IV, Constitution of India, Art. 226, N. 13,

(b) U. P. Board of Revenue (Declaration of Procedure and Validation) Act (30 of 1953) — Enactment is not ultra vires of legislature.

The Board of Revenue was constituted by U. P. Acts and it is the U. P. Legislature which is competent to lay down the procedure according to which the Board of Revenue is to act in exercising its judicial powers. Obviously, until the passing of Act 30 of 1953 the procedure in writ cases arising under the U. P. Tenancy Act was governed by the procedure laid down in the Code of Civil Procedure with the amendments to it made by the U. P. Tenancy Act itself. That procedure which was applicable to the Board of Revenue has been amended by Act 30 of 1953 and in passing such an enactment the U. P. Legislature has not in any way exceeded its legislative powers. (Para 2)

(c) U. P. Board of Revenue (Declaration of Procedure and Validation) Act (30 of 1953), S. 3 — Hearing of appeal by one only of the two members giving decision — (Civil P. C. (1908), O. 41, R. 30).

The use of the words "except where it is expressly provided to the contrary", in the second part of S. 3 mean that there should be some express provision of law requiring that hearing must be given by more than one member. Order 41, R. 30, Civil P. C. does not now apply to proceedings before the Board of Revenue because of the first para of this section and therefore cannot be said to make any express provision to the contrary within the meaning of this section so as to require every member of a court to give a hearing to the parties and as laying down that an appeal cannot be heard by one member and must be heard by more than one or all the members of the Board of Revenue. AIR 1953 All 264, distinguished. (Para 2)

Anno: C. P. C., O. 41, R. 30, N. 1.

1953 Mulla: O. 41, R. 30, P. 1222, N. "After .... Pleads" (6 Pts. extra in N. 1 to O. 41, R. 30, in A.I.R. Com.).

Harish Chandra Sharma, for Applicant; S. C., for Opposite Party.

CASE REFERRED : Para

(A) (V40) AIR 1953 All 264: 1953 All LJ 1 2

ORDER : I have heard learned counsel for the petitioner in support of this petition under Art. 226 of the Constitution. The petitioner seeks to challenge an order of the Board of Revenue on three grounds.

The first two grounds amount to an allegation that the Board of Revenue in deciding the case before it went wrong in applying the provisions of S. 20, U. P. Zamindari Abolition and Land Reforms Act to the plaintiff's case and in holding opposite party No. 2 to be an Adhivasi under that section. Learned counsel has urged that this is an error of law apparent on the face of the record and consequently in such a case a writ of certiorari can be issued by this Court.

The question of interpretation of S. 20, U. P. Zamindari Abolition and Land Reforms Act and its applicability to the proceedings before the Board of Revenue is a point which was within the competence of the Board of Revenue to decide and the Board of Revenue could decide it rightly or wrongly. An incorrect decision of such a controversial point cannot be said to be an error of law apparent on the face of the record. An error, even if it is found to be such after argument, as to the incorrect application of any law or as to its incorrect interpretation is not the type of error apparent on the face of the record which has been considered a ground for exercising the powers of issuing a writ of certiorari. On these grounds, therefore, this petition cannot be entertained.

(2) The third ground taken relates to a question of jurisdiction as it is alleged that a decision by two members of the Board of Revenue without one of them giving a hearing to the parties was without jurisdiction, and it is contended that S. 3, U. P. Board of Revenue (Declaration of Procedure and Validation) Act (Act 30 of 1953) is 'ultra vires' of the legislature. It has authorised the Board of Revenue to give a judgment without hearing the parties. Learned counsel has not been able to advance any argument to show that the provisions of S. 3 of Act 30 of 1953 are 'ultra vires' of the legislature.

The Board of Revenue was constituted by U. P. Acts and it is the U. P. legislature which is competent to lay down the procedure according to which the Board of Revenue is to act in exercising its judicial powers. Obviously, until the passing of Act 30 of 1953 the procedure in writ cases arising under the U. P. Tenancy Act was governed by the procedure laid down in the Code of Civil Procedure with the amendments to it made by the U. P. Tenancy Act itself. That procedure which was applicable to the Board of Revenue has now been amended by this Act and it does not appear that in passing such an enactment the U. P. Legislature in any way exceeded its legislative powers.

Learned counsel alternatively argued that even under S. 3, U. P. Board of Revenue (Declaration of Procedure and Validation) Act of 1953 both Members should have given a hearing to the parties before deciding the appeal pending before them. His contention is that the last paragraph of this section requires the hearing of the appeal by both Members because of the provision made in O. 41, R. 30, Civil P. C.

It was held by a Full Bench of this Court in — 'Surajmal v. Board of Revenue U. P. Allahabad', AIR 1953 All 264 (A), that, according to the U. P. Tenancy Act and the Code of Civil Procedure as

made applicable to the proceedings under that Act, the law at that time required that every Member of the Board of Revenue taking part in a decision should give a hearing to the parties under O. 41, R. 30, Civil P. C. The provisions of O. 41, R. 30, Civil P. C. do not, however, now apply to proceedings before the Board of Revenue because of the first paragraph of S. 3 of Act 30 of 1953 which specifically lays down that no appeal, reference or revision shall be construed as requiring all the Members of the Board who participate in the decision of any appeal, reference or revision or concurring in or pronouncing the judgment, to actually hear, whether sitting together or separately, the parties thereto or their counsel.

The second part of the S. 3 reads as follows: "it shall always be deemed to be sufficient compliance of the law that except where it is expressly provided to the contrary at least one such member has so heard them."

The use of the words 'except where it is expressly provided to the contrary' mean that there should be some express provision of law requiring that hearing must be given by more than one member. Order 41, R. 30, Civil P. C. does not make any express provision requiring every member of a court to give a hearing to the parties and it does not lay down that an appeal cannot be heard by one member and must be heard by more than one or all the members of the Board of Revenue. The provision of law cannot be said to be one making an express provision to the contrary within the meaning of S. 3 of the U. P. Act 30 of 1953. Consequently the hearing by the Board of Revenue in this case was correct.

(3) The petition has no force and is rejected.

A/M.K.S. Petition dismissed.

A.I.R. 1954 ALLAHABAD 455 (Vol. 41, C.N. 199)

BRIJ MOHAN LALL J.

Md. Ishaq, Defendant-Applicant v. Abdul Majeed, Plaintiff-Opposite Party.

Civil Revn. No. 1375 of 1953, D/- 9-12-1953, against order, 1st Addl. Munsif, Allahabad, D/- 14-9-1953.

Civil P. C. (1908), O. 2, Rr. 3, 6 — Suit joining several causes of action — Power of Court — Objection by defendant.

Rule 3 of O. 2, Civil P. C., permits a plaintiff to unite in the same suit several causes of action against the same defendant or the same defendants jointly. No question of convenience or inconvenience is material under the R. 3. (Para 2)

At the same time, the law has invested the Court under R. 6 with power to order separate trials provided it finds it convenient to try or dispose of the different causes of action in one suit. But this privilege of ordering the trial to be split up into two or more trials is given to Court alone. The defendant cannot claim it as of right. If the Court does not find it inconvenient to try the suit as brought, the plaintiff is certainly entitled to continue the suit in the form in which he has filed it. (Para 3)

Anno: Civil P. C., O. 2, R. 3 N. 6 Pts. 1, 2.

1953 Mulla: O. 2, R. 3, P. 540 N. "One..... action" (2 Pts. extra in Mulla).

Civil P. C., O. 2, R. 6 N. 2.

1953 Mulla: O. 2, R. 6 P. 552 (2 Pts. extra in N. 2 to O. 2, R. 6 in A.I.R. Com. — Point (e) in Mulla noticed in N. 1 to O. 2, R. 6 in A.I.R. Com.).

(b) Civil P. C. (1908), S. 115 — Case decided — — Finding on one issue.

No revision can lie against a finding recorded by a Court on any issue as the finding does not amount to a case decided. (Para 4)

Anno: Civil P. C., S. 115 N. 5.

1953 Mulla: S. 115 P. 410 N. "Interlocutory order" (Lahore view indicated in Mulla is based on overruled case in AIR 1924 Lah 425 — Later F. B. case AIR 1943 Lah 65 which overruled AIR 1924 Lah 425 not noted in Mulla — Views of Ajmer-Merwara, Kutch, Madhya Bharat, Rajasthan and Lahore (subsequent to AIR 1943 Lah 65 (FB) and conflict between Lahore and Allahabad views not noted in Mulla — Solution of conflict not indicated).

Civil P. C., S. 115 N. 6.

1953 Mulla: S. 115 P. 416 N. "Subordinate Court" (Similar propositions scattered in Mulla, see for example Pt. (b) on page 417 and Pts. (m) to (u) on page 417 and Pt. (s) on page 416 and Pt. (i) on page 418 — 4 Pts. extra in N. 6 to S. 115 in A.I.R. Com.).

Lakshmi Saran, for Applicant.

ORDER: This is an application in revision by a defendant.

(2) A suit has been instituted by the opposite party against the applicant and is pending in the court of the learned first Additional Munsif of Allahabad. Several causes of action have been combined in that suit. There is only one plaintiff and one defendant. The applicant who, as already stated, is the defendant, raised an objection to the effect that there was a defect of misjoinder of causes of action. The learned Munsif has overruled this plea and has rightly pointed out that R. 3 of O. 2, Civil P. C. permits a plaintiff to unite in the same suit several causes of action against the same defendant or the same defendants jointly. Since the law has conferred on the plaintiff opposite party the right to have his several disputes with the applicant decided in one suit and since the plaintiff has chosen to combine all the causes of action in one suit, he has done nothing contrary to law. No question of convenience or inconvenience is material under R. 3 of O. 2, Civil P. C.

(3) It may, however, be conceded that, although law has given this privilege to a plaintiff, it has, at the same time, invested the court with power to order separate trials provided it finds it convenient to try or dispose of the different causes of action in one suit. This is provided by R. 6. But this privilege of ordering the trial to be split up into two or more trials is given to court alone. The defendant cannot claim it as of right. If the court does not find it inconvenient to try the suit as brought the plaintiff is certainly entitled to continue the suit in the form in which he has filed it. In the present case, the learned Munsif has said that "there is not much inconvenience" in trying the suit. This means that he does not find it inconvenient to try the suit in its present form. He has refrained from ordering separate trials. Since the learned Munsif has not chosen to split up the trial, the defendant has no right to claim separate trials in respect of different causes of action. For this reason, this revision must fail.

(4) There is yet another reason, viz., that the decision of the learned Munsif is after all a finding on one of several issues involved in the case. No revision can lie against a finding recorded by a court on any issue. The finding does not amount to a case decided.

(5) The application must, therefore, fail. It is hereby rejected.

B/D.R.R. Application rejected.

A.I.R. 1954 ALLAHABAD 456 (Vol. 41, C.N. 191)

MALIK C. J. AND SAPRU J.

Mst. Allah Bandi and another, Applicants v. Govt. of Union of India and others, Opposite Party.

Misc. Writ No. 19 of 1952, D/- 21-12-1953.

Constitution of India, Arts. 5 and 7 — Migration and domicile — Minor or married woman — (Succession Act (1925), S. 16).

Where two Muhammedan minor married girls who were residents of India left for Pakistan along with their parents in 1947, their husbands who were citizens of India remaining all along in the territory of India.

Held that the girls could not be said to have migrated to Pakistan in 1947, as they could not in law change their domicile of origin and shift to Pakistan with the intention of resettling there. Under S. 16, Indian Succession Act (Act 39 of 1925) their domicile must be deemed to be the domicile of their husbands. As a matter of fact they were both Indian citizens by birth also. So long as the marriage subsisted they could not change their domicile at their will and during their minority the only persons who could decide such questions for them were their husbands, who were their legal guardians. AIR 1951 All 16; AIR 1952 All 257; AIR 1951 Pat 434, Beale's 'Conflict of Laws' Rel. on. (Paras 4, 5, 6)

Anno: Const. of India, Art. 5 N. 4; Art. 7 N. 2.

M. A. Kazmi, for Applicants; S. C., for Opposite Party.

CASES REFERRED : Paras

(A) (V38) AIR 1951 All 16: 1952 Cri LJ 338 6

(B) (V39) AIR 1952 All 257: 1952 Cri LJ 553 6

(C) (V38) AIR 1951 Pat 434: 30 Pat 21 6

MALIK C. J.:

This is an application on behalf of two young women, Allah Bandi, aged 20 years, and Khatoon, aged 16 years, under Art. 226 of the Constitution that they were being illegally deported to Pakistan.

(2) The facts of the case now more or less admitted by counsel and established from the affidavits are that Allah Bandi was the daughter of one Abdul Latif, resident of village Gonchi in the district of Gurgaon, and Khatoon was the daughter of Shafi Mohammad, brother of Abdul Latif, of the same village. These two girls were married, while minors, to two persons of Usmanpur, district Bulandshahr. Allah Bandi was married to Abdul Sattar and Khatoon was married to Abdul Jabbar.

In the year 1947 Abdul Latif and Shafi Mohammad left for Pakistan and they have settled there. At that time Allah Bandi and Khatoon were both minors, being aged 16 years and 12 years respectively. When their parents left for Pakistan they were with their parents and left with them. They were, however anxious to come back to India. In 1950 they returned to India on a permanent permit issued by the High Commissioner for India in Pakistan. This permit had, however, been obtained on the basis of a statement that they had migrated to Pakistan during the period between the 1st of February and 31-5-1950.

There had been an agreement between the two countries which provided that all those who had migrated from one country to another between those dates were entitled to come back to their original homes and re-settle there. The permanent permit, however, was cancelled on 20-12-1950, as it was found that Allah Bandi and Khatoon had migrated to Pakistan in 1947 and not between 1st February and 31-5-1950. On behalf of the State Government reliance was placed on an earlier application dated 21-9-1949.

On 21-9-1949, Biland Khan, brother-in-law of Allah Bandi and Khatoon, had made an application for a permanent permit to return to India and in the list of relations who were to accompany him he had included the names of Allah Bandi and Khatoon, his sisters-in-law. The application for a permanent permit for re-settlement was on a printed form which was to be filled in by Pakistan residents who had migrated from India since 1-3-1947. Reliance was placed on this application and it was asserted that the petitioners had left for Pakistan in 1947 and the permanent permit issued in 1950, having been obtained on a false statement of fact, was rightly cancelled.

(3) Two points have been urged in this connection: whether a permanent permit issued for resettlement in India in accordance with the provisions of Art. 7 of the Constitution can be cancelled by the authorities issuing the same on the ground that the permanent permit had been obtained by fraud. The other point raised is that the petitioners cannot be said to have migrated to Pakistan as both were minors and were, therefore, incapable in law of exercising their volition of leaving the country of their origin with the intention of resettling elsewhere. In other words, that a minor cannot during the continuance of his minority be deemed in law to have a mind of his own which he can exercise for himself and decide whether he will change his place of domicile and adopt another and that their husbands alone, they being married, could act as their guardian.

(4) It is not necessary in this case to consider the first point as no arguments have been advanced by learned counsel in support of the proposition. Coming to the next point, it is not denied that the two petitioners were married before they left India for Pakistan. Under S. 16, Indian Succession Act (Act 39 of 1925) their domicile must be deemed to be the domicile of their husbands. As a matter of fact they were both Indian citizens by birth also. So long as the marriage subsisted they could not change their domicile at their will and during their minority the only persons who could decide such questions for them were their husbands, who were their legal guardians.

In Dicey's Conflict of Laws, 6th edition, at p. 44, dealing with the question of change of domicile the learned author has pointed out that there are two types of persons—independent persons and dependent persons. A man of full age, or an unmarried woman of full age, is an independent person. While a minor or a married woman is said to be a dependent person.

> "Neither of these classes has the legal capacity to make a change of domicile, and both of these classes are liable to have it changed by the act of another person, who in the case of infants is generally the father, and in the case of married women is always the husband."

(5) It is admitted that the husbands are citizens of India. They were residents of Bulandshahr and they have continued to reside in Bulandshahr all along. The two girls happened to be with their parents at the time of the disturbances of 1947 and as their parents left for Pakistan, the minor girls could not be left behind and went with them.

It cannot, therefore, be said that the girls could legally change their domicile of origin and shift to Pakistan with the intention of settling there. There are certain observations in Beale's 'The Conflict of Laws', 1935 edition, Volume I, which are helpful. The relevant passage at p. 186 is as follows:

"So important, so fundamental a thing as the family cannot be kept by the law amorphous and unorganized. In order to perform its social functions it must have a head, which determines its action. To speak precisely, the family must have a location, the legal domicile, and some one must determine where the domicile shall be. If it were practicable for the State to select the head of each individual family, it might choose here the husband, there the wife, and now and there, perhaps one of the children; for in actual practice the wife often, and a child not infrequently, proves the actual head of the establishment. But the law in determining general rules for domicile cannot deal with particular families; it must govern families in a mass. The requirements of practical Government make it necessary to have one rule for all families, and the typical family is represented by the husband.

Though he is no longer the entire family he is still, in the eye of law, the head of the family and legally responsible for its support. Whether our view of married women's position be ultra-conservative or modern, we must accept this doctrine of the unity of the family and its necessary consequences. In normal case the husband and not the wife must choose the family dwelling place.

Either the husband or the wife must have the final say in the matter of where their home is to be; and so long as the husband is burdened with the responsibility of feeding and clothing the family, the wife and children, that very responsibility ought to carry with it the authority to determine the location where his toil will earn its best reward for their benefit."

(6) The question what amounts to migration has also been considered in — 'Badruzzaman v. The State', AIR 1951 All 16 (A). It has been said:

"The expression (migration) embraces in its scope two conceptions: (1) Going from one place to another and (2) The intention to make destination a place of abode or residence in future."

In the Constitution it means the transference of allegiance from the country of departure to the country of adoption. In — 'Shabbir Husain v. State of U. P.', AIR 1952 All 257 (B) the definition taken from the Shorter Oxford Dictionary has been quoted with approval and the learned Judge has observed as follows:

"The first meaning contemplates, to my mind, a movement associated with transit and does not exactly contemplate merely an act of going from one place to another. I think that the second meaning, i.e., 'To move from one place of abode to another, specially to leave one's country to settle in another' is the meaning to be approximately associated with this word in Art. 7 of the Constitution. The main provision of the Article therefore means that if a person has gone from the territory of India to the territory now included in Pakistan after 1-3-1947 with the intention of shifting his permanent residence from India to Pakistan he will lose all his citizenship which could have accrued to him by his coming within the terms of Art. 5."

The same view has been taken by a Bench of the Patna High Court in — 'Sayeedah Khatoon v. State of Bihar', AIR 1951 Pat 434 (C). We are, therefore, not satisfied that the two petitioners migrated to Pakistan, or could in law migrate, when they left India in 1947 with their parents.

(7) We would like to mention that at our request Mr. D. P. Singh, Advocate, looked up the authorities and gave us the references quoted above and was thus of great assistance to the Court.

(8) The application is, therefore, granted. The opposite parties are restrained from deporting the petitioners from their place of residence to Pakistan. We make no order as to costs.

A/K.S.B. Application allowed.

A.I.R. 1954 ALLAHABAD 457 (Vol. 41, C.N. 192)

V. BHARGAVA J.

Ram Chander, Applicant v. Mohan Lal Tewari and others, Opposite Party.

Civil Misc. Writ No. 22 of 1952, D/- 13-1-1954.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1941), S. 2 — Duly appointed officer — (Constitution of India (1950), Art. 226).

The definition of a District Magistrate in the U. P. (Temporary) Control of Rent and Eviction Act no doubt does not require that the authority should be conferred in any particular form but an order to be valid should be so worded as to indicate that that order had the effect and was intended to authorise the officer to perform the functions of the District Magistrate under the Act. Where the District Magistrate passes an order, before any officer was posted and has taken charge in the district, saying that a Deputy Collector was being posted and that he would take up house and rent control work, the language of the order does not lead to the inference that the District Magistrate by that order intended to confer authority upon the particular officer who on being posted subsequently took charge. The language in the order merely indicates that at that time he was merely considering what would be the distribution of work among the officers. Further before the District Magistrate might have the authority to delegate powers and authorise an officer to perform the functions of a District Magistrate under the Act such officer must have already taken over charge in the district and become subordinate to the District Magistrate. Consequently the officer who is subsequently posted and taken charge has no authority to act under the Act and an order of allotment passed by him cannot be given effect to. (Paras 3, 4)

Held that in the circumstances the application of landlord for mandamus directing the authorities not to give effect to such order of allotment must be allowed. (Para 4)

Anno: C. P. C., App. III, Const. of India, Art. 226 N. 11.

D. Sanyal, for Applicant; B. L. Gupta, for Opposite Party; Hari Swarup holding the brief of the Standing Counsel, for the State.

ORDER: By this writ petition under Art. 226 of the Constitution the petitioner seeks issue of a writ of mandamus directing the Rent Control and Eviction Officer, Kanpur, opposite party No. 3, the District Magistrate, Kanpur, opposite party No. 4, and the State of Uttar Pradesh, opposite party No. 5, not to give effect to the allotment order dated 12-7-1950, passed by opposite party

No. 3. Opposite party No. 1, Mohan Lal Tiwari is the person in whose favour the allotment order was passed and opposite party No. 2, Panna Lal is the person who, according to the petitioner, is occupying the accommodation allotted by this order and whom the petitioner wants to retain as occupant of that accommodation.

The petitioner claims to be the owner of the accommodation. The fact that the petitioner is the owner of the accommodation is not contested by the opposite parties. The only opposite party who filed a counter-affidavit is opposite party No. 1 Mohan Lal Tewari. No counter-affidavits have been filed by any of the other four opposite parties.

(2) When this petition came up for hearing before me, learned counsel for the petitioner sought permission to argue first one point which was more or less a question of law and that related to the authority of opposite party No. 3 to pass the order challenged by this writ petition. The post of opposite party No. 3 at the time of the order of allotment was held by Shri P. S. Tandon who, it appears, was a probationary Deputy Collector.

According to the affidavit filed in support of the petition, no express order was passed by the District Magistrate of Kanpur authorising Shri P. S. Tandon to perform the functions of the District Magistrate under the U. P. (Temporary) Control of Rent and Eviction Act or under any of the provisions of that Act. The affidavit says that the District Magistrate only passed one single order which was to the following effect :

"A probationary Deputy Collector is being posted here. He will take up house and rent control work."

(3) There are two aspects which are of importance. The first is that this order was passed at a time when Shri P. S. Tandon had not yet taken over charge in the district of Kanpur and was still being posted to that place. The latter portion of the order cannot, therefore, be deemed to be an order authorising him to perform the functions of a District Magistrate as no such order could be passed until he had already taken over charge in the district and had become subordinate to the District Magistrate so that the District Magistrate might have authority to delegate the powers to him.

The second aspect is that the language used in the order of the District Magistrate merely indicates that the District Magistrate was considering at that time what would be the distribution of work among the officers and he said that Shri P. S. Tandon would take up house and rent control work. In recording this order, it does not appear that the District Magistrate intended by the order passed to confer authority on Shri P. S. Tandon to perform the functions of a District Magistrate under the U. P. (Temporary) Control of Rent and Eviction Act.

In the counter-affidavit Mohan Lal Tewari contented himself by stating that the assertion made by the petitioner in his affidavit that Shri P. S Tandon was not a duly appointed officer under S. 2 (d), U. P. (Temporary) Control of Rent and Eviction Act was denied. In case there was any proper order actually conferring the authority on Shri P. S. Tandon, the opposite party in his affidavit could have re-produced it or at least made a reference to it.

It may be noticed that, in this case, the Rent Control and Eviction Officer of Kanpur was himself an opposite party and so was the District Magistrate of Kanpur. No counter-affidavits have been filed on their behalf and no attempt has been made to contest the correctness of the allegation made by the petitioner in para No. 23 of his affidavit that only one single order was passed by the District Magistrate which was to the effect mentioned above. Hence it must be held that no other order was passed conferring authority on Shri P. S. Tandon to perform the functions of the District Magistrate under the Act.

(4) Learned counsel for the opposite party Mr. Brij Lal Gupta urged that the definition of a District Magistrate in the U. P. (Temporary) Control of Rent and Eviction Act did not require that the authority should be conferred in any particular form, and consequently the Court should not insist that the order should be in any particular form. It is correct that no particular form is prescribed but an order to be valid should be so worded as to indicate that that order had the effect and was intended to authorise the officer to perform the functions of the District Magistrate under the Act. Such an inference does not follow from the actual order which was passed by the District Magistrate. It must, therefore, be held that the allotment order was passed by an officer who had no authority to make the order of allotment and consequently it cannot be given effect to.

It appears from the further facts given in the affidavit of the petitioner that this order of 12-7-1950, was subsequently considered by the Housing Committee which made a recommendation that the order of allotment should be withdrawn and the accommodation should be allotted to Panna Lal opposite party No. 2. This recommendation of the Housing Committee was accepted by opposite party No. 3 who vacated his previous order of 12-7-1950.

Thereupon, opposite party No. 1 approached the State Government who set aside the order of cancellation and restored the order of opposite party No. 3 dated 12-7-1950. There is no suggestion that the State Government, while exercising its powers, passed any allotment order of its own. All that is stated is that the State Government restored the order of opposite party No. 3 dated 12-7-1950. That order being invalid and having been passed by a person having no authority to pass such an order, the restoration of that order by the State Government would not make it a valid order liable to be enforced. In these circumstances, this writ petition must succeed on this preliminary ground.

(5) I, therefore, direct that a writ of mandamus shall issue to opposite parties Nos. 3 to 5 not to give effect to the order passed by opposite party No. 3 on 12-7-1950, directing the petitioner to let out the accommodation to opposite party No. 1. Since the petition has been decided on a technical point, I make no order as to costs.

A/M.K.S. Petition allowed.

A.I.R. 1954 ALLAHABAD 458 (Vol. 41, C.N. 193)

V. BHARGAVA J.

Najib Khan, Applicant v. State through D. M., Meerut, Opposite party.

Criminal Misc. Writ No. 1594 of 1952, D/-27-1-1954.

Constitution of India, Arts. 226 and 7—Scope of proceedings — (Influx from Pakistan (Control) Act (1949), S. 7).

The question whether the petitioner is or is not a citizen of India is a question of fact.

Where the criminal court has already examined the position, evidence cannot be recorded and the question whether or not the petitioner migrated from India cannot be gone into in detail in proceedings under Art. 226 especially where there was no assertion that, after migration, the petitioner again acquired Indian citizenship in accordance with the proviso to Art. 7 of the Constitution. (Para 2)

M. H. Beg, for Applicant; J. R. Bhatt, A. G. A., for Opposite Party.

ORDER: By this petition under Art. 226 of the Constitution the petitioner seeks the issue of a writ, order or direction to the opposite party, the State of Uttar Pradesh, in the nature of certiorari and/or mandamus and/or prohibition so that the petitioner may not be deported to Pakistan.

(2) It appears from the petitioner's own affidavit that he went to Pakistan some time in the year 1948 before the permit system was introduced between India and Pakistan regulating movement of persons from one country to the other. Thereafter the petitioner was unable to return to India for a month. He, however, obtained a temporary permit and returned to India. The period of that temporary permit lapsed and thereafter the petitioner was prosecuted under the provisions of the Influx from Pakistan (Control) Ordinance, 1948 and was convicted and fined. Proceedings are now being taken to arrest the petitioner in order to deport him to Pakistan. The proceedings for deportation are challenged on the allegation that the petitioner is a citizen of India and consequently S. 7 of the Influx from Pakistan (Control) Act cannot be applied to him.

The question whether the petitioner is or is not a citizen of India is a question of fact. The petitioner contends that he is still a citizen of India and he never migrated from India. His case in the affidavit is that he left for Pakistan because his sister's son was one of the refugees who left for Pakistan and the petitioner learnt that that young boy was crying for the petitioner so that the petitioner left in search of the boy.

On behalf of the opposite party it is alleged that the petitioner had migrated to Pakistan. As against the affidavit of the petitioner that he went to Pakistan without any intention of settling down and taking his family there are several circumstances. Firstly, the petitioner was prosecuted under the Influx from Pakistan (Control) Ordinance of 1948 and in that case the trial Court came to the finding that the petitioner had migrated to Pakistan. Secondly, when the petitioner came back to India under a temporary permit, he applied in the capacity of a person who had migrated from India. Further, the petitioner has moved for his permanent resettlement in India in Form C prescribed for the purpose by the rules made under the Influx from Pakistan (Control) Act. In that form C an application can be presented by only such a person as has already migrated to Pakistan. In thus making an application in that form, the petitioner has declared that he is a person who had migrated from India to Pakistan.

Such being the circumstances it is not possible to accept the petitioner's contention that he never migrated from India. Evidence cannot be recorded and the question cannot be gone into in detail in these proceedings under Art. 226 of the Constitution. The criminal court has already examined the position and if the petitioner thinks that he has a remedy in civil court he can move the civil court for a decision on this question. So far as this writ petition is concerned, it has to be decided on the basis that the petitioner has failed to satisfy the Court that he had not migrated from India. Further, there is no assertion that, after migration, the petitioner again acquired Indian citizenship in accordance with the proviso to Art. 7 of the Constitution. It must, therefore, be held for the purpose of this petition that the petitioner is not an Indian citizen. Consequently S. 7, Influx from Pakistan (Control) Act is applicable to him and no writ can be issued restraining the opposite party from deporting him.

(3) The petition is dismissed. The stay order dated 25-8-1952 is vacated.

A/H.G.P. Petition dismissed.

A.I.R. 1954 ALLAHABAD 459 (Vol. 41, C.N. 194)

RAGHUBAR DAYAL AND ASTHANA JJ.

Badrul Islam, Plaintiff-Appellant v. The Sunni Central Board of Waqf, U. P. Lucknow, Defendant-Respondent.

First Appeal No. 221 of 1946, D/- 21-1-1954, against decision of Civil & Sessions Judge, Kanpur, D/- 17-7-1945.

(a) U. P. Muslim Waqfs Act (13 of 1936), S. 2(2)(i) — Payment for benefit of Waqif's descendant.

Any payment to the mutwalli even though he be a descendant or a member of the family of the waqif is not a payment to him for his benefit in the sense in which the word 'benefit' is used in Cl. (i), Sub-s. (2) of S. 2 of the Act. The payment is not made to him on account of his having that relationship with the waqif as a member of his family or as his descendant but is on account of another character filled in by him that is of being a mutwalli. The payment is, therefore, to a mutwalli and not to a descendant or a member of the family. (Para 6)

(b) U. P. Muslim Waqfs Act (13 of 1936), S. 2(1) — Applicability — Effect of subsequent non-existence of waqf property inside the State.

Where part of the property included in a waqf deed admittedly was situate in U. P. When S. 2 of the Act came into force on the enforcement of the Act, the waqf became subject to the Act and will not cease to be so subject when subsequently none of the property included in the waqf is situate in Uttar Pradesh. (Para 7)

Therefore the fact that on the date on which the Central Board issued a notification later on there was no property within U. P. cannot make the Act inapplicable to the wakf. No provision in the Act fixes the date of the notification under S. 5(1) by the Central Board to be a relevant date for the purpose of determining whether a particular waqf would be subject to the Act or not. (Para 8)

(c) U. P. Muslim Waqfs Act (13 of 1936) — Legislative competence to pass the Act — (Government of India Act (1919), S. 80A).

It is true that under S. 80A, Government of India Act of 1919 the local legislature of a province had power to make laws for the peace and good government of the territories for the time being constituting that province and could enact laws which could regulate any central subject with the previous sanction

of the Governor-General. The Muslim Waqfs Act of 1936 was enacted after obtaining such sanction. That may not give power to the legislature to make laws which may affect the peace and good government of the territories beyond the limits of the United Provinces. The Act, in brief, however provides for a sort of supervision over the mutwalli for the better management of the waqfs and there is nothing in it which can be construed as affecting the peace and good government of territories beyond the limits of United Provinces. In the circumstances therefore the Act cannot be considered to be beyond the legislative powers of U. P. Legislature on the ground that it affected property situate outside the territorial limits of the United Provinces. (Para 9)

M. H. Beg, for Appellant; M. A. Kazmi, for Respondent.

RAGHUBAR DAYAL J.:

Hafiz Abdul Karim executed three waqf deeds in 1917 and 1918. Notification was issued by the Central Board constituted under the Muslim Waqfs Act (U. P. Act No. 13 of 1936) on 26-2-1944, under S. 5, sub-section (1) of the Act, that the provisions of the Act would apply to these three waqfs. Badrul Islam, the mutwalli under the three waqf deeds, instituted a suit against the Sunni Central Board of Waqfs for a declaration that these waqfs were exempt from the operation of the Muslim Waqfs Act. The Civil Judge did not agree with the contention for the plaintiff and dismissed the suit.

(2) The plaintiff submits to the decree with respect to one of the waqfs, which was created by a deed, dated 11-5-1917. He challenges the decree of the court below with respect to the other two deeds executed on 20-3-1917, and 11-6-1918, respectively.

(3) Badrul Islam, the plaintiff, has migrated to Pakistan and the Custodian of Evacuee Property has been given notice of this appeal in view of S. 50, Administration of Evacuee Property Act (Act No. 31 of 1950). He has not applied to be impleaded and we did not consider it necessary to implead him in the exercise of our powers under S. 50, sub-section (2) of the Act.

(4) Exemption is sought for the first deed, dated 20-3-1917, as supplemented by a deed, dated 3-7-1919, on the ground that under the terms of the deed creating the waqf more than 75 per cent. of the total income after deduction of land revenue and cesses payable to the State Government of the property covered by the deed of waqf was payable for the benefit of the waqif or his descendants or any member of his family and that, therefore, this Act did not apply in view of S. 2, sub-section (2), Cl. (i) of the Act. Parties agreed that this wakf would be exempted from the operation of the Act in case it was held that Rs. 600 made payable to the mutwalli under the terms of the waqf deed amounted to a payment for the benefit of the descendants of the waqif.

Paragraph 4 of the waqf deed executed on 20-3-1917, is:

"The details of expenses:

"The income from the waqf property after deducting the expenses like income-tax, house tax, repairs and salaries of the employees, etc., shall be spent in this manner:

"Rupees six hundred shall be paid to Badrul Islam Mutwalli and thereafter to each Mutwalli for the time being annually and Rs. 1,200 for the spiritual benefit of the waqif, Rs. 300 per annum to Must. Sahibunnisa, wife of the waqif .....in all Rs. 3,120 shall be spent annually and the balance shall equally be divided amongst the five sons."

(5) Paragraphs 1 and 2 of the wakf deed relate to the appointment of mutwalli and provide that the waqif would be the first mutwalli for his lifetime and after his death his eldest son Badrul Islam shall be the mutwalli and after his death mutwalliship shall devolve upon Mishahul Islam and thereafter would be devolving on the eldest son living. It is only in the absence of any male descendant that a mutwalli would be appointed from among competent and honest Muslims.

(6) The contention for the appellant is that, as a mutwalli would be one of the descendants of the waqif till a certain contingency comes into existence, this payment of Rs. 600 to the mutwalli will always be a payment to one of the descendants of the waqif and that, therefore, this amount should be taken to be a payment for the benefit of the waqif's descendants or a member of his family. We are not prepared to agree with this contention. It is clear from the provisions of para. 4 of the waqf deed that the payment to the sons is from the balance after the payment of Rs. 3,120 has been made to others. The waqif does not say in the deed that the eldest male member of the family, who, according to the terms of the deed, would be the mutwalli, would get any larger share in the balance left after the other payments are made.

The payment of Rs. 600 is not to such eldest son or member of the family on account of his having that relationship with the waqif but is on account of another character filled in by that particular member of the family and that character is of being a mutwalli. The payment is, therefore, to a mutwalli and not to a descendant or a member of the family, even though at a certain point of time the mutwalli happens to be a member of the family or a descendant of the waqif. In this connection it may be mentioned that every person who gets a benefit under the waqf would answer the definition of a beneficiary and that a beneficiary and a mutwalli are separately defined in the Act itself. It should be inferred therefore that any payment to the mutwalli even though he be a member of the family is not a payment to him for his benefit in the sense in which the word 'benefit' is used in Cl. (i), sub-section (2) of S. 2 of the Act. We are, therefore, of opinion that the court below was right in holding that the sum of Rs. 600 should not be taken to amount to a payment for the benefit of the waqif's descendant and that in view of the agreement between the parties the waqf cannot be said to be outside the operation of the Muslim Waqfs Act of 1936.

(7) The wakf deed, dated 11-6-1918, related to a house situate at Delhi and cash of over a lac of rupees invested in a tannery at Kanpur. This amount, according to the plaintiff himself, remained invested at Kanpur till 1943 when the shares in the Kanpur tannery were sold and the proceeds equivalent to the amount mentioned in the waqf were invested in a business at Delhi, which was owned by the plaintiff solely. The contention for the plaintiff, therefore, is that the Muslim Waqfs Act of 1936 does not apply to this waqf in view of the provisions of sub-section (1) of S. 2 of the Act.

This sub-section (1) is:

"Save as herein otherwise specifically stated, this Act shall apply to all waqfs, whether created before or after this Act comes into force, any

part of the property of which is situate in the Uttar Pradesh."

There can be no doubt that part of the property included in the waqf deed was situate in U. P. till 1943 according to the plaintiff's own allegation and that, therefore, when S. 2 of the Act came into force on the enforcement of the Act, this waqf became subject to this Act. There is no provision in the Act that a waqf which has become subject to the Act will cease to be so subject when none of the property included in the waqf deed is situate in the Uttar Pradesh. It would follow, therefore, that when once this waqf became subject to the Act it would continue to be subject to it even if the plaintiff's allegation that the cash had been withdrawn from the Kanpur tannery and had been invested at Delhi be correct.

(8) The contention for the appellant really is that at the time when the Central Board issued the notification in February 1944 no property included in the waqf deed was situate in U. P. and therefore the Muslim Waqfs Act cannot apply to this waqf. No provision in the Muslim Waqfs Act of 1936 fixes the date of the notification under S. 5(1) by the Central Board to be a relevant date for the purpose of determining whether a particular waqf would be subject to the Act or not. It is true that the provisions of Ss. 5 to 71 of the Act did not come in force till some time in 1941. This fact has no bearing because it appears that the late enforcement of these provisions was due to the fact that what was provided by these provisions could not have been given effect to till the Central Board had found on investigation through proper agency the waqfs which were subject to the Act. It was no use enforcing these provisions which could not have been given effect to. It was for this reason that these sections were later enforced.

(9) Lastly, it was urged for the appellant that the Muslim Waqfs Act of 1936 was beyond the legislative powers of the U. P. Legislature under the Government of India Act, 1919, as it affected the property situate outside the territorial limits of the United Provinces as this province was called at the time.

It is true that under S. 80A, Government of India Act of 1919 the local legislature of a province had power to make laws for the peace and good government of the territories for the time being constituting that province. It could enact laws which could regulate any central subject with the previous sanction of the Governor-General. The Muslim Waqfs Act of 1936 was enacted after obtaining such sanction. That may not give power to the legislature to make laws which may affect the territories outside the particular province. But we find nothing in the Act which can be construed to affect the peace and good government of the territories beyond the limits of the United Provinces. The Act, in brief, provides for a sort of supervision over the mutwalli for the better management of the waqfs. Whatever powers the mutwalli had under the waqf or under any law do not appear to have been curtailed. In the circumstances, we do not consider that this Act was beyond the legislative power of the U. P. Legislature.

(10) In view of the above we are of opinion that this appeal should fail. We accordingly dismiss it with costs.

A/M.K.S. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 461 (Vol. 41, C.N. 195)

ROY J.

Autar Singh and another, Applicants v. State.

Criminal Revn. No. 530 of 1952, D/- 20-1-1954, from order of S. J., Dehradun, D/- 26-2-1952.

(a) Criminal P. C. (1898), Ss. 145, 107 — Conversion of proceedings — 35 Cal 117, Dissented from.

Proceedings started under S. 145, Criminal P. C. can be converted into proceedings under S. 107, Criminal P. C. 35 Cal 117, Dissented from; 34 All 449; 39 Cal 150; AIR 1942 Pat 331; AIR 1948 Nag 76, followed. (Para 4)

Anno: Criminal P. C., S. 145, N. 60.

1953 Mitra: S. 145, (Topic discussed in N. 60 to S. 145 in A.I.R. Com., extra: See 1953 Mitra, S. 145 P. 475, N. 432 "Alteration....proceedings" and P. 479, N. 437 "Sub-section (10)....see 107).

(b) Criminal P. C. (1898), Ss. 145, 107 — Question of title — Powers of Magistrate

In a case where there is a dispute concerning land, it is proper to take action against both sides if S. 107, Criminal P. C. is to be resorted to because binding over one party puts the other at an advantage. But it cannot be said that the Court should not investigate the title and the facts about possession of the parties. Such an inquiry falls legitimately within the purview of a criminal Court acting under S. 107, Criminal P. C., because the Court has to find out who is the aggressor and who has the right on his side. Such an inquiry into the title may be out of place under S. 145 — proceedings which are mainly concerned with the maintenance in possession of a person dispossessed within two months of the passing of the preliminary order, but they cannot be said to be out of place where action is not taken under that section but under S. 107 of the Code. In view of Sub-s. (10) of S. 145, it is within the discretion of the Magistrate to proceed either under S. 145 or under S. 107 or under both the sections of the Code and when he proceeds under S. 107, he is perfectly justified in finding out the respective rights of the parties and also in giving a finding as to the fact of possession. AIR 1948 Nag 76, Ref. (Paras 5, 6)

Anno: Criminal P. C., S. 145, N. 60.

1953 Mitra: S. 145 (Topic discussed in N. 60 to S. 145 in A.I.R. Com., extra: See 1953 Mitra, S. 145. P. 475, N. 432 "Alteration....proceedings" and P. 479, N. 437 "Sub-section (10).....Sec 107").

Criminal P. C., S. 145, N. 4.

1953 Mitra: S. 145, P. 413, N. 388 "Sections... 145" (25 Pts. extra in N. 4 to S. 145 in A.I.R. Com. — A.I.R. Com. note exhaustive).

Criminal P. C., S. 107, N. 11.

1953 Mitra: S. 107, P. 224, N. 232 "wrongful.... peace" (2 Pts. extra in N. 11 to S. 107 in A.I.R. Com. — 2 Pts. extra in Mitra — For illustrative cases, see footnotes in N. 11 to S. 107 in A.I.R. Com.).

Janardan Swarup Gupta, for Applicants; Aqiq Hasan, for the State.

CASES REFERRED:	Paras
(A) ('08) 35 Cal 117: 6 Cri LJ 398	4
(B) ('12) 34 All 449: 13 Cri LJ 526	4
(C) ('12) 39 Cal 150: 12 Cri LJ 569	4
(D) (V29) AIR 1942 Pat 331: 43 Cri LJ 637	4
(E) (V35) AIR 1948 Nag 76: 49 Cri LJ 61	4, 5

ORDER: This is an application in revision by Autar Singh and Sewan Singh against an order

dated 26-2-1952, passed by the learned Sessions Judge of Dehra Dun in proceedings under S. 107, Criminal P. C.

(2) The case started on the complaint of one Ringhna. He alleged in the complaint that he was a tenant of certain plots of land in village Archadea Grant; that on 25-7-1949, he had borrowed a certain sum of money from one Bakshi Amar Nath and had given the land to him for three years ending with Rabi 1358 Fasli; that on 9-5-1951, he had repaid the entire loan and Bakshi Amar Nath had put him back into possession of the land, and that when he wanted to cultivate the land the applicants objected and became ready to use force.

The complaint was filed before the Sub-Divisional Magistrate, Dehra Dun, who called for a police report. The Station Officer, Kotwali, reported that there was a dispute between Ringhna on one side and the applicants on the other and there was a likelihood of the breach of peace. He recommended that action be taken under S. 145, Criminal P. C. On that report the Sub-Divisional Magistrate ordered that as there was a likelihood of a breach of peace, the land be attached. He directed the parties to file their written statements in the court of the City Bench of Magistrates, First Class, and transferred the file to that court for disposal.

(3) In that court a question arose as to whether proceedings were to be taken under S. 145 or under S. 107, Criminal P. C. The learned Bench of Magistrates, after hearing counsel for the parties, decided on 16-8-1951 that they should proceed under S. 107, Criminal P. C. and not under S. 145. Notice under S. 107 was, therefore, issued and read out to both the applicants and they were required to furnish personal bonds for Rs. 2000/- together with two sureties for Rs. 1000/- each That order was confirmed after evidence had been gone into.

(4) The first question which has been urged before me is that the case having been started under S. 145, Criminal P. C., it could not have been converted into one under S. 107 of the Code, and that the proceedings were consequently without jurisdiction. The argument is that an application had already been made under S. 145 and that admittedly the dispute relates to immovable property. This argument was on the strength of a decision in — 'Balajit Singh v. Bhoju Ghose', 35 Cal 117 (A), where it was held that in such cases the court is compelled by the terms of S. 145 to go on with the trial and the directions in that section are mandatory. It is undoubtedly true that in that case it was held by the Calcutta High Court that S. 145—proceedings cannot be converted into proceedings under S. 107 of the Code. The view taken in the Calcutta High Court was, however, dissented from by this Court in — 'Emperor v. Thakur Pande', 34 All 449 at p. 450 (B) and later by a Full Bench of the same court in — 'Emperor v. Abbas', 39 Cal 150 (C). In — 'Madho Singh v. Emperor', AIR 1942 Pat 331 (D), the view taken in — '39 Cal 150 (C)', had been approved. And the same view was approved of by the Nagpur High Court in — 'Shamrao Deorao v. Emperor', AIR 1948 Nag 76 (E). It is, therefore, obvious that in the present case the proceedings under S. 107, Criminal P. C. were not without jurisdiction.

(5) It was next contended that the court should not have given any finding as to the rights of the parties and that in any case proceedings ought to have been taken against both the sides. A similar question was considered by the Nagpur High Court in — 'AIR 1948 Nag 76 (E)', cited above. In a case where there is a dispute concerning land it is proper to take action against both sides if S. 107, Criminal P. C. is to be resorted to because binding over one party puts the other at an advantage. But it cannot be said that the court should not investigate the title and the facts about possession of the parties. Such an inquiry falls legitimately within the purview of a criminal court acting under S. 107, Criminal P. C. because the court had to find out who is the aggressor and who has the right on his side. Such an inquiry into the title may be out of place under S. 145 proceedings which are mainly concerned with the maintenance in possession of a person dispossessed within two months of the passing of the preliminary order, but they cannot be said to be out of place where action is not taken under that section but under S. 107 of the Code.

Sub-section (10) of S. 145 of the Code, which was introduced by the Amending Act (No. 18 of 1923), provides that nothing in this section shall be deemed to be in derogation of the powers of Magistrates to proceed under S. 107. It was, therefore, within the discretion of the Magistrate to proceed either under S. 145 or under S. 107 or under both the sections of the Code.

(6) In my opinion, therefore, the courts were perfectly justified in finding out the respective rights of the parties and also in giving a finding as to the fact of possession. The order passed by the court below is correct. There is no force in this revision application which is accordingly rejected.

A/H.G.P. Revision rejected.

***A.I.R. 1954 ALLAHABAD 462 (Vol. 41, C.N. 196)**

(FULL BENCH)

RAGHUBAR DAYAL, AGARWALA AND MUKHERJI JJ.

Sukhnandan Lal and others, Appellants **v.** Musammat Raj Kali and others, Respondents.

First Appeal No. 491 of 1944, D/- 3-2-1953, against order of Civil J., Muzaffarnagar, D/- 3-6-1944.

***(a) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), Ss. 9(5) and 13 — Creditors' right to recover amount due from non-applicant debtor.**

The true import of S. 13 of the Encumbered Estates Act is to discharge, so much of a joint debt only as is due from a landlord applicant himself, and not to lead to the discharge also of that portion of the debt which can be recovered from the non-applicant joint debtor. In other words, the provisions of S. 9(5) of the Encumbered Estates Act cannot be used for holding that the creditor's right to recover the amount due from non-applicant debtors gets extinguished on his failure to file a claim under S. 10 against the landlord applicant in view of S. 13 of the Encumbered Estates Act. AIR 1941 All 363 (FB), Criticised; AIR 1950 All 378 (FB), Rel. on; AIR 1940 All 148 (FB); AIR 1942 All 153 (FB), Disting. Case law Ref. (Para 43)

During the pendency of a suit by the mortgagee against the mortgagor and his subsequent transferees, the mortgagor, after the preliminary decree was passed, applied under S. 4 of the Encumbered Estates Act. He did not mention the debt under this mort-

gage or decree passed by the ordinary civil Court in his written statement under S. 8 of the Act. The mortgagee decree-holder too did not file any claim under S. 10 of the Act. The Special Judge passed decrees under S. 14 of the Act. The decree-holder filed an application for the preparation of a final decree. Among other grounds, it was contended that the decree-holder had no right to apply for a final decree because he had not proved his debts before the Special Judge in the Encumbered Estates Act proceedings. This contention found favour with the Civil Judge and he rejected the application. The decree-holder appealed.

Held that the Court below was wrong in dismissing the application for the preparation of the final decree and that the Court should proceed with the preparation of the final decree with respect to the amount due from the non-applicant joint debtors treating the proportionate amount due from the applicant debtor to have been discharged in view of the failure of the creditor to claim that amount against the applicant debtor in the proceedings under the Encumbered Estates Act. (Para 46)

(b) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 13 — "For all purposes."

The expression "for all purposes and on all occasions" in S. 13 does not cover suits against non-applicant debtors. (Para 8)

(c) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 13 — S. 13 is to be interpreted independent of S. 9 (5) (c) and (d) — Principle of interpretation — (Civil P. C. (1908), Pre.) — (Interpretation of statutes).

In S. 9, sub-clauses (c) and (d) are introduced in the U. P. Encumbered Estates Act by the Amending Act 11 of 1939. No amendment is made in S. 13 by that Act. Therefore, the interpretation of S. 13 should not be dependent on the effect of the provisions of S. 9(5) (c) and (d). It must continue to bear the same interpretation which it would have borne without those provisions. Moreover, a certain provision of an Act is primarily to be interpreted according to the language used in that provision and help from other provisions of the Act in interpreting it ought to be taken only when its provisions are capable of more than one meaning. (Para 10)

Anno: C. P. C., Pre. N. 7 Pt. 5.

(d) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 9(5) (a) — Joinder of creditor — Absence of provision — Effect.

There is no provision in S. 9(5) (a) or any other section of the Encumbered Estates Act empowering the Court to implead a creditor whose debts happen to be mentioned by the debtor applicant in his written statement under S. 8 but who fails to file a claim. (Para 13)

The fact that the absence of a provision empowering the Special Judge to implead the creditor for the purposes of determining the amount due from the non-applicant debtors makes it clear that such determination is contemplated and enjoined by the Act only in those cases in which the creditor has filed a claim and seeks such determination and that such determination is not to be made in cases in which the creditor has not filed a claim though the debtor applicant has mentioned the debt in his written statement under S. 8. (Para 13)

(e) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 9(5) — Applicability and scope of S. 9(5) — AIR 1947 Oudh 201, Dissented from.

The provisions of S. 9(5) and Cls. (a) and (b) come into effect only when the creditor has filed a claim before the Special Judge against the debtor applicant and not in any other case. (Para 13)

There is nothing in the provisions of S. 9(5) which would show that its provisions supersede the provisions with respect to the execution of decrees against non-applicant debtors. These provisions just supplement the existing provisions and are applicable only when the amount due from non-applicant debtor has been determined by the Special Judge in the exercise of his jurisdiction to determine the amount of debt for which the applicant is liable and for which the non-applicants are liable and this jurisdiction he gets only after the creditor puts in a claim before him. AIR 1947 Oudh 201, Dissented from. (Para 39)

Clauses (c) and (d) of S. 9(5) just provide a quicker remedy for the creditor to realise the amount due from non-applicant debtors but do not bar him, if he be so pleased, from instituting a regular suit if no decree has been obtained from the Civil Court or to apply for execution on the basis of the amount determined to be due to him from the non-applicant debtors by the Special Judge. (Para 39)

(f) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 7(1) (a) — Scope and purpose of provisions in S. 7(1) (a) — AIR 1949 All 770; AIR 1942 Oudh 248, Dissented from.

The effect of the provision in S. 7(1) (a) is that an order for the stay of proceedings pending in any court is to be passed by the Court in which the proceedings are pending. It does not mean the automatic stay of the proceedings nor does it mean that the Court in which the proceedings are pending lost jurisdiction over those proceedings the moment the Collector passed an order under S. 6. It is to be presumed that the creditor, when his suit gets stayed, does positively come to know of the institution of the Encumbered Estates Act proceedings by some of the debtors and, therefore, is expected to file his written statement of claim and have the liability of the applicant and non-applicant debtors determined. (Para 15)

In case the proceedings are not stayed, there is a possibility that the creditor may not even know of the Encumbered Estates Act proceedings, and, therefore, the provisions of S. 7 or any other section of the Encumbered Estates Act do not provide that the subsequent proceedings in that court would be null and void. AIR 1949 All 770; AIR 1942 Oudh 248, Dissented from. (Para 15)

(g) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 9(5) — Remedial provision — Interpretation of — AIR 1942 Oudh 482, Dissented from.

Remedial provisions in respect of a class only should not be interpreted in such a manner as will bar the creditor's claim against the non-applicant debtor, unless the

language of the provision is compelling so as to take away substantive rights of parties which the law has not positively denied them. AIR 1942 Oudh 482, Dissented from. (Para 33)

(h) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 9(5) — Jurisdiction of Special Judge when arises.

The jurisdiction of the Special Judge to apportion the liability of joint debtors arises when he has to determine the liability of the debtor applicant and which must be the case only when the creditor puts in a claim. AIR 1950 All 378 (FB), Rel. on. (Para 42)

(i) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 9(5) (b) — Creditor's "right" — Extent and meaning of.

The provision of S. 9(5) (b) does not lend support to the observation and to arguments to the effect that the original right of the creditor on the basis of the original debt gives place to a new right which is created by the Special Judge's determination of the liability of the non-applicant debtor. The word "right" in S. 9(5) (b) does not mean the substantive right which arises in favour of the creditor on account of the joint debtors binding themselves to pay the debt when it is borrowed but refers to a sort of procedural right for the recovery of the debt. A new substantive right would have come into existence only if the original right had been taken away by any provision of the law. But there is nothing in the Encumbered Estates Act which takes away that right. (Para 43)

The word "right" in S. 9(5) (b) means that in view of the determination, the creditor's original right gets limited to the right to recover the apportioned amount from the non-applicant debtors. If no such amount is determined, the original right continues and the creditor can sue the non-applicant debtor for such portion of the joint debt for which he is liable after taking into consideration the liability of the applicant debtor which is either discharged by virtue of S. 13, Encumbered Estates Act or is to be dealt with by the Special Judge. (Para 43)

J. C. Mukerji and Man Singh, for Appellants; D. D. Seth and S. S. Dhawan, for Respondents.

CASES REFERRED: Paras

(A) ('08) 30 All 141: 5 All LJ 132 9
(B) (V13) AIR 1926 All 136 (2): 89 Ind Cas 574 9
(C) ('12) 10 All LJ 171: 15 Ind Cas 849 9
(D) (V25) AIR 1938 All 6: ILR (1938) All 22 20, 23
(E) (V26) AIR 1939 All 75: ILR 1939 All 115 21, 25
(F) (V27) AIR 1940 All 148: ILR (1940) All 228 (FB) 22, 34
(G) (V27) AIR 1940 All 203: ILR (1940) All 257 25, 26
(H) (V28) AIR 1941 All 363: ILR (1941) All 796 (FB) 26, 30, 31, 34, 37
(I) (V29) AIR 1942 All 153: ILR (1942) All 174 (FB) 27
(J) (V29) AIR 1942 Oudh 248: 17 Luck 597 28, 32, 37
(K) (V29) AIR 1942 Oudh 254: 17 Luck 623 29, 32
(L) (V29) AIR 1942 Oudh 413: 18 Luck 259 32
(M) (V29) AIR 1942 Oudh 482: 202 Ind Cas 111 33, 37
(N) (V31) AIR 1944 All 288: ILR (1944) All 486 34
(O) (V25) AIR 1938 All 47: ILR (1938) All 110 34
(P) (V36) AIR 1949 All 770: 1950 All LJ 593 35, 40
(Q) (V32) AIR 1945 All 321: ILR (1945) All 833 (FB) 37, 40
(R) (V34) AIR 1947 Oudh 201: 1947 All WR CC 100 37
(S) (V37) AIR 1950 All 53: 1949 All LJ 469 41
(T) (V37) AIR 1950 All 378 (FB) 42

RAGHUBAR DAYAL J.:

On 19-8-1936, a preliminary decree for sale was passed in favour of Sukhnandan Lal and others mortgagees on the basis of a mortgage deed executed by Chhottan Lal in their favour in 1928 with respect to zamindari property and houses. The decree was against Chhottan Lal, Mohammad Akram Khan, Mohammad Azam Khan and Mohammad Umar Khan subsequent transferees from Chhottan Lal & Srimati Chhajia who had a subsequent mortgage and a deed of further charge over the mortgaged property. Chhottan Lal died on 12-5-1949, and Srimati Chhajia on 1-9-1938. Their legal representatives were duly brought on the record.

(2) Azam Khan and Umar Khan, two of the judgment-debtors, appealed against that decree in November 1936. The appeal was dismissed on 27-10-1942.

(3) During the pendency of the suit Chhottan Lal applied under S. 4 of the Encumbered Estates Act on 29-10-1936. He did not mention the debt under this mortgage or decree in his written statement under S. 8 of the Encumbered Estates Act. Sukhnandan Lal and others decree-holders too did not file any claim under S. 10 of the Act. The Special Judge passed decrees under S. 14 of the Act on 27-5-1941.

(4) The decree-holders filed an application on 31-8-1943, for the preparation of a final decree. Among other grounds it was contended that the decree-holders had no right to apply for a final decree because they had not proved their debts before the Special Judge in the Encumbered Estates Act proceedings. This contention found favour with the learned Civil Judge and he rejected the application. The decree-holders appealed.

(5) This appeal came before a Division Bench and was heard by it. The sole point for consideration before it was whether by virtue of S. 13 of the Encumbered Estates Act there was a discharge of a debt, jointly and severally due, from a landlord applicant and a non-applicant debtor to the Encumbered Estates Act proceedings, not only as against the landlord applicant but also as against the non-applicant debtor. The learned Judges constituting the Bench considering the importance of the question, and the opinions expressed by two Division Benches, referred the case for decision to a Full Bench.

(6) The contention for the appellants is that the true import of S. 13 of the Encumbered Estates Act was to discharge, so much of a joint debt only as be due from a landlord-applicant himself, and not to lead to the discharge also of that portion of the debt which could be recovered from the non-applicant joint debtor. The contention of the respondents, however, is that S. 13 should not be so construed because of its language and further because of the provisions of S. 9(5) of the Encumbered Estates Act. I am of opinion that the contention for the appellants is sound.

(7) Section 13 of the Encumbered Estates Act is in these words:

"Every claim decreed or undecreed against the landlord in respect of a private debt, other than a debt due to a co-operative society registered under the Co-operative Societies Act (2 of 1912) by its members shall, unless made within the time and the manner required by this Act, be deemed for all purposes and on all occasions to have been duly discharged."

It is clear that what is deemed "for all purposes and on all occasions" to have been duly discharged is "a claim decreed or undecreed against the landlord" in respect of a private debt other than a debt due to the co-operative society. A joint debt is a debt taken jointly by more than one person. Each such person is liable to pay his share of the debt to the creditor. It is only in cases of joint and several liability that each debtor is liable to pay the entire debt to the creditor & has, on such payment, a right to recover such amount from each joint debtor as he is liable to pay his share of the entire debt. It is clear, therefore, that any joint debtor has the ultimate liability to pay his own share in the joint debt, whether the debt be merely joint or joint and several.

I am, therefore, of opinion that whenever a special Act like the Encumbered Estates Act which was enacted to benefit indebted landlords speaks of the debt of a landlord applicant it must be taken to mean such portion of the debt only for whose payment the landlord is ultimately liable.

Further, the claim that is required by Ss. 9 and 10 to be filed by a creditor is not a claim with respect to the entire debt but is a claim with respect to what be due from the landlord applicant. Section 8 requires the landlord applicant to mention in his written statement full particulars respecting the public and private 'debts to which the landlord be subject', or with which his immovable property or any part thereof is encumbered. Section 9 authorises the Special Judge to call upon all persons having

"claims in respect of private debts both decreed and undecreed against the person or the property of the landlord by or on whose behalf the application has been made."

Section 14(2) enjoins the Special Judge to examine and to determine the amount, if any, 'due from the landlord to the claimant' on the date of the application under section 4. The whole object of the Encumbered Estates Act is to relieve the landlords of their debts. It did not intend to relieve non-applicant debtors. Claims against them were to be decided according to the ordinary law. I shall refer to S. 9, sub-section (5) and its effect later.

(8) Section 13 could not, therefore, have contemplated the discharge of the debts due from joint debtors. The language of S. 13 does not lead to that conclusion either, for it only speaks of a claim against the landlord and does not speak of the debt decreed or undecreed to which the landlord or his property be subject. If such an expression had been used, then there might have been something to be said in favour of the proposition that the entire debt is to be taken as a unit and that the failure of the creditor to file a claim with respect to that debt led to the discharge of the entire debt and not only to so much of the debt as would have been recoverable from the landlord applicant. The expression "for all purposes and on all occasions" in S. 13 does not in my opinion cover suits against non-applicant debtors.

(9) The language of S. 13 of the Encumbered Estates Act is practically identical with that of S. 12 of the Bundelkhand Encumbered Estates Act (Local Act I of 1903) which is:

"Every claim against the proprietor in respect of a private debt shall, unless made within the time and in the manner required by this Act, be deemed, for all purposes and on all occasions, to have been duly discharged."

In — 'Makund Rao v. Janki Bai', 30 All 141 (A), it was observed at p. 142:

"In our opinion the effect of S. 12 of the Encumbered Estates Act is to discharge the decree to the extent of the joint liability of the five judgment-debtors who took advantage of the Act."

In — 'Mt. Beti Bai v. Tantya Singh', AIR 1926 All 136 (2) (B), where in a suit for the redemption of a mortgage made by one of the five mortgagors it was contended that in view of three of the mortgagors having applied under S. 6 of the Bundelkhand Encumbered Estates Act the entire debt became discharged and therefore there was no occasion for redemption, the mortgagee being in adverse possession since the date of discharge, Sulaiman, J., as he then was, observed at p. 138:

"But under S. 12, it was only the claim against the proprietors who had applied that was duly discharged, and not also their claim against those who had not applied. But the mortgagees also cannot now claim the whole of the debt from those who had not applied, on the ground that they were jointly liable for the whole. The legal effect of the proceedings is that the integrity of the mortgage must be deemed to have been broken up by operation of law so far as the share in the joint debt of those who applied was concerned."

He expressed agreement with the view of Piggott, J. in — 'Pohkar Singh v. Ram Din', 10 All LJ 171 (C) to the effect:

"The failure of the mortgagees to make any claim under the Act as against some of the mortgagors had the same effect in law as if they had accepted from these mortgagors their proportionate share of the mortgage-debt and freed their share from encumbrance i.e., it has the effect of partially breaking up the integrity of the mortgage-debt".

In view of the interpretation put on S. 12, Bundelkhand Encumbered Estates Act there can be no room for giving a different interpretation to the effect of S. 13, U. P. Encumbered Estates Act both because the two sections are practically similarly worded and because the Legislature must be deemed to have used practically the same language knowing full well the interpretation put upon the language used in the previous Act.

(10) The contention for the respondents, as already mentioned, is based more on the interpretation of the provisions of S. 9(5) (a), (b), (c) and (d) of the Encumbered Estates Act than on the expression used in S. 13. At present I need just mention that sub-clauses (c) and (d) were introduced in the Act by the Amending Act 11 of 1939. No amendment was made in S. 13 by that Act.

It can be said to follow from this that the interpretation of S. 13 should not, therefore, be dependent on the effect of the provisions of S. 9(5) (c) and (d). It must continue to bear the same interpretation which it would have borne without those provisions. This is besides the consideration that a certain provision of an Act is primarily to be interpreted according to the language used in

that provision and that help from other provisions of the Act in interpreting it ought to be taken only when its provisions be capable of more than one meaning.

(11) It may also be mentioned for the sake of clarity that there is no other provision in the Encumbered Estates Act except S. 13 which speaks of the discharge of any debt or speaks of the discharge of the liability of non-applicant debtors in case of joint debt when the creditor does not file a claim against the debtor applicant. It should follow, therefore, that the right of a creditor to realise his claim from the non-applicant debtors should not be taken away by mere implication of certain provisions of the Act unless the implication was so strong as to leave no other conclusion possible.

(12) Before I deal with the interpretation of S. 9(5) I should like to quote it here:

"9(5)(a). If one or more of several joint debtors, who are not members of same joint Hindu family, apply under S. 4 but all the joint debtors do not apply then the Special Judge shall determine the amount of the joint debt which is due by the debtor or debtors who have applied and the amount due by those who have not applied. For the purpose of this determination the Special Judge shall make the joint debtors who have not applied parties to the proceedings and shall hear any objection that they may make before recording his finding.

(b) If all the joint debtors have not applied under S. 4 the creditor shall have a right to recover from the debtors who have not applied only such amount on account of the joint debt as may be determined by the Special Judge to be due by them.

(c) Where no suit has been instituted or where no application for execution of a joint decree has been made in any other Court in respect of such joint de t or joint decree the creditor may on application to any Court having jurisdiction to entertain such suit, or execute such decree, obtain a decree, or get the decree executed against non-applicant joint debtors, for the amount so determined, subject to the payment of the court-fee payable on such execution application or on a plaint in a suit for the amount determined by the Special Judge:

Provided that notwithstanding anything contained in the Indian Limitation Act, 1908, or any other law for the time being in force, in computing the period of limitation for such suit or such execution application the period from the date of the order of the Collector under S. 6 to the date of determination of such debt by the Special Judge under Cl. (b) shall be excluded in either case.

(d) Where a suit in respect of the joint debt had been instituted or an application for the execution of the joint decree made, and proceedings therein were stayed under sub-section (1) of S. 7, the Court in which such suit had been instituted or such execution application was made shall, on the application of the creditor, proceed with such suit, or execute such application in accordance with sub-section (c) as against those joint debtors who had not applied under S 4, in respect of the amount of the joint debt determined by the Special Judge to be due from such joint debtors.

Provided that in a suit in respect of a liability of a firm, not being a joint family firm and not being a landlord itself, the creditor shall be entitled to proceed in respect of the whole debt against the property of the firm; but the amount recoverable from the applicant partner personally shall be determined in accordance with the provisions of S. 14:

Provided further that for the purposes of this Act, a person who is liable for a debt as a surety shall not be deemed to be a joint debtor;

Provided further that notwithstanding anything to the contrary in the Code of Civil Procedure, 1908, nothing in this Act shall prevent the institution of a suit for the recovery of debt against a surety, but no decree shall be passed in such suit for an amount in excess of the amount determined or which could have been determined in accordance with the provisions of S. 14 against the landlord;

Provided also that the total amount which may be recovered from the landlord and the surety shall not exceed the amount determined or which might have been determined by the Special Judge against the landlord."

(13) The object of the Encumbered Estates Act was to relieve the debtor applicant by determining his debts and then by liquidating them. It was for this primary purpose that the applicant was called upon to detail his debts and the creditors were required to file their claims. As already mentioned S. 14(2) of the Act required the Special Judge to determine the debts due from the applicant debtor. It, therefore, became necessary not only to provide for the determination of the debtor applicant's liability personally but of his joint debtors as well. If such debts were not brought within the fold of the Encumbered Estates Act, such debts would have remained undetermined and outstanding against the debtor applicant in spite of all the proceedings under the Encumbered Estates Act, either recoverable in the suits by creditors or in suits for contribution by co-debtors, who might have paid off the debt of the creditor.

It is for this purpose that S. 9(5)(a) provides that in case of the joint debt of the debtors who had not applied the Special Judge was to implead the non-applicant debtors and determine the amount due from them as well. It is to be noted here that there is no provision in S. 9(5) (a) or any other section of the Encumbered Estates Act empowering the Court to implead a creditor whose debts happen to be mentioned by the debtor applicant in his written statement under S. 8 but who failed to file a claim. In cases in which the creditor files a claim and all the necessary parties are before the Special Judge, the Special Judge could decide the proportionate liability of the debtor applicant and the non-applicant debtors in the joint debts provided he (the Special Judge) was given the jurisdiction to determine it.

It was for this reason that the Special Judge was given this power to determine the liability of the non-applicant debtors and such decision was to be an effective decision in the sense that this determined liability could not be reopened between non-applicant debtors and the creditors that S. 9(5)(b) provided that the creditor was to have a right to recover only the amount so determined by the Special Judge from the non-applicant debtors. If there was no such provision the creditor could agitate in the ordinary civil court that his right to recover what he could recover under ordinary law from the non-applicant debtors remained intact irrespective of all what the Special Judge had done. The proceedings of the Special Judge would have been ineffective and the result would have been in some cases that the creditor would have been doubly paid.

The fact that the absence of a provision empowering the Special Judge to implead the creditor for the purposes of determining the amount due from the non-applicant debtors makes it clear that such determination was contemplated and enjoined by the Act only in those cases in which the creditor had filed a claim and sought such determination and that such determination was not to be made in cases in which the creditor had not filed a claim though the debtor applicant had mentioned the debt in his written statement under S. 8. Of course, if the debtor applicant had not mentioned it in his written statement under S. 8, and the creditor had not filed a claim, the Special Judge could not have determined the liability of the non-applicant debtor for the obvious reason that he would not have had information about the debt or of the joint debtors.

It appears to me, therefore, that the provisions of S. 9(5) and sub-clauses (a) and (b) will come into effect only when the creditor has filed a claim before the Special Judge against the debtor applicant and not in any other case. It may be repeated here that in the case before us, neither the debtor applicant mentioned the debt in his written statement, nor the creditor filed a claim and, therefore, the Special Judge could not have determined it. I am, therefore, of opinion that the provisions of S. 9(5)(a) and (b) do not apply to this case. It cannot, therefore, be held that because the creditor did not get the liability of the non-debtor applicants determined by the Special Judge, he cannot now sue them on the basis of that liability in the ordinary Courts and cannot get a decree therefrom.

(14) Section 9(5)(c) and (d) lay down the procedure for the creditor to realise what has been determined as due from the joint debtors. Clause (c) deals with a case in which either no suit had been instituted by the creditor or the suit had ended in a joint decree and execution of the joint decree had not been sought. In such a case he could just put in an application for a decree or for the execution of the decree on payment of the necessary court-fees. The proviso to Cl. (c) shows that he could claim the period between the order of the Collector under S. 6 and the date of determination of such debt over and above the usual period of limitation for the institution of the suit or the execution application. If no such determination is made in certain contingencies as discussed above, it would follow that, if the Special Judge was the sole authority to decide this apportionment, & if the necessary result of his failure was to deprive the creditor of his right to sue the non-applicant debtors, that the Special Judge should have power to apportion the liability of the debtor applicant and a non-applicant debtor whenever the creditor wants it.

Such cannot be the position in law as that would mean keeping undecided indefinitely the liability of the debtor applicant which has to be determined under S. 14 and which is to be deemed to be discharged under S. 13 if no claim is filed. It may also be said that after the debt against the landlord applicant has been discharged in view of S. 13, and this would be, latest, when decrees passed under S. 14 have been sent to the Collector under S. 19, there remains no such joint debt which was against the landlord applicant and which required apportionment and that, therefore, S. 9(5) no more controlled the creditor's right to sue and recover the amount due from the non-applicant debtors.

(15) Clause (d) deals with a case when a suit or an execution proceeding in respect of the joint debt had been stayed under S. 7(1). In such a case the decree-holder has simply to apply that proceedings be revived against the non-applicant debtors in respect of the amount of the joint debt determined by the Special Judge to be due from such joint debtors. These provisions cannot apply to the case in which proceedings were not stayed under sub-section (1) of S. 7. Section 7(1), Cl. (a) provides that pending proceedings in respect of debts to which the landlord was subject or with which his immoveable property was encumbered, shall be stayed.

This means that an order for their stay is to be passed by the Court in which the proceedings were pending. It does not mean the automatic stay of the proceedings nor does it mean, to my mind, that the Court in which the proceedings were pending lost jurisdiction over those proceedings the moment the Collector passed an order under S. 6. It is when it is brougnt to the notice of the Court that in view of S. 7(1)(a) those proceedings should be stayed that the Court has to pass an order of stay in the proceedings and in such a case the provisions of S. 9(5)(d) would apply. It is to be presumed that the creditor, when his suit gets stayed, does positively come to know of the institution of the Encumbered Estates Act proceedings by some of the debtors and, therefore, is expected to file his written statement of claim and to have the liability of the applicant and non-applicant debtors determined.

If the proceedings are not stayed, there is a possibility that he may not even know of those Encumbered Estates Act proceedings, and, therefore, the provisions of S. 7 or any other section of the Encumbered Estates Act do not provide that the subsequent proceedings in that Court would be null and void. I am aware of certain cases in which such a view was expressed and would discuss, at the right place, that they are distinguishable and the point did not arise exactly in circumstances similar to those of the present case.

(16) The first proviso to Cl. (d) allows the landlord's suit in respect of the liability of a firm, not being a joint family firm and not being a landlord itself, to proceed in respect of the whole debt against the property of the firm but provides that the amount recoverable from the applicant partner personally shall be determined in accordance with the provisions of S. 14. This envisages the possibility of the creditor obtaining a personal decree against the applicant partner under S. 14 with respect to the amount recoverable from him and also obtaining a decree for the entire debt against the property of the firm. Therefore, the notion that the maintainability of a suit by the creditor against the non-applicant debtors without his putting in a claim in the Encumbered Estates Act proceedings, and without getting their liability determined would create injustice, does not stand on any substantial grounds.

(17) The third proviso to Cl. (d) also contemplates the institution of a suit for the recovery of a debt against a surety and lays down this restriction on the amount of the decree to be passed that it should not exceed the amount either determined or which could have been determined in accordance with the provisions of S. 14 against the landlord. This means that at one and the same time there may be a decree against the landlord applicant with respect to the same debt and a decree against the surety with respect to the same debt.

(18) The fourth proviso lays down that the total amount which can be recovered from the landlord and the surety should not exceed the amount

determined or which might have been determined by the Special Judge against the landlord and thus safeguards double payment to the creditor. This again shows that there is nothing inherently objectionable in the ordinary Civil Court dealing with the debt simultaneously with the Special Judge dealing with the same debt in determining the liability of the landlord applicant.

(19) I may now deal with the cases which have been referred to us by the parties in chronologicol order as far as possible.

(20) In 'Babu Ram v. Manohar Lal', AIR 1938 All 6 (D), it was held that where there is a joint decree and therefore a joint judgment debt, the execution of that decree must be stayed, even if one of the judgment-debtor applies under S. 7 until the Special Judge has determined the amounts required to be determined by S. 9, Cl. (5). I need not dispute this proposition, but I am not clear as to why the stay of that suit is to be upto the date of the determination of the amount by the Special Judge as by the time of the decision of this case on 24-8-1937, Cl. (d) had not been introduced in S. 9(5) of the Encumbered Estates Act and there was no provision in that Act for the recommencement of such proceedings which had been stayed.

Why the proceedings against the non-applicant debtor were ordered to be stayed was because S. 7(1)(a) provided for the stay of all proceedings in respect of any public or private debt to which the landlord was subject and it was considered that the suit against the non-applicant debtor did remain a suit on the basis of a debt to which the landlord was subject. It could have been, and, to my mind, would have been more properly held that the proceedings against the non-applicant debtors were not meant to be stayed under S. 7(1)(a) with respect to the debt recoverable from those persons alone as with respect to that proportionate debt the landlord was not subject. If such a view had been taken that would have avoided many points which were disputed and had to be decided by several Full Benches later on.

The stay of the proceedings should have been justified on the ground of expediency in view of the provisions of S. 9(5), Cls. (a) and (b) as it was open to the Special Judge in that case to apportion the debt. However, having held that the proceedings were to be stayed, the provisions of S. 9(5) (a) and (b) were considered and it was then observed:

> "It is quite clear that the creditor can realise only such amount on account of the joint debt as may be decreed by the Special Judge. As no such amount has been decreed by the Special Judge, the decree-holder cannot recover any such amount at all. The object of this provision is to protect the landlord who is one of the joint debtors and execution cannot proceed until the joint debt has been determined and it had also been determined for how much the person who has applied is liable and for how much those who have not applied are liable, for the decree-holder can realise only such amount as may be decreed by the Special Judge."

It is these observations which are repeated in practically every subsequent case. It is on the basis of this view that support was found for the view taken of the provisions of S. 7(1) (a). If a case like the present had been contemplated, and it had been considered along with the absence of a provision depriving the creditor of his claim against the non-applicant debtors, a different view might have appealed to the learned Judges who decided the case. Another consideration which the learned Judges mentioned in support of their view was the danger of the creditor getting the decree for the entire amount against the non-applicant debtor and thus shifting his burden on to the co-debtors who might not be able to recover their share from the landlord who was protected. In this consideration, they omitted to consider that the Act which benefited the landlord debtor was not necessarily intended to penalise the creditors except when they were negligent and failed to file a claim against the landlord debtor.

The learned Judges failed to consider that there was no provision in the Encumbered Estates Act on that date which allowed for the revival of the stayed proceedings in a suit or execution case against non-applicant debtors after their liability had been determined by the Special Judge under S. 9(5)(a). If those proceedings could not be proceeded with in the absence of any specific provision to that effect, the result could be that the creditors' suit against non-applicant debtors could remain stayed indefinitely. Such cannot have been the intention of the legislature and, to my mind, the provisions of S. 7(1)(a) should have been interpreted in a different manner.

It is true that now S. 9(5)(C) and (d) provide for the revival of the proceedings, but as I have mentioned earlier, their introduction should not have any effect on the interpretation of S. 7 (1)(a) or S. 13 which exist in the original form. I may mention here that the interpretation of S. 9 (5)(a) and (b) did not directly arise for decision in this case where the provisions of S. 7(1)(a) alone were to be interpreted. I may also mention that at that time when this case was decided the proceedings under the Encumbered Estates Act appear to have been pending and that it was possible for the creditor to go to the Special Judge for the determination of his claim and, therefore, the learned Judges had no occasion to contemplate the case of any other party being deprived of any particular right which the law did not intend to deprive him of.

(21) The next case to be considered is — 'Swadeshi Bima Co. Ltd. Agra v. Shiv Narain', AIR 1939 All 75 (E). The question that directly arose for decision before Mulla J. was whether a suit against a joint debtor was barred and he held that it was not barred. In that case two persons executed a pronote. A suit was instituted against them on its basis. One of them had previously applied under S. 4 of the Encumbered Estates Act and had obtained an order from the Collector under Section 6 of the Act. The non-applicant debtor alone applied for the stay of the suit at first but later applied that the entire suit be dismissed. The Small Cause Court Judge agreed with this contention and dismissed the suit. Mulla, J. held that the Small Cause Court Judge was wrong. He observed:

> "It necessarily follows therefrom that the debts referred to in Section 7 (1) (b) cannot be the debts of a person who is not a landlord and who has made no application under Section 4 of the Act .....It is only when the debtor happens to be a landlord and he makes an application under Section 4, Encumbered Estates Act, that the provisions of that Act come into operation for the purpose of staying any proceeding that might be pending against him in any Civil Court at the date of his application and of preventing the institution of any fresh proceeding after the date of his application".

He observed, however, later that it might be open to be contended by the non-applicant deb-

tor in cases of some joint debts that no suit could be instituted at all but that contention was not open in a case where the liability was joint and several. He further observed:

"There is nothing, however, in any provision in the Encumbered Estates Act even to suggest that the plaintiff's right to bring a suit against Kanhi Singh is barred or limited in any way. It is to be noted that the apportionment of liability between joint debtors made by a Special Judge under Section 9, Clause (5) of the Act is not an executable decree. In fact, the Encumbered Estates Act provides only for a decree being passed in favour of a claimant against the landlord who makes an application under Section 4 of the Act. There is no provision in it for a decree in favour of the claimant against any person who is jointly liable with landlord to discharge the debt. If the plaintiff is not allowed to institute the suit, the necessary result would be that his claim against Kanhai Singh would be barred by time.

There is no provision in the Encumbered Estates Act to save limitation for the claimant against the landlord in respect of any claim which he might further have against the joint detbor with the landlord, arising out of a joint and several liability. I am therefore definitely of the opinion that the suit instituted by the plaintiff was fully competent as against Kanhi Singh and it should not have been dismissed as against him."

The case further shows that a similar view had been taken in two other cases — one decided by a single Judge and the other by a Bench.

(22) In —'Ramdeo v. Sri Sadaitan Pande', AIR 1940 All 148 (FB) (F) the case before the Full Bench was that three brothers had executed a sarkhat in favour of the plaintiff firm. There had been separation between the three brothers and thereafter the two brothers, who were the executants, had applied under Section 4 of the Encumbered Estates Act and an order under Section 6 had been passed by the Collector. The two brothers admitted their liability for two-thirds of the debt. The non-applicant debtor was also made a party in the Encumbered Estates Act case and the creditor filed his claim. A suit was filed for one-third of the amount against one of the executants. The other two executants who had applied under Section 4 of the Encumbered Estates Act were impleaded as pro forma defendants. The suit was dismissed on the ground that it was barred by Section 7 (1) (b) of the Encumbered Estates Act.

(23) The judgment of the Full Bench was delivered by Thom C. J. He started his judgment by reference to S. 9 (5) (b) and observed:

"It would appear from Section 9, sub-section (5) (b) that the remedy of the creditor against the non-applying debtor was by way of execution of a decree passed by the Special Judge."

It was on account of such interpretation of S. 9 (5) (b) that he considered the wide expression of Section 7 (1) (b) a bar to a suit against the non-applicant debtor. He did not consider it at all necessary to decide the question as to whether under the Act before the amendment the creditor was entitled by a separate suit to recover what was due by a joint debtor who had not preferred an application under the Act remarking that that question was not free from difficulty. He referred to Clauses (c) and (d) of Section 9 (5) and observed:

"Under the amended Act therefore the creditor must wait until the amount due by the joint debtor who had not made an application under the Encumbered Estates Act had been determined by the Special Judge. Thereafter he may apply to the Civil Court for a decree for that amount against the debtor."

These are observations similar to those made in AIR 1938 All 6 (D)', but Thom C. J. further remarked:

"When the suit out of which this appeal arises was filed the law as to the procedure to be adopted by the creditor to recover the proportion of the debt due to him by the debtor who had not applied under the provisions of the Encumbered Estates Act was somewhat in doubt. The procedure to be followed is now made plain by the amendment above referred to."

The case is distinguishable as in this case all the creditors had filed a claim before the Special Judge; the non-applicant debtor was a party before the Special Judge, and the order passed by the High Court was that the suit be restored and stayed till the Special Judge determined the amount due from the non-applicant debtor and be proceeded with thereafter as an application under Section 11 of Act 11 of 1939 which introduced Cls. (c) and (d) of S. 9 (5) of the Encumbered Estates Act.

(24) It may also be noted that this Full Bench does not say that the claim of the creditor against the joint debtor becomes dead, or that he cannot sue or get a decree with respect to the liability of the non-applicant debtor if he had not filed a claim against the applicant debtor and had not got the liability of the non-applicant debtors determined.

(25) The next case is—'Firm Narain Das Balkishan Das v. Munshi Muniruddin', AIR 1940 All 203 (G) decided by Bennett and Verma JJ. The facts of the case were that three persons executed a pronote in favour of the plaintiff firm agreeing jointly and severally to be liable for the amount. Two of them applied under Section 4 of the Encumbered Estates Act and the Collector passed an order under Section 6 of the Act. Subsequent to it the plaintiff firm filed a suit in the Court of Small Causes against all the three debtors. He, however, disclosed the facts about the Encumbered Estates Act proceedings and prayed that the case should proceed against the non-applicant debtor alone. The Court discharged the applicant debtors from the suit and proceeded against the non-applicant debtor. This defendant then contested the suit on the ground of its non-maintainability against him.

The learned Small Cause Court Judge agreed with the contention and dismissed the suit. In revision the learned Judges held firstly that Section 9 (5) of the Encumbered Estates Act did not apply to that case as it contemplated only those cases in which the liability of the debtor was joint and not those cases in which it was joint as well as several.

They approved of the case 'AIR 1939 All 75 (E).' They further held that the failure of the creditor to put in a written statement of claim under S. 9 (1) and (3) of the Act was only that the claim which the plaintiff might have had against the applicant debtors would be deemed to have been duly discharged and that such failure of the creditors could not put an end to the claim which he had against the non-applicant debtor; and thirdly they held that Section 7 (1) (b) of the Encumbered Estates Act did not prohibit the institution of a suit against a person who was not a landlord and had not made an application under Section 4 of the Act. The view expressed on the

interpretation of Section 13 and Section 7 (1) (b) supports the view I have taken.

(26) The next case is the Full Bench case of —'The Punjab National Bank Ltd. v. Vishwa Nath Khanna', AIR 1941 All 363 (H) decided by Iqbal Ahmad C. J. and Yorke and Dar JJ. The facts of the case were that a decree for money was passed against two persons. It imposed a joint and several liability on them. The heirs of one of the judgment-debtors applied under Section 4 of the Encumbered Estates Act and in due course the Collector passed an order under Section 6. The debtor applicant applied for determination of the liability of the non-applicant debtors. The creditor and the co-debtor objected to it. The Special Judge overruled the objection and determined the liability of the non-applicant debtors. The creditor went up in appeal to the High Court.

The Court had to consider in this case whether the Special Judge had acted correctly in apportioning the liability. The Court held that he had acted correctly as Section 9 (5) applied to debts which were both joint and several and not only to such debts which were only joint and thus disagreed with the view expressed in 'AIR 1940 All 203 (G). Dar, J. who delivered the judgment, however, observed at page 364, Col. 2:

> "As the statute stands today, it is quite clear that the words "joint debt" in Clause (5) (a) of Section 9 includes debts which are both joint and several because Clauses 5 (b), (c) and (d) of Section 9 enjoin that a creditor will not be able to follow his remedy against non-applicant debtors till the amount has been determined and apportioned by a Special Judge under Cl. (5) (a) and, therefore, the right of a creditor to pursue his remedy separately in the case of a joint and several debt has been taken away by the statute and the jurisdiction to determine and apportion the liability in a case of joint debt against debtors who have applied and against debtors who have not applied now solely vests in the Special Judge dealing with the proceedings under the U. P. Encumbered Estates Act."

It is not made clear how the provisions of subclauses (5) (b), (c) and (d) of Section 9 lead to the conclusion that the expression joint debt in Clause (5) (a) must include debts which are both joint and several. These clauses simply deal with the amount which the creditor can realise from a non-applicant debtor and the manner in which he can realise it. The question that the creditor can seek his remedy separately or not in the case of joint debts or joint and several debts against non-applicant debtors was not before the Full Bench for consideration and therefore the latter observations in the above quotation can be said to be mere 'obiter dicta'.

(27) 'Girjesh Bahadur v. Bhagwati Prasad', AIR 1942 All 153 (I) is another Full Bench case decided by Iqbal Ahmad C. J. and Braund and Dar JJ. The question referred to the Full Bench was:

> "Is Section 7 (1) (b) Encumbered Estates Act limited in its operation to suits, proceedings etc. to be instituted against the landlord in respect of any debts incurred by him before the passing of the order under Section 6 of the Act or it applies to suits or proceedings etc. to be instituted by the landlord also?"

The Full Bench held that it applied to suits instituted by the landlord also and that it was not limited in its operation to suits, proceedings etc. to be instituted against the landlord. No occasion arose in this case to decide whether Section 7 (1) (b) applied to suits by creditors against non-applicant debtors with respect to their liability in respect of joint debt. This case therefore is distinguishable for the purposes of our case.

(28) A number of cases decided by the Oudh Chief Court in 1942 were referred to. The first case for consideration is — 'Har Charan Lal v. Sukha Nand', AIR 1942 Oudh 248 (J), decided by Bennett and Ghulam Hasan JJ. In this case one of the two judgment-debtors applied under Section 4 of the Encumbered Estates Act. In execution proceedings before the Sale Officer, it was contended that the proceedings be stayed. The Sale Officer held that proceedings for the sale of the property of the non-applicant judgment-debtor could continue. He sold his property. The Bench in discussing the question whether the provisions in Section 7 Encumbered Estates Act with respect to certain execution processes becoming null and void, applied only to the processes issued against the applicant's property, observed.

> "This question is connected with the question of the applicability of sub-section (5) of Section 9, and in view of the provisions of that sub-section we are of opinion that the bar applies equally to the property of non-applicants. The reason is clear. Under sub-section (5) the Special Judge has to determine the separate liability of the applicants and the non-applicants in respect of the joint debt, and since this involves a reduction in the total amount which may be claimed either from the applicant or the non-applicants, it would clearly not be open to an execution Court to execute a decree in its entirety against one or more of the joint debtors."

This appears to me to be a wrong approach to interpret the provisions of Section 7. These provisions should be interpreted in accordance with the language used in expressing them.

(29) The next case is — 'Jagdish Prasad v. Mt. Pran Kunwar', AIR 1942 Oudh 254 (K) decided by Bennett, J. The facts in this case were that a decree was passed against 58 judgment-debtors. One of them applied under Section 4 of the Encumbered Estates Act. The decree-holders applied for executing the decree against two non-applicant debtors. The proceedings were stayed in view of the Encumbered Estates Act proceedings. No reference to the debt was made in the application by the landlord applicant, and the creditor decree-holder had not filed any claim against him. The debt of the landlord applicant was not therefore before the Special Judge and it was not possible for him to determine the separate liability of the applicant and non-applicants under Clause (5) of Section 9. Bennett J. observed:

> "There does not appear to be any direct authority on the point whether it is open to a decree-holder to proceed in execution of a decree against non-applicants under the Act when the question of the liability of an applicant under the decree is not before the Special Judge. That possibility does not appear to be contemplated by the provisions of Clause (b) of Section 9. There can be no doubt that until the position in Section 13 of the Act is reached the debt of the applicant under Section 4 is not extinguished, and on this ground alone if there is still a possibility of the debt coming before the Special Judge, the order passed by the lower Court would appear to be justified."

It is clear that the facts of that case were very much similar to those of the present case except for the fact that the proceedings before the Spe-

cial Judge in the present case are over while in that case they were pending when the question came up for decision. I do not think that it can be said that the possibility of the decree-holder not filing a claim before the Special Judge and thus not bringing the liability of the applicant for determination before the Special Judge was not contemplated by the Encumbered Estates Act. The provisions of Section 13 of the Act clearly contemplate such a possibility and provide the penalty for the decree-holder's failure to put forward his claim.

(30) Bennett J. then considered it undesirable that the decree-holder should be allowed to adopt the procedure which was not contemplated by the law as the creditor's not filing a claim against applicant debtor and then proceeding in a separate proceeding against the non-applicant debtor would be to make the latter liable for a larger sum than he would be liable for if the procedure provided by the Act was followed. There will not be any danger about such a result if the decree holder's claim against non-applicant debtors be considered to be good only with respect to their proportionate liability in view of the liability of the applicant-debtor being for the Special Judge to determine if it be taken before him or of its being deemed as discharged in view of Section 13.

Bennett, J. distinguished the cases decided under the Bundelkhand Encumbered Estates Act and referred to by me above, on the ground that that Act did not contain provisions similar to those laid down in S. 9 (5). He then relied on the observations of the Full Bench in 'AIR 1941 All 363 (H)' which I have stated above were 'obiter dicta'.

(31) Bennett, J. also considered the difficulty of non-applicant debtors realising the applicant's share from him in a suit for contribution if they were made to pay the whole decretal amount and considered the possibility of the non-applicant being prejudiced. Lastly he said that Section 7 of the Act justified the stay of the execution proceedings as they were in respect of the debt to which the landlord was subject and observed:

> "He remains subject to this debt until his liability is extinguished under S. 13."

These observations would imply that after the applicant's liability had become extinguished the decree-holder could proceed against non-applicant debtors. Bennett, J. continues to observe:

> "The only answer to the argument is that the proceedings referred to in this section should be construed as meaning proceedings against the landlord and not against other persons in respect of the same debt."

He, however did not consider it necessary to decide that point and observed:

> "I found my view that execution of a decree in the regular Court against non-applicants must be stayed while proceedings under the Encumbered Estates Act are pending on the provision in the Act for the determination of the several liability of applicants and non-applicants."

He based his view of the interpretation of S. 9(5) upon the Full Bench in — 'AIR 1941 All 363 (H)'. He then made further observations to the effect:

> "No doubt the Special Judge cannot determine that liability until the debt is before him on a claim by the decree-holder; but that is no reason why the decree-holder should be allowed to ignore the provision of Cl. (5) and execute his decree wholly against non-applicants. It is in my opinion incumbent upon him, as soon as one of the judgment-debtors has applied under the Act, to prefer his claim against him and have the liability of the applicant and non-applicants respectively determined by the Special Judge."

This is practically repeating the effect of S. 9(5) admitting the impossibility of the Special Judge determining the liability till the debt was before him on a claim by the decree-holder. The case does not go to the length of holding that the decree-holder loses his right to recover the amount due from non-applicant debtors on his failure to prove his claim against the applicant debtors and on the necessary failure in the circumstances of the Special Judge to determine the liability of the non-applicant debtors. As would be already clear, the emphasis in the case was on the interpretation of S. 9(5) by the Full Bench and on the pendency of the proceedings before the Special Judge during which it was possible for the creditor to prefer a claim to have the apportionment of the liability between the applicant debtor and non-applicant debtors.

(32) The third case is — 'Shyam Lal v. Mustafa Husain', AIR 1942 Oudh 413 (L) which was decided by Bennett and Ghulam Hasan JJ. In that case a suit for rent had been instituted against certain persons two of whom had previously applied under the Encumbered Estates Act. These two defendants then applied for stay of the rent suit. The plaintiff applied for the withdrawal of the suit against them. The Assistant Collector rejected the plaintiff's prayer and dismissed the suit holding that it should not have been instituted in view of the provisions of the Encumbered Estates Act. The District Judge thought otherwise and remanded the suit for disposal according to law against the non-applicant defendants. The Bench relied on the two cases just mentioned, namely, those reported in — 'AIR 1942 Oudh 248 (J)' and — 'AIR 1942 Oudh 254 (K)' and observed:

> "It cannot be doubted that the provisions of sub-section (5) of S. 9 of the Act contemplate that in the case of joint debtors where some of the debtors have applied and some of the debtors have not applied under the Act their separate liability shall be determined by the Special Judge and that the liability so determined takes the place of their previous joint and several liability. We think too that S. 7 Encumbered Estates Act, is a bar to the initiation or continuation of proceedings in the regular Courts against non-applicants in respect of a debt for which the applicant or applicants under the Act are also liable."

This case again did not hold that the creditor's right against non-applicant debtors failed absolutely if he does not go before the Special Judge. They also interpreted S. 7 in a wider sense in view of the provisions of sub-section (5) of S. 9. The Encumbered Estates Act case was proceeding at the time and that also is a fact for distinguishing this case from the present case.

(33) The last case is — 'Mohammad Ahmad Ali Khan v. Sheo Shankar Singh', AIR 1942 Oudh 482 (M) decided by Agarwal J. The facts of the case show that during the pendency of execution proceedings one of the judgment-debtors filed an application under S. 4 of the Encumbered Estates Act. The decree-holder preferred a claim on the basis of a decree before the Special Judge but it was disallowed on the ground that it was filed too late. The non-applicant debtor contended in the execution case that the decree-holder's claim was extinguished and the decree could not be executed. Agarwal J. too in considering the rights of the decree-holder against the non-applicant

judgment-debtor, referred to S. 9(5)(a) and (b) and held that the decree-holder could have proceeded against the non-applicant debtors with respect to the amount found due from them by the Special Judge and as there was no such amount determined he could not execute his decree against the non-applicant debtors.

This case, which is practically at par with the present case, does not hold that the creditor's claim against the non-applicant debtor gets extinguished but simply interprets the provisions of S. 9(5) in a way as to bar the remedy open to him to realise the amount. I am of opinion that remedial provisions in respect of a class only should not be interpreted in such a manner, unless the language of the provision is compelling so as to take away substantive rights of parties which the law has not positively denied them. I am therefore not inclined to agree with the view expressed in this case.

(34) The next case is — 'Manmohan Das v. Mt. Radha Rani', AIR 1944 All 288 (N) which was decided by Mathur and Sinha JJ. The facts were that one of the co-judgment-debtors applied under S. 4 of the Encumbered Estates Act. The creditors did not put in any claim before the Special Judge. It was contended by the non-applicant debtor that the failure of the creditors to lodge claims before the Special Judge involved the extinction of the entire claim and at least to the extent of the liability of the debtor applicant in view of S. 13 of the Encumbered Estates Act. The Encumbered Estates Act proceedings were quashed under S. 20 of the Act. Subsequently, the Civil Judge repelled the objection of the judgment-debtor and granted the application for execution. The main contention before the Court was the same, that is, that the failure on the part of the creditors to prefer their claim extinguished the claim in its entirety and the appellant relied on the language of S. 13. Their Lordships said

> "the answer to this argument is furnished by the proceedings which Pt. Krishna Kant Malaviya had taken under S. 20 of the Act and which had the effect of quashing all proceedings taken under it".

Their Lordships considered Ss. 13 and 9(5) of the Encumbered Estates Act, rulings under the Bundelkhand Encumbered Estates Act and the Full Bench decisions reported in — 'AIR 1941 All 363 (H)' and — 'AIR 1940 All 148 (F)'. I shall deal with this discussion later. After having discussed this question, they observed:

> "We have dwelt upon this aspect of the matter at some length although in our opinion S. 20 is a complete answer even to this argument."

What their Lordships meant was that in view of the quashing of the Encumbered Estates Act proceedings nothing in the Encumbered Estates Act could affect the proceedings in the Civil Court as the result of the quashing of the proceedings was that no proceedings could be deemed to have taken place under that Act. It follows, therefore, that the discussion about the other points was purely academic. I further find that the learned Judges did not give any clear-cut decision on the points involved. They just expressed certain views in discussing the alternative question. The first observation made was:

> "The Encumbered Estates Act is a remedial statute and has been provided for the amelioration of the lot of the landlord. It will be putting a strain upon both the purpose and the language of the Act to hold that the redress provided by it should be extended not only to the landlord but also to people who do not fall within the scope of the Act or people who never sought any relief under it."

In this connection they referred to the case reported in — 'Ashraf v. Saith Mal', AIR 1938 All 47 (O) and then observed:

> "This clearly means that the claim is extinguished only to the extent of the liability of the applicant."

Then they referred to the alternative contention of the appellant to the same effect that if there had been no total extinction of the claim there had at least been a partial extinction of the liability of the applicant under S. 4. They then observed that there was nothing in the Bundelkhand Encumbered Estates Act, corresponding to S. 9(5)(a), U. P. Encumbered Estates Act & then referred to the Full Bench case of — 'AIR 1941 All 363 (H)' & also to the importance given by the Legislature to the provisions of S. 9(5) as it had made it obligatory on the Court to make non-applicant joint debtors parties to the proceedings and hear their objections if any. In this connection they referred to the case reported in — 'AIR 1940 All 148 (F)', and finally they observed:

> "If the intention of the Legislature is, as it must be held to be, to make the Act self-contained, the determination of the debt must be made by the Special Judge in proceedings under the Encumbered Estates Act. If there was no such apportionment or determination by the Special Judge, the Civil Judge has no jurisdiction to enter upon an inquiry in that direction."

With respect, it appears to me that the learned Judges were inclined to interpret S. 13, both on account of the language used in the section and the purpose of the Act to the effect that it was the liability of the applicant debtor alone which gets extinguished on account of the failure of the creditor's claim and that they then laid down, as they were bound to lay down in view of the observation of the Full Bench, the matter being of academic interest only, that if there was no such apportionment or determination by the Special Judge the Civil Judge had no jurisdiction to enter upon an inquiry in that direction. This case, therefore, does not in any way go against our interpretation of S. 13.

(35) The next case is — 'Salamat Ullah v. Mt. Maharaj Kuar', AIR 1949 All 770 (P) decided by Misra and Chandiramani, JJ. In this case decree sought to be executed was obtained against the judgment-debtors during the pendency of the Encumbered Estates Act proceedings which had been instituted by some of them prior to the institution of the suit. The Court passing the decree did not know of the pendency of Encumbered Estates Act proceedings.

The question before the Court was whether S. 7 of the Encumbered Estates Act took away the jurisdiction of the civil court in respect of a private debt incurred before the institution of the proceedings under the Encumbered Estates Act. It was held that in view of the provisions of S. 7(1)(a) providing that all the proceedings pending at the date of an order under S. 6 of the Act shall be stayed, it was clear that suits in respect of private debts, incurred before the passing of the order under S. 6, could not be proceeded with, that they could not result in a decree and that if there was a violation of the statutory prohibition against the trial of the suit, the resulting decree obviously could not be regarded as a valid decree which could be enforced by execution. I do not agree with the view that in the circumstances no valid decree could be passed by the civil court.

(36) A court in which the execution proceeding or a suit is pending cannot be expected to stay the proceedings unless it knows of the Collector's order. These proceedings must continue in the absence of an order of the court staying them. The expression "shall be stayed" means, to my mind, that the court must pass an order staying the proceedings then pending and does not mean that without such an order of stay, they be deemed to have been stayed and that any further action in the proceeding will be null and void.

It was for the debtor-applicant to inform the court that the Collector had passed the order under S. 6 of the Encumbered Estates Act. On such information the Court is bound to stay the proceedings and as a result of such stay order the process issued becomes null and void. If no such stay order is passed due to ignorance about the Collector passing an order under S. 6, on the application of any party and the proceedings continue, those proceedings taken by a proper court cannot become null and void in the absence of any clear provision of law to that effect. Section 7(1)(a) does not say that further action in such a proceeding will be null and void.

I therefore do not agree with the view that S. 7(1)(a) provides that the suit cannot be proceeded with after the Collector has passed an order under S. 6 even if the court was not informed about it and that the decree passed in such circumstances will be null and void. Further their Lordships observed:

"We may add that the decree-holder does not claim to have obtained from the Court of the Special Judge any decree in respect of the maintenance allowance which formed the subject-matter of the decree under execution and by operation of S. 13 of the Act the debt must be taken to be wiped off".

This may mean that the debt would be wiped off. There is, however, no discussion in regard to the language of S. 13 or of any kind which could indicate the reason for this view.

(37) Reference is then made to the decided cases reported in — 'AIR 1941 All 363 (H)'; — 'Mt. Khatoon Begam v. Saghir Husain Khan', AIR 1945 All 321 (FB) (Q) and — 'Tirbhawan Datt v. Pashupat Pratap Singh', AIR 1947 Oudh 201 (R) and it is observed:

"The rule there laid down is that in a case in which there had been no determination as to the sum payable by the non-applicants, there can be no execution against the non-applicant debtors."

This case, therefore, does not take us far. It simply summed up what these cases had held. I have already referred to the Full Bench case of Allahabad — 'AIR 1941 All 363 (H)'.

(38) 'AIR 1947 Oudh 201 (R)', relied on — 'AIR 1942 Oudh 248 (J)'; and — 'AIR 1942 Oudh 482 (M)', which also I have referred to. Further in that case the creditor had filed a claim before the Special Judge and the joint debtors were impleaded there. The joint-debtors admitted their liability but the Special Judge did not accept their admission and decreed the entire amount against the landlord applicant. The decree-holder appealed to the District Judge with respect to costs and did not implead the non-applicant joint debtors.

The applicant debtor raised the question of apportionment there and the appellate Court then remitted an issue to the Special Judge for a finding as to how much of the costs claimed were due from the applicant and what sum from the non-applicants. The Special Judge held that the decree-holder was entitled to recover the whole amount from the applicants as their liability was joint and several.

(39) Execution in the Civil Court, however, remained stayed all the time till the decree-holder applied for its revival. The non-applicant judgment-debtors objected to the proceedings on the ground that no part of their liability having been apportioned against them by the Special Judge proceedings in execution could not be taken against them in respect of the decree. The Civil Judge rejected this contention and that was repeated before the Bench. After discussing S. 9(5)(b) it was observed:

"The words of this sub-clause are perfectly clear and prohibit the recovery from the non-applicant debtors of anything in excess of the amount determined by the Special Judge to be due from them."

The learned Judges further observed:

"The Civil Judge has quite ignored the fact that by a special law laid down in S. 9(5), Encumbered Estates Act, the general law relating to execution of decrees has been modified and that it is only in accordance with, and to the extent provided by, the special law that decrees may now be executed in this Province. In this view execution cannot proceed not because the decree has ceased to exist but because there is no sum of money in respect of which execution can proceed."

I do not find anything in the provisions of S. 9(5) of the Act which would show that its provisions supersede the provisions with respect to the execution of decrees against non-applicant debtors. To my mind these provisions just supplement the existing provisions and are applicable only when the amount due from non-applicant debtor has been determined by the Special Judge in the exercise of his jurisdiction to determine the amount of debt for which the applicant is liable and for which the non-applicants are liable this jurisdiction he gets only after the creditor puts in a claim before him. It may be mentioned here that clauses (c) and (d) of the Act just provide a quicker remedy for the creditor to realise the amount due from non-applicant debtors but do not bar him, if he be so pleased, from instituting a regular suit if no decree has been obtained from the Civil Court or to apply for execution on the basis of the amount determined to be due to him from the non-applicant debtors by the Special Judge.

I, therefore, do not agree with the view that the provisions of S. 9(5) modify the general law relating to execution of decrees. I may also note that the concluding observation makes it clear that the decree-holders' claim against the non-applicant debtors does not get extinguished but simply is incapable of being realised on account of the failure of apportionment by the Special Judge.

(40) I do not find anything useful in — 'AIR 1945 All 321 (Q)', referred to in — 'AIR 1949 All 770 (P)', on the point under discussion.

(41) In — 'Sheodan Singh v. Ramesh Singh', AIR 1950 All 53 (S), the point for decision was whether an applicant debtor from whom the entire debt had been realised by the creditor could sue the non-applicant debtor for contribution. It was held that nothing in the Encumbered Estates Act barred such a suit. When holding so, Wanchoo J. delivering the judgment of the Bench, went on to point out that there was a provision in the Encumbered Estates Act which, in effect, barred a creditor from filing a suit and obtaining a decree

against a co-debtor, if he fails to get the debt apportioned between the debtor, who has applied, and the co-debtor, and then referred to S. 9(5)(b) of the Encumbered Estates Act. These observations are 'obiter dicta'.

(42) In the Full Bench case of — 'Khurshed Ali Khan v. Ram Saran Das', AIR 1950 All 378 (T) one of the three joint debtors applied under S. 4 of the Encumbered Estates Act. The creditor's suit against the other two was stayed. The creditor filed a claim before the Special Judge after he had passed decrees under S. 14 and prayed for the revival of the suit and for the determination of the liability of the non-applicant debtors. The Special Judge rejected the application. The District Judge allowed the appeal. It was against his order that a revision was filed in the High Court. The revision was allowed by the Full Bench as no appeal lay to the District Judge against the order of the Special Judge and, therefore, the order of the District Judge was bad. It was, however, observed in this case at p. 380:

> "If the liability of the landlord applicant is not in question then the Special Judge does not seem to be really concerned with the other debtors who are not before him. It is only because the other debtors are joint debtors with the landlord applicant that the apportionment becomes necessary."

This observation in the judgment of Malik C. J. supports my view that the jurisdiction of the Special Judge to apportion the liability arises when he has to determine the liability of the debtor applicant and which must be the case only when the creditor puts in a claim.

(43) The expression used in S. 9(5)(b) about the creditor having a right to recover from the non-applicant debtor only such amount on account of the joint debt as may be determined by the Special Judge to be due by them has led to an observation in some cases and also to arguments to the effect that the original right of the creditor on the basis of the original debt gives place to a new right which is created by the Special Judge's determination of the liability of the non-applicant debtor. The word "right" in S. 9(5)(b) does not to my mind really mean the substantive right which arises in favour of the creditor on account of the joint debtor's binding themselves to pay the debt when it is borrowed but refers to a sort of procedural right for the recovery of the debt. A new substantive right would have come into existence only if the original right had been taken away by any provision of the law. As already mentioned there is nothing in the Encumbered Estates Act which takes away that right. Therefore no new right could have been created.

The word "right" in S. 9(5)(b) therefore just means that in view of the determination, his original right gets limited to the right to recover the apportioned amount from the non-applicant debtors. If no such amount is determined, the original right continues and the creditor can sue the non-applicant debtor for such portion of the joint debt for which he be liable after taking into consideration the liability of the applicant debtor which is either discharged by virtue of S. 13, Encumbered Estates Act or is to be dealt with by the Special Judge. Section 18 of the Encumbered Estates Act runs:

> "Subject to the right of appeal or revision conferred in Chapter 6, the effect of a decree of the Special Judge under sub-section (7) of S. 14 shall be to extinguish the previously existing rights, if any, of the claimant, together with all rights, if any, of mortgage or lien by which the same are secured and, where any decree is given by the Special Judge to substitute for those rights a right to recover the amount of the decree in the manner and to the extent hereinafter prescribed."

This language makes it clear that a decree passed under S. 14(7) extinguishes the previously existing rights, if any, of the claimant, and that a decree given by the Special Judge substitutes for those rights a right to recover the amount of the decree in the manner and to the extent therein prescribed.

I refer to this provision simply to show that when the existing right is extinguished and a new right created in its place, this Act in very clear terms provides for the same. This strengthens my general observation above that in the absence of any positive enactment depriving a person of a certain right in him such deprivation of the right is not to be construed from provisions which do not deal with it but deal with the mode of enforcing those rights; in other words, the provisions of S. 9(5) of the Encumbered Estates Act cannot be used for holding that the creditor's right to recover the amount due from non-applicant debtors gets extinguished on his failure to file a claim under S. 10 against the landlord applicant in view of S. 13 of the Encumbered Estates Act.

(44) Lastly, reference may be made to S. 44 of the Encumbered Estates Act. Section 44 sub-section (1) provides for the cessation of the disabilities of the landlord in certain contingencies terminating the proceedings under the Encumbered Estates Act. Sub-section (2) provides for similar cessation of the landlord's disabilities when the application under S. 4 is dismissed or when the proceedings under the Act are quashed. Sub-section (3) provides for ignoring the interval between the date of decree to be executed and the date of declaration under sub-section (1) of the order referred to in sub-section (2) when applying for execution of the decree stayed under sub-sections (2) and (3) of section 7. Nothing is said in S. 44 as to what will happen to the proceedings stayed under S. 7(1)(a) or (b).

Of course the proceedings stayed in suits against the landlord applicant alone might be considered as stayed indefinitely or might be subsequently ordered by the Court on learning of the result of the Encumbered Estates Act proceedings to be filed and the absence of any provision dealing with the final disposal of stayed proceedings would not have made any difference to them but it would affect the proceedings against non-applicant debtors.

The suits or execution proceedings against non-applicant debtors would have remained stayed indefinitely as neither S. 44 nor any other section of the Encumbered Estates Act as originally enacted in 1934 provided for the vacation of the stay order and for proceeding further with the proceeding which had been stayed. Such a situation could not have been contemplated when S. 7, S. 13 and S. 44 were enacted and, therefore, the correct interpretation of S. 7(1)(a) and (b) and S. 13 appears to me to be that their provisions govern only a suit and the proceedings against the landlord applicant alone and the claim due from the landlord applicant alone either on the basis of the entire debt taken by him or on the basis of a proportionate share in a joint debt due from him and others.

It was in 1939 that Cl. (d) was added in S. 9(5) of this Act and provided for further action in stayed proceedings. This later provision should not affect the interpretation of Ss. 7, 13 and 44 which are as originally enacted.

(45) Lastly, I may refer to the argument for the respondent that even though the Encumbered Estates Act does not intend to deal with providing any relief to the non-applicant debtors such a relief to them, if it be held that S. 13 of the Encumbered Estates Act extinguishes the entire debt due to the creditor from all the joint-debtors, will be incidental and such incidental reliefs are not unknown to law, and have been the result of certain provisions in other Acts. To my mind the relief which the non-applicant debtor gets by such an interpretation of S. 13 will not be the indirect result of a provision giving relief to the applicant debtor alone whose relief was the purpose and object of the Encumbered Estates Act, but would be the case of direct relief provided by S. 13 if its language is construed that way.

Incidental relief which the non-applicant debtors get is a relief to the extent of his escaping the liability of the proportionate share due from the applicant debtor in a joint debt and specially in a joint and several debt. The latter kind of incidental relief is not denied to the non-applicant debtor. In this view of the matter I need not refer to the various provisions referred to by the learned counsel for the respondent in the course of his arguments.

(46) In view of the above, I am of opinion that S. 13 leads to the extinction of the creditor's claim to the extent of the liability of the applicant debtor and does not lead to the extinction of the debt to the extent of the liability of the non-applicant joint debtor. I am further of opinion that S. 9(5)(a) applies to those cases alone in which the creditor files a claim under S. 10 against the applicant debtor in respect of the joint debt and that the result of the Special Judge's apportioning the liability of the non-applicant debtor is simply this that in view of Cl. (b) of S. 9(5) the creditor can recover the amount so determined from the non-applicant joint debtors.

I am further of opinion that Cls. (c) and (d) of S. 9(5) of the Encumbered Estates Act simply provide the alternative and the easier remedy to the creditor in getting relief against the non-applicant debtors and do not in any way affect the ordinary relief and procedure which the creditor could take to recover the amount due from the non-applicant judgment-debtors under the general law.

I, therefore, hold that the Court below was wrong in dismissing the application for the preparation of the final decree. I, therefore, would allow this appeal with costs, set aside the order of the Court below and order that the Court should proceed with the preparation of the final decree with respect to the amount due from the non-applicant joint debtors treating the proportionate amount due from the applicant debtor to have been discharged in view of the failure of the creditor to claim that amount against the applicant debtors in the proceedings under the Encumbered Estates Act.

(47) AGARWALA, J.: I agree and have nothing to add.

(48) B. D. MUKERJI, J.: I agree and have nothing to add.

A/V.S.B. Appeal allowed.

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(LUCKNOW BENCH)

MALIK C. J. AND AGARWALA J.

Sheo Dulare Lal Sah, Plaintiff-Appellant **v.** Anant Ram and another, Defendants-Opposite Party.

Second Appeal No. 200 of 1948, D/- 31-7-1953, against judgment of Dist. J., Lucknow, D/- 13-12-1947.

(a) **T. P. Act (1882), S. 116 — Tenant holding over — Assent of landlord — Creation of new tenancy — Demand for rent — Repudiation of tenancy — Suit on title — Limitation (Limitation Act (1908), Arts. 139 and 144). 31 Mad 163, Commented and dissented from.**

The assent of the landlord to the continuance in possession of the tenant, after the determination of the tenancy, would create a new tenancy and make the tenant a tenant holding over in accordance with the provisions of S. 116, T. P. Act. In order to create a tenancy at sufferance the tenant should have lawfully entered into possession in recognition of the landlord's superior title and should have continued to remain in possession in the same right after the termination of the tenancy without asserting any title hostile to that of the landlord and without his assent or dissent. The continuance in possession should be due to the laches of the owner in not asking for payment of the rent or vacation of the premises or taking over possession of the property.

Where the tenant had remained in possession after the determination of the tenancy the requirements of S. 116 are satisfied by giving the notice demanding rent for the period after the termination of the tenancy and the landlord must be deemed to have assented to his continuing in possession and the tenant at sufferance becomes a tenant from month to month. (Paras 11 and 12)

Where the defendants being the legal representatives of the tenant holding over are not tenants on sufferance but hold the property under an independent title of their own then Art. 139 would not apply at all. If, on the other hand, they hold the property in the same right as the deceased tenant being his legal representatives, there is no reason why the position should be different and the landlord should not be able to give his assent to their continuing in possession as he could have done if the deceased was alive. 31 Mad 163, commented and dissented from.

The Courts in England seem to have taken a slightly different view and no fresh tenancy after the termination of tenancy seems to arise in England unless both parties agree. Case law Ref. (Para 13)

Where after the landlord demanded payment of rent and also the arrears for three years and thereby assented to the tenant's continuing in possession which gave rise to a fresh tenancy in accordance with the provisions of S. 116, T. P. Act, and the tenants repudiated the tenancy and set up an adverse title a fresh cause of action arises in landlord's favour to file a suit for possession of property, on the basis of title within 12 years of the repudiation of title under Art. 144, the cause of action arising on the date of repudiation of the landlord's title. (Para 19)

To such a case Art. 139 is not applicable. Defendants' plea of adverse possession is in-

consistent with the application of Art. 139 which applies to a suit by landlord suing to recover possession from a tenant. AIR 1934 PC 77, Relied on. (Para 23)

Anno: T. P. Act, S. 116 N. 4, 6, 13; Limitation Act, Art. 139 N. 4; Arts. 142 and 144 N. 59.

(b) T. P. Act (1882), S. 107 — Oral lease not exceeding one year — Kabuliat by lessee only — Lessee going into possession — Validity of lease — (Evidence Act (1872), S. 114).

As regards leases not exceeding one year, a lease of immoveable property can be created by oral agreement accompanied by delivery of possession. Where the lessor did not execute any document and it was the lessee alone who executed a 'kabuliat' and the lessee was in possession of the property after the execution of the 'kabuliat':

Held that it may be presumed under S. 114, Evidence Act that there must have been an oral agreement between the lessor and lessee agreeing to the terms on which the lessee was being put in possession of the property and there was, therefore, an oral agreement accompanied by delivery of possession which satisfied the requirements of S. 107. (Para 24)

Anno: T. P. Act, S. 107 N. 4: Evidence Act, S. 114 N. 22.

Sarvari Niamatullah and B. N. Mulla, for Appellant; Hyder Husain, for Respondents.

CASES REFERRED: Paras

(A) (1810) 128 ER 22: 3 Taunt 54 10
(B) (1786) 1 TR 159: 99 ER 1029 13
(C) (1871) 3 PC 751: 40 LJPC 35 14, 20
(D) (1893) 1893-1 QB 736: 62 LJQB 462 15
(E) ('08) 31 Mad 163: 18 Mad LJ 26 20
(F) ('10) 33 Mad 260: 4 Ind Cas 1080 20, 21
(G) (V21) AIR 1934 PC 77: 61 Ind App 50 (PC) 23
(H) (V29) AIR 1942 All 330: 202 Ind Cas 678 24
(I) (V37) AIR 1950 All 661: 1950 All WR 506 24

MALIK C. J.:

The facts of this case are given in the judgment of the lower appellate Court but it may be convenient to state them briefly here. Lala Saheb Dayal was the owner of the house in suit. He got indebted and there was a decree against him in favour of one Devendra Nath for about Rs. 1,200/-. On 15-8-1932, Sahib Dayal executed a sale-deed of the house in favour of Sri Krishna Das for Rs. 1,260/-. Sahib Dayal was related to Sri Krishna Das and was also working as his servant. This document was presented for registration and was registered on 17-8-1932. On the date of the registration of the document Sahib Dayal executed a 'sarkhat' in favour of Sri Krishna Das to the effect that he would continue to remain in possession of the house for one year and pay him rent at the rate of Rs. 13/- per mensem.

Sri Krishna Das, after he purchased the property, paid off Davendra Nath and satisfied the decree. Sahib Dayal and his two sons, who are the defendants-respondents, continued to live in this house but no rent was ever paid to Sri Krishna Das in Sahib Dayal's lifetime or demanded by him. In 1944 Sahib Dayal died. After his death on 14-8-1944, Sri Krishna Das gave a notice, Ext. A-21, that the defendants were in possession of the house as his tenants but they had not paid rent and they should pay the rent at Rs. 13/- per month and also demanded payment of rent for the last three years previous to the date of the notice. On 17-8-1944, the defendants sent a reply that the house was their ancestral property, that they were not his tenants and that he had no right to demand any rent from them.

Sri Krishna Das sold the house to the plaintiff and the plaintiff then filed a suit No. 42 for arrears of rent and for ejectment of the defendants treating them as tenants. The defendants, however, took the plea that they were not tenants of the plaintiff, that no proper notice in accordance with the provisions of S. 106, T. P. Act had been given and that no rent was due from them. The learned Munsif held that it was not established that the relationship of landlord and tenant existed between the plaintiff and the defendants, that the notice was invalid and that no rent was due from the defendants to the plaintiff. The suit was, therefore, dismissed with costs.

(2) Thereafter, the plaintiff filed the suit out of which this appeal has arisen and in the plaint no mention was made that the plaintiff was the landlord or that the defendants were tenants. All that the plaint stated was that the plaintiff was the owner by purchase of the house, that Sahib Dayal on 17-8-1932, had executed a 'keraya nama' in favour of Sri Krishna Das and had remained in possession, that the defendants had denied the title of the plaintiff that they were liable to ejectment and were liable to pay a sum of Rs. 400/- for use and occupation of the house.

(3) In the written statement filed on behalf of the defendants it was pleaded that the sale deed as well as the 'sarkhat' executed by Sahib Dayal were fictitious documents, that Sahib Dayal had executed the sale deed to save the property from his creditors and that Sahib Dayal, and after his death the defendants, had all along remained in possession as proprietors, that there had never been any relationship of landlord and tenant between them nor had any rent been ever paid. A plea was, however, also taken in the written statement that the plaintiff's suit was barred by limitation though no particular article of the Limitation Act was mentioned in the written statement.

(4) The learned Civil Judge framed the following issues:

1. (a) Did Sahib Dayal execute a sale-deed on 15-8-1932, in favour of Sri Krishna Das as alleged?

(b) If so, was the sale-deed fictitious and without consideration as alleged by the defendants?

2. Are the defendants not entitled to plead that the sale-deed was fictitious without admitting execution of the sale-deed?

3. Is the suit within time?

4. Have the defendants perfected title to the property in suit by adverse possession as alleged?

5. Has the plaintiff lost title under S. 28, Limitation Act?

6. To what relief, if any, is the plaintiff entitled?

The learned Judge was of the opinion that the sale-deed by Sahib Dayal in favour of Sri Krishna Das had not been proved to be a genuine document intended to take effect, Sri Krishna Das had, therefore, no title to sell the property to the plaintiff and the plaintiff's suit was dismissed on that ground and some other grounds.

(4a) On appeal, the learned District Judge came to the conclusion that the sale-deed was a genuine document and was for consideration, that Sahib Dayal had sold the property to raise money for payment of the decretal amount due to Davendra Nath, that Sri Krishna Das had in fact paid up

Davendra Nath and that there was no reason for holding that the sale-deed was either fictitious or was not intended to be given effect to. After having recorded a finding to that effect the learned Judge went into the question of limitation and held that the plaintiff's suit was barred by Art. 139, Limitation Act.

(5) The only point for decision in this case, therefore is which Article of the Limitation Act is applicable and whether the plaintiff's suit is barred under Art. 139.

(6) Article 139, Limitation Act is in these terms:

"A suit by a landlord to recover possession from a tenant	twelve years from the date when the tenancy is determined."

It is not difficult to understand what the Article means. The article applies to a case where a suit is brought for possession by dispossession of a person who had entered into possession of the property as a tenant but had continued to remain in possession of the property after the tenancy had been determined. It is not necessary for us to go into the question why the legislature put this limitation of twelve years on the right of a person to file a suit who had let out the property to a tenant and, after the termination of the tenancy, had for a period of twelve years taken no steps to eject the tenant and get back possession of the property. It may be that the legislature intended that the landlords should also be vigilant of their rights and if, for twelve years they had not brought a suit for dispossession, after the tenancy had been determined, they should not be allowed to recover possession of the property.

The words in the third column of Art. 139 are "when the tenancy is determined".

In S. 111, T. P. Act (No. 4 of 1882) more or less the same words have been used. A lease of immovable property, it is said, determines among other causes by efflux of the time limited thereby. It is not necessary to quote the other clauses in that section. Here, if the sarkhat is taken as establishing a tenancy between Sri Krishna Das and Sahib Dayal for a period of one year then the tenancy was determined at the expiry of one year, i.e., on 17-8-1933. The suit should, therefore, have been filed within twelve years from that date. This is the view that has been taken by the learned District Judge.

(7) On behalf of the appellant, however, three points have been raised by learned counsel. The first point is that this was not a suit to which Art. 139, Limitation Act at all applied as the plaintiff had come into court on the basis of his title claiming to be the owner of the property. He had not claimed that he was the landlord and the defendants were his tenants nor had the defendants pleaded that they had ever been his tenants and, as it was not the case of either party that there was a tenancy which had determined, Art. 139, Limitation Act had no application. It is pointed out that the previous suit No. 42 of 1946 on the basis of tenancy had failed on the ground that the plaintiff was not the landlord and the defendants were not his tenants.

(8) The second point raised by learned counsel is that the 'sarkhat' dated 17-8-1932, executed by Sahib Dayal, in the absence of any corresponding document by Sri Krishna Das, could not create a lease for a period of one year and it could not, therefore, be said that there was a tenancy which was determined at the expiry of one year.

(9) The third point is that even if Sahib Dayal was a tenant and the lease was determined on 17-8-1953, Sahib Dayal's possession, and after his death that of his sons, was merely that of a tenant holding over &, on 14-8-1944, when Sri Krishna Das gave him notice to pay rent at the rate of Rs. 13/- per month he assented to their continuance in possession as his tenants and under S. 116, T. P. Act the defendants became tenants and, the property being house property, they must be deemed thereafter to be tenants from month to month and a fresh cause of action arose in plaintiff's favour on the repudiation of the tenancy by the defendants on 17-8-1944.

(10) Taking up the third point first, on the expiry of a lease for a period, S. 108(q), T. P. Act imposes a duty on the lessee to put the lessor into possession of the property. Sahib Dayal, therefore, on the expiry of the period of one year fixed under the lease was bound to put Sri Krishna Das in possession of the property in accordance with the provisions of S. 108(q) T. P. Act. If he did not do so, he was merely a tenant whose lease had expired and who had continued to remain in wrongful possession of the property on the expiry of the lease. It was open in such a case to the landlord to regularise the position by giving his assent to the continuance of possession and in that case the provision of S. 116, T. P. Act would apply and the lessee would, in accordance with the provisions of that section, become a month to month tenant.

In the case before us the question, therefore, is whether the notice given by Sri Krishna Das on 14-8-1944, demanding from the defendants to pay rent at the rate of Rs. 13/- per mensem amounts to recognition of the defendants as tenants, or, in the words of the section, amounts to his assenting to their continuing in possession. It must be noted that there is no suggestion, on behalf of the defendants, that before 14-8-1944, Sahib Dayal or his sons had ever repudiated the tenancy and so they must be deemed to have continued in possession in the same right as before. Learned Counsel for the respondents has urged that this notice demanding payment of rent does not amount to an "assent" and has relied on a decision in — 'Doe on the demise of Godsell v. Inglis', (1810) 128 E R 22 (A). That case was entirely different and is distinguishable. There the landlord gave a notice in which he asked the defendant to quit the premises which he had held under him and the term of which had long since expired. The argument on behalf of the defendant was that the notice itself amounted to a recognition of the possession of the defendant as a tenant but Mansfield, C. J., observed :

> "This writing is not in the least like a notice to quit, but is a mere demand of possession, the defendant's term having then some time since expired."

What his Lordship's decision would have been if the plaintiff had given the usual notice to quit that is given by a landlord to a tenant it is not necessary for us to speculate on.

(11) It is not necessary in this case to go into the question whether, in a case where a defendant has repudiated the tenancy, the landlord can, after such repudiation, give his assent and thereafter claim that the defendant's possession of the property was that of a tenant holding over, as these questions do not arise in this case. It is admitted that barring the fact that rents had never been paid even from the beginning of the tenancy there was nothing else to show that the

defendants or Sahib Dayal had at any time repudiated the title of Sri Krishna Das as owner of the property. If they had, therefore, merely continued to remain in possession after the expiry of one year, their possession is merely that of tenants whose tenancy had terminated by efflux of time and, on the expiry of the tenancy, to regularise their possession all that was needed was the owner's consent so that possession which, after the expiry of the tenancy was without any right, after the consent was given became lawful.

No case in point has been cited at the Bar and we have, therefore, to decide the point as a question of first impression but, as the section is worded, we are inclined to the view that the assent of the landlord to the continuance in possession of the tenant, after the determination of the tenancy, would create a new tenancy and make the tenant a tenant holding over in accordance with the provisions of S. 116, T. P. Act.

(12) In order to create a tenancy at sufferance the tenant should have lawfully entered into possession in recognition of the landlord's superior title and should have continued to remain in possession in the same right after the termination of the tenancy without asserting any title hostile to that of the landlord and without his assent or dissent. The continuance in possession should be due to the laches of the owner in not asking for payment of the rent or vacation of the premises or taking over possession of the property. In Corpus Juris Secundum, Vol. 51, p. 780, 175, it is pointed out that :

"The holding of a tenant at sufferance is the most shadowy estate recognized at common law, and practically the only distinction between such a tenant's holding and the possession of a trespasser is that the land-owner may, by his acquiescence, at any time base on the tenancy at sufferance the relation of landlord and tenant, which he cannot establish at law against a mere trespasser, and that the tenant cannot be subjected to an action in trespass before entry or demand for possession."

The law thus enunciated is in line with the provisions of S. 116, T. P. Act (No. 4 of 1882) which pointed out that:

"If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased as specified in S. 106."

In the case before us the tenant had remained in possession after the determination of the tenancy and, by giving the notice demanding rent for the period after the termination of the tenancy, the landlord must be deemed to have assented to his continuing in possession. The requirements of S. 116, T. P. Act were thus fulfilled and the tenant at sufferance became a tenant from month to month.

(13) The courts in England seem to have taken a slightly different view and no fresh tenancy after the termination of tenancy seems to arise in England unless both parties agree. In — 'Right v. Darby', (1786) 1 TR 159 (B), Lord Mansfield said:

"If there be a lease for a year, and by consent of both parties the tenant continues in possession afterwards, the law implies a tacit renovation of contract. They are supposed to have renewed the old agreement, which was to hold for a year."

(14) In — Day v. Day', (1871) 3 PC 751 (C), it was a case where a tenant had continued to remain in possession for more than thirty years after the termination of the lease. The question arose whether by reason of the provisions of the Statute for the Limitation of actions relating to land, 3 and 4 Will. 4, c. 27(1) the suit for possession could still be maintainable by the landlord. It was pointed out by their Lordships that the Statute was in no way impeded. Their Lordships said:

"Doubtless, an agreement for a fresh tenancy may be implied from acts and conduct, if such are proved, as ought to satisfy a jury that the parties actually made such an agreement, and in that event it is proper to be found by a jury as a material fact in issue..... The language and policy of the Statute require that to constitute this new 'terminus a quo', the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will."

(15) In — 'Dougal v. McCarthy', (1893) 1 QB 736 (D), the premises were let under an agreement in writing for one year. After the expiry of one year the landlord wrote a letter demanding a quarter's rent due in advance. The tenant did not answer but remained in possession. After a month, however, he sent a reply in which he said that he did not wish to continue the tenancy and the landlord might take over possession on a date specified in the reply. Lord Esher, Master of the Rolls held:

"The evidence appears to me clearly to show that the landlord consented to their so remaining in possession as tenants; and that he treated them as tenants from year to year on the terms of the previous tenancy, i.e., at the same rent payable at the same periods as before; for on February 25, he wrote to them demanding a quarter's rent on that footing."

He then went on to say :

"Here there is the landlord's consent, and the fact that the tenants remained in possession after the letter written by him. I take it that it would be a question for a jury in such a case, whether there was the consent of both parties that the tenant should remain in possession after the termination of the expired tenancy. If the tenant under such circumstances remained in possession without saying anything, I should say that a jury ought to conclude that he consented to continue in possession as tenant."

No importance was attached to the fact that after a month of the receipt of the notice the tenant sent a letter that he did not want to continue the tenancy and would like to give it up and asked the landlord to take over possession of the property.

(16) In Field's Landholding and the Relation of Landlord and Tenant, 1883, dealing with the relationship of landlord and tenant in America the learned author in 196 at p. 372 said:

"In every case in which there is no agreement as to the term, the presumption is that the tenancy is for one year only. No tenant is considered to have a right to continue to occupy his holding without his landlord's consent; but if he is allowed to hold over for a month after the expiry of his lease, the law presumes the

revival of the tenancy of a whole year but not longer."

From the quotation it would appear that all that is necessary is the landlord's consent and no fresh agreement between the landlord and the tenant.

(17) In Foa's General Law of Landlord and Tenant, 7th Edition, p. 388, para. 606 it is said:

"Though the act of holding over after the expiration of the term does not necessarily create a tenancy of any kind—it being in such case a question of fact what the intention of the parties was — yet when a tenant continues in possession after such expiration by consent of his landlord, he is deemed 'prima facie' a mere tenant at will."

(18) In Hill and Redman's Law of Landlord and Tenant, 11th Edn., p. 19, in the notes on that page it is said:

"Any consent by the landlord to the holding over constitutes a tenancy at will, though a written acknowledgment that the tenant holds "on sufferance only" has been held to be a mere acknowledgment and not to require to be stamped as an agreement for a tenancy."

(19) As we have already said no case of the courts in India has been cited at the Bar and we have been asked to decide this question as a matter of first impression. After having however looked into the various authorities on the point we are of the opinion that after the expiry of one year of the lease dated 17-8-1932, Sobha Ram continued in possession of the property as a tenant holding over. It is not suggested that he, or, after his death, his legal representatives had at any time asserted any adverse title to the property before 14-8-1942, when the landlord demanded payment of rent and also the arrears for three years and thereby assented to the tenant's continuing in possession which gave rise to a fresh tenancy in accordance with the provisions of S. 116, T. P. Act and on 17-8-1944, the defendants having repudiated the tenancy and set up an adverse title a fresh cause of action arose in plaintiff's favour to file a suit for possession of the property. The plaintiff, however, first filed a suit for ejectment treating the defendants as tenants but that suit having failed on the ground that there was no relationship of landlord and tenant between the parties this suit was brought on the basis of title and the cause of action for the suit arose on 17-8-1944, when the plaintiff's title was repudiated.

(20) It is urged by learned Counsel that even if it was possible for the lessor by giving his assent to convert a tenant holding over, he could not by his mere assent convert the representative of a tenant by sufferance into a tenant. Reliance is placed on a ruling of the Madras High Court in — 'Vadapalli Narasimham v. Dronamraju Seetharamamurthy', 31 Mad 163 (E). In that case the learned Judges held that if a tenant after the expiry of the lease in his favour had continued to remain in possession as a tenant by sufferance and had then died, the position of his legal representative in possession of the premises was that of a trespasser and not a tenant by sufferance and in case of the legal representative any implication that a tenancy was subsequently created by consent was negatived. In other words, though in the case of a tenant in possession after the expiry of the tenancy the law will presume a tacit renovation of that contract if the landlord agrees to the tenant's continuance in possession the same presumption would not arise in the case of a legal representative of a tenant who had died after the termination of the tenancy. In that case it was held that

"The representatives of a tenant by sufferance who enter after his death cannot, in our opinion, be said to have ever been tenants within the meaning of Art. 139, and a suit against them would appear to fall within Art. 144."

Though reliance is placed by learned Counsel for the respondents on the first part of the judgment that S. 116, T. P. Act will not apply to a legal representative of a tenant whose tenancy had terminated, learned counsel has urged that the decision that Art. 139 would not apply and it was Art. 144 that was applicable was wrong and was not accepted by the same High Court in — 'Subbaveti Ramah v. Gundala Ramanni', 33 Mad 260 (F). In the latter case the learned Judges doubted the correctness of the whole of the decision in — 'Vadapalli Narasimham's case (E)' and said—

"It seems doubtful whether the fiction of a tenancy by sufferance should be kept up after the T. P. Act, according to which a lease is determined by efflux of the time limited thereby (see S. 111). Such a tenancy does not operate in England to interrupt the running of the time. See — '(1871) 3 PC 751 at p. 761 (C)'. Nor under Art. 139, is it of any avail to the landlord. Whether for purposes of Art. 144 a distinction should be made between Kondanna and his sons appears to be doubtful. But however this may be, there seems to us to be nothing wrong in holding that if the plaintiff would be barred against Kondanna if now alive, he would be likewise barred against his sons."

Whether we use the words "tenancy by sufferance" or not, the position is that a possession lawfully obtained would not become adverse unless an assertion has been made setting out an adverse title against the owner of the property.

(21) When a suit is filed and a particular article of the Limitation Act is said to apply the question arises, whether on the facts stated or found that Article of the Limitation Act is applicable. Article 139, Lim. Act applies only to a case where a suit is brought by a landlord against a tenant for possession of the property and such a suit should be filed within twelve years of the determination of the tenancy. If the defendants being the legal representatives of Sahib Dayal were not tenants on sufferance but held the property under an independent title of their own then Art. 139 would not apply at all. If, on the other hand, they held the property in the same right as Sahib Dayal, being his legal representatives, there is no reason why the position should be different and the landlord should not be able to give his assent to their continuing in possession as he could have done if Sahib Dayal was alive. We may point out that the view expressed by the learned Judges that a tenant or his legal representative in possession of the property after the expiry of the lease is in adverse possession of the property has not been uniformly accepted and the Madras High Court itself has in a later decision in — '33 Mad 260 (F)' taken a contrary view.

(22) In our view, therefore, when Sri Krishna Das, before the expiry of twelve years from the date of the termination of the tenancy, gave the notice demanding payment of rent on 14-8-1944, the defendants became from that date tenants holding over. The cause of action on which this suit is brought is the repudiation of the tenancy and the assertion by the defendants that they were the owners of the property. So a fresh cause

of action arose against them by reason of their notice, Ext. 14 dated 17-8-1944, and Sri Krishna Das or the plaintiff to whom he sold the property could bring a suit for possession of the property within twelve years under Art. 144, Limitation Act.

(23) A reference may also be made to a decision of their Lordships of the Judicial Committee in — 'Mt. Allah Rakhi v. Mohammad Abdur Rahim', AIR 1934 PC 77 (G). The facts of that case were very different from the facts of this case, but there is an observation of their Lordships which may be quoted with some benefit. The defendants in that case had relied on Art. 144, Limitation Act and they had also in the alternative relied on Art. 139. Their Lordships observed—

> "The learned Counsel for the appellants referred to Art. 139 as well as Art. 144. It may be noted at once that the appellant's plea of adverse possession is obviously inconsistent with the application of Art. 139, which relates to the case of a landlord suing to recover possession from a tenant."

No doubt it does not appear from the judgment of their Lordships that there had ever been a tenancy created in defendants' favour and the defendants were claiming that from the date of their removal by Sajjadanashin they ceased to be mujawars and were in adverse possession of the property, but the observation of their Lordships pointed out above is that in a case where after the determination of a tenancy a tenant has remained in possession a suit by the landlord for his ejectment would be governed by Art. 139; where, however, a different title is set up, that is, of adverse possession, Art. 144, Limitation Act would become applicable.

(24) The last point that now remains to be decided is whether it could be said that there was a lease created in favour of Sahib Dayal for a period of one year, when Sri Krishna Das had not executed any written document in his favour and Sahib Dayal had merely executed a kabuliat. Learned counsel has placed reliance on S. 107, T. P. Act and has urged that a lease of immoveable property must be executed by both the lessor and the lessee, and as there was no lease executed by the lessor no lease came into existence. As regards leases not exceeding one year, however, a lease of immoveable property can be created by oral agreement accompanied by delivery of possession. The lessor did not execute any document and it is the lessee alone who executed a 'kabuliat' but, as the lessee was in possession of the property after the execution of the 'kabuliat' and after he had handed over the 'kabuliat' in the original to the lessor from whose possession it was filed, we may presume under S. 114, Evidence Act that there must have been an oral agreement between the lessor and the lessee agreeing to the terms on which the lessee was being put in possession of the property and there was, therefore, an oral agreement accompanied by delivery of possession which satisfies the requirements of S. 107, T. P. Act.

Learned Counsel has drawn our attention to two single Judge decisions, — 'Ganga Sahai v. Badrul Islam', AIR 1942 All 330 (H) and 'Chotey Lal v. Mst. Durga Bai', AIR 1950 All 661 (I). In the first case a learned single Judge held that in the absence of a deed of lease executed by the lessor by the execution of a 'kabuliat' by the lessee no lease is created and the position of a lessee is that of a mere licensee. In the second case the learned single Judge has not decided what the position of the lessee would be but merely contented himself by saying that there was no valid lease created. It does not appear to have been argued before the learned Judges that it was not necessary in the case of a lease which was not for a period of more than one year or did not reserve an yearly rent that a written document should be executed by the lessor and it was open to the parties to enter into an oral agreement accompanied by delivery of possession. The circumstances enumerated above, that is, the execution of the 'kabuliat' by the lessee, the handing over of the 'kabuliat' to the lessor, and the lessor thereupon putting the lessee in possession, can lead only to one conclusion that there had been an oral agreement in accordance with the terms of which the lessee was put in possession. We are, therefore, satisfied that there was a lease as contemplated by S. 107, T. P. Act.

(25) The result, therefore, is that, in our view, the plaintiff's suit was within time and the lower Court wrongly dismissed it on that ground. This appeal is, therefore, allowed. The decrees of the lower Courts are set aside. The plaintiff's suit for delivery of possession by ejectment of the defendants is decreed and the plaintiff is entitled to the compensation claimed.

(26) The plaintiff will be entitled to his costs in all the Courts.

B/R.G.D. Appeal allowed.

A.I.R. 1954 ALLAHABAD 480 (Vol. 41, C.N. 198)

MALIK C. J. AND ROY J.

Mohanlal, Defendant-Appellant v. Kanwar Sen, Plaintiff-Respondent.

Letters Patent Appeals Nos. 4 and 3 of 1952, D/- 18-12-1953, against judgment of Mushtaq Ahmad J., reported in AIR 1953 All 598.

(a) Letters Patent (All.), Cl. 10 — New point — (Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 15).

Decree for realisation of rent and for eviction — Execution — Sanction under S. 15, Rent Control and Eviction Act granted by Additional District Magistrate — Sanction later on filed in District Judge's Court in execution proceedings — No objection on ground that A. D. M. had no authority to grant sanction, raised in that Court nor raised even in High Court in second appeal — Point raised for the first time in special appeal — Point held would necessitate further enquiry into the question whether District Magistrate had delegated his authority to A. D. M. and A.D.M. was qualified to grant sanction — Such a point held could not be allowed. (Para 11)

Anno: Civil P. C., App. II; L. P., Cl. 15 N. 14. 1953 Mulla: App. II, "Charters.....Courts", P. 1467, N. "Whether.....appeal" and P. 1471 N. "Points.....heard" (1 Pt. extra in N. 14 to Cl. 15 in AIR Com. — 1 Pt. extra in N. "Points.....heard" to Cl. 15 in Mulla — Lahore view and Madras view before 35 Mad 1 (FB), not noticed in N. "Whether.....appeal" to Cl. 15, on P. 1467 in Mulla).

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 15, 3 — Applicability and scope — Grounds for sanction — Permission of District Magistrate on ground other than mentioned in clauses (a) to (f) of S. 3.

Under the general law a tenancy is always terminable in accordance with the terms of the tenancy after a proper notice terminating the tenancy is given by the landlord. After the termination of the tenancy, every landlord has a right to file a suit for ejectment. But by reason of dearth of accommodation and to prevent landlords being able to harass tenants with the object of rack renting them, the Rent Control and Eviction Act set out certain grounds which it considered fair and just and if any of those grounds exists, the landlord has a right to eject a tenant. Under S. 15 of that Act no decree can be passed except on one or more of the grounds mentioned in S. 3 of the Act. If, however, the grounds (a) to (f) as stated in S. 3 are not available, but there is some other good ground why the tenant should be ejected and the landlord given back possession of the premises, a discretion is left in the District Magistrate to grant permission where he considered that the facts justify such grant. Thus in S. 15 words "on one or more grounds mentioned in S. 3" relate not only to grounds (a) to (f) but the permission of the District Magistrate can also be taken to be a ground for passing a decree, and a decree for eviction can be passed even in a suit pending disposal on the date the Act came into force if his permission is obtained. AIR 1951 All 396, Ref.

(Paras 14, 15)

(c) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 — Applicability and scope.

The words "to file a suit" in a case where the decree had already been passed before the U. P. Act 3 of 1947 came into force mean "to institute proceedings for execution by ejectment of the tenant" and in the case of a suit pending on the date when the Act came into force mean "to continue the same". The District Magistrate can therefore, grant permission either to execute a decree for ejectment already obtained or to continue a suit for ejectment filed before the Act came into force and it is not necessary that the permission must precede the filing of a suit in every case. AIR 1952 All 819; AIR 1949 Cal 674, Not followed; AIR 1954 All 111, Foll.

(Paras 17, 18)

(d) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 (1) (a) — Wilful default.

Where it was not even alleged by the tenant that there was an agreement between the parties that the landlord will accept the rent by a bank draft and if the tenant sent a bank draft in payment of arrears of rent and because it did not reach the landlord and was lost in the post, the landlord demanded the rent and the tenant refused to make the payment as he thought that sending the bank draft amounted to payment. Held that the sending of a bank draft did not amount to payment or even a tender of the amount due and the defendant must be deemed to have been guilty of wilful default within the meaning of S. 3 (1) (a). AIR 1952 All 504, Foll.

(Paras 19, 20)

(e) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 3, 14, 15 — Scope.

Sections 3, 14 and 15 should be so interpreted as to place the landlord and the tenant, more or less, in the same position. There is no reason why a landlord who had already obtained a decree for ejectment or who had filed a suit for ejectment before the Act came into force should be placed in a worse position than a landlord who wants to institute a suit after the Act came into force and he should be deprived of the opportunity of satisfying the District Magistrate that there are grounds not mentioned in Cls. (a) to (f) of S. 3 (i) which entitled him to eject the tenant.

(Para 16)

S. B. L. Gaur and S. S. Verma, for Appellant; J. N. Wagherey, for Respondent.

CASES REFERRED: Paras

(A) (V38) AIR 1951 All 396: 1951 All LJ 154 8, 10
(B) (V40) AIR 1953 All 62: 1952 All LJ 486 11
(C) (V39) AIR 1952 All 819 17
(D) (V36) AIR 1949 Cal 674: 53 Cal WN 855 17
(E) (V41) AIR 1954 All 111: 1953 All LJ 555 18
(F) (V39) AIR 1952 All 504: 1952 All LJ 152 20

MALIK C. J.:

These two special appeals are connected and can be disposed of by one judgment. Letters Patent Appeal No. 4 of 1952 is against the decree in Second Appeal No. 855 of 1946 and Letters Patent Appeal No. 3 of 1952 is against an order in Execution Second Appeal No. 231 of 1950.

(2) The facts are not complicated but some difficulty has been created by reason of a recent enactment. The defendant had taken a house on rent under a registered lease dated 27-4-1938, for a period of one year. On the expiry of the year the defendant continued to remain in possession. The plaintiff alleged in the plaint that after the expiry of the year the tenancy became a month to month tenancy according to the Hindi calendar and the defendant was liable to pay to the plaintiff rent at the rate of Rs. 55/- per month. These averments were admitted by the defendant in the written statement. The fact being admitted in the pleadings, it is not possible for learned counsel now to urge that the tenancy was not a month to month tenancy according to the Hindi calendar and the notice to quit was, therefore, defective.

(3) On 8-12-1944, the plaintiff said that rent for four months had been in arrears and gave the defendant a notice to quit with effect from the end of the Hindi month. A second notice was given on the 23rd of December but we are not concerned with it, as that notice was given as a matter of extra precaution. On 10-1-1945, the plaintiff filed a suit for realisation of rent and for ejectment of the defendant.

(4) One of the pleas taken in defence and repeated before us was that the notice to quit was not in accordance with law. This argument was based on the ground that the tenancy was not a month to month tenancy in accordance with the Hindi month. The lower Courts have on the basis of evidence recorded a finding that the tenancy was a month to month tenancy according to the Hindi month. In view, however, of the admission in the written statement it was not open to the defendant to urge that the tenancy was not in accordance with the Hindi calendar month. Be that as it may, on the findings recorded that the tenancy was a month to month tenancy according to the Hindi month and the notice dated 8-12-1944, required the defendant to vacate the premises at the end of the Hindi month, the notice was rightly held to be a valid notice.

(5) As regards the arrears, the plaintiff had claimed that a sum of Rs. 220/- was due for four months in accordance with the Hindi month commencing from the 3rd of September and ending with 29-12-1944. The defence was that on 2-11-1944, the defendant had sent a draft on the Jwala Bank to the plaintiff at Calcutta for a sum of Rs. 110/- to cover the rent of the first two months that was in arrears. The plaintiff's case was that this draft never reached him and he had already, when on a previous occasion the defendant had sent rent by a bank draft, written to the defendant that it caused inconvenience to him and that he should sent rent by money order and not by bank drafts.

(6) The Manager of the Jwala Bank gave evidence that the draft had not been cashed. The plaintiff's statement has been believed that the draft was lost in the post and it never reached him. The defendant was examined as a witness and he did not say that the plaintiff had ever agreed to any arrangement that payment may be made by bank drafts. The fact, therefore, that the defendant sent a bank draft to the plaintiff on 2-11-1944, which, however, never reached him, cannot be treated either as a valid payment or even as a valid tender. On 11-12-1944, the defendant sent a money order for Rs. 55/- but this was addressed to Rajnarain Phoolchand. The learned Munsif has observed as follows:

> "The money order for Rs. 55/- was sent on 11-12-1944, to Rajnarain and Phoolchand. It is not shown who is Rajnarain and Phoolchand."

Even if it be assumed that Rajnarain Phoolchand represented the plaintiff and the plaintiff had refused to receive the money order, it could not affect the plaintiff's rights as the plaintiff was not bound to accept Rs. 55/- when a sum of Rs. 165/- was due to him. The money order of Rs. 55/- having been refused, the money was returned to the defendant by the Post-office. On 2-1-1945, the defendant sent another money order, this time of Rs. 110/- and this was addressed to the plaintiff. The plaintiff refused to accept this money order and that too was returned to the defendant.

(7) The position, therefore, is that the defendant had sent a bank draft for Rs. 110/- but it never reached the plaintiff and, in law, it cannot be deemed to be either a valid tender or a valid payment. The money order of Rs. 55/- could only be in part payment and the plaintiff was not bound to accept it. The money order of Rs. 110/- was also in part payment and the plaintiff was not bound to accept that either.

(8) The trial Court held that the sum of Rs. 222-8-0 was due to the plaintiff and on 26-5-1945, decreed the suit for ejectment and for arrears of rent. The defendant filed an appeal which was dismissed by the lower appellate Court on 22-12-1945. The defendant then filed a Second Appeal No. 855 of 1946 in this Court on 13-3-1946. The appeal was admitted by a learned Single Judge on 26-4-1946. On 1-3-1947, the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) was passed. Section 1 (3) of the Act provides that—

> "the Act shall be deemed to have come into force on the first day of October, 1946."

The Act came into force, therefore, during the pendency of the appeal in this Court. A Bench of this Court has held that an appeal is a continuation of a suit and the Act must be deemed to have been intended to apply not only to pending suits but also to pending appeals: see the case of — 'Manzoor Ali Usmani v. Mt. Lal Devi', AIR 1951 All 396 (A).

(9) The decree-holder had applied for execution of his decree for ejectment and arrears of rent and the defendant-appellant judgment-debtor thereupon filed an application for stay of execution of the decree under O. 41, R. 5, Civil P. C. This application was dismissed and the execution proceedings were, therefore, continued in the lower Court. During the execution proceedings the defendant raised an objection under the Rent Control and Eviction Act and the plaintiff decree-holder thereafter applied to the District Magistrate for permission to eject the defendant. On 3-7-1948, the Additional District Magistrate granted the permission, the operative portion of which is as follows:

> "I, therefore, permit Kunwar Sen to file a civil suit for the ejectment of Mohan Lal, if necessary, and also for the execution of the civil Court's decree for ejectment if required."

It was on the strength of this permission that the learned District Judge dismissed the objection of the judgment-debtor and allowed the decree for ejectment to be executed. Against the order passed by the learned District Judge rejecting the objection to the execution of the decree the judgment-debtor filed in this Court Execution Second Appeal No. 231 of 1950. The Second Appeal No. 855 of 1946 and the Execution Second Appeal No. 231 of 1950 were connected at the request of the appellant and both cases were heard together and disposed of by one judgment by the learned single Judge.

(10) On the strength of the decision in — 'Manzoor Ali Usmani's case (A)' it has been urged by learned counsel that though the suit for ejectment had been decreed by the lower Courts, as an appeal against that decree was pending in this Court, S. 15 of the Act was applicable and the decree for ejectment passed by the lower Courts could be affirmed only if any of the grounds mentioned in S. 3 of the Act existed.

(11) It is urged by learned counsel that as grounds mentioned in S. 3 which could entitle this Court to affirm the decree for eviction did not exist the decree could not be affirmed and the sanction received from the Additional District Magistrate was not a 'ground' within the meaning of S. 15 and, in any case, the sanction being of the Additional District Magistrate, and not the District Magistrate, it was bad in law. In support of the last point mentioned above reliance is placed on the decision in — 'Kedar Nath v. Mool Chand', AIR 1953 All 62 (B). The sanction was, however, filed in the Court of the learned District Judge in the execution appeal, pending in this Court and no objection on the ground that the Additional District Magistrate had no authority to grant the sanction was raised in that Court nor was such an objection raised before the learned single Judge. We cannot, therefore, in this Special Appeal allow learned counsel to raise a new point specially as it would necessitate further enquiry into the question whether the District Magistrate had delegated his authority to the Additional District Magistrate and the Additional District Magistrate was, therefore, qualified to grant the sanction.

(12) The question, however, remains whether the permission given to file a civil suit for ejectment or for the execution of the civil Court's decree for ejectment entitled the learned single Judge to dismiss the appeal and affirm the decree for ejectment.

(13) Section 15 of the Rent Control Act is as follows—

"In all suits for eviction of a tenant from any accommodation pending on the date of the commencement of this Act, no decree for eviction shall be passed except on one or more of the grounds mentioned in S. 3."

The learned single Judge laid stress on the words "no decree for eviction shall be passed" and he came to the conclusion that, if one or more of the grounds mentioned in S. 3 exist, then a decree for eviction can be passed. The question, therefore, arises what the words "one or more of the grounds mentioned in S. 3" mean.

(14) The relevant part of S. 3 (1) is as follows:

"Subject to any order passed under sub-section (3) no suit shall, without the permission of the District Magistrate, be filed in any civil Court against a tenant for his eviction from any accommodation, except on one or more of the following grounds."

Thereafter grounds (a) to (f) are mentioned. If the words "on one or more grounds mentioned in S. 3" relate to grounds (a) to (f) only, then the decree can be passed only if grounds (a) to (f) exist. If, on the other hand, the permission of the District Magistrate can also be taken to be 'a ground' for passing a decree, then a decree for eviction can be passed even in a suit pending disposal on the date the Act came into force if such permission has been obtained.

(15) It has been held in several cases that the Act was intended to apply to decrees which had been passed before the Act came into force but which have to be executed after that date, to suits pending on the date when the Act came into force and to suits instituted after that date. It has also been held by this Court that the legislature in enacting S. 3 left the discretion to the District Magistrate to grant permission as it was not possible to define all cases where a landlord should have the right to eject a tenant.

Under the general law a tenancy is always terminable in accordance with the terms of the tenancy after a proper notice terminating the tenancy is given by the landlord. After the termination of the tenancy, every landlord has a right to file a suit for ejectment. By reason of dearth of accommodation and to prevent landlords being able to harass tenants with the object of rack-renting them, the Act set out certain grounds which it considered fair and just and if any of those grounds existed, the landlord had a right to eject a tenant. If, however, the grounds (a) to (f) were not available, but there was some other good ground why the tenant should be ejected and the landlord given back possession of the premises, a discretion was left in the District Magistrate to grant permission where he considered that the facts justified such grant.

As the Act originally stood, it was held by a Bench of this Court that this was, more or less, an executive or an administrative function exercised by the District Magistrate and the exercise of his discretion could not be challenged in a court of law. Now, however, the Act has been amended and the refusal to grant permission to file a suit has been made appealable to the Commissioner.

(16) The learned single Judge relied on the words "no decree for eviction shall be passed" and held that while S. 3, which relates to the filing of a suit, lays stress on the pre-requisites for a filing of a suit, S. 15 which relates to pending suits, lays stress on the date when the decree is passed and, therefore, if the same conditions existed on the date when the decree has to be passed, as would have entitled the plaintiff to file a suit, there is no reason why a decree for ejectment should not be passed in plaintiff's favour.

There is a lot to be said for the view taken by the learned single Judge specially as all the three Ss. 3, 14 and 15 should be so interpreted as to place the landlord and the tenant, more or less, in the same position. There is no reason why a landlord who had already obtained a decree for ejectment or who had filed a suit for ejectment before the Act came into force should be placed in a worse position than a landlord who wants to institute a suit after the Act came into force and he should be deprived of the opportunity of satisfying the District Magistrate that there are grounds not mentioned in Cls. (a) to (f) of S. 3(1) which entitled him to eject the tenant.

(17) It is, however, pointed out that there are several decisions of this Court to the effect that the permission of the Magistrate under S. 3(1) must be obtained before a suit for ejectment is filed. This was held by a Division Bench of this Court in — 'R. N. Seth v. Girja Shankar', AIR 1952 All 819 (C). The same view was taken by a Bench of the Calcutta High Court in — 'Gupta Chowdhury v. Manmatha Nath', AIR 1949 Cal 674 (D). Section 3(1) provides that "no suit shall, without the permission of the District Magistrate, be filed in any civil court against a tenant for his eviction from any accommodation". It is, therefore, urged that the District Magistrate's permission must precede the filing of the suit and the District Magistrate can only grant permission to file a suit and he cannot, therefore, grant permission either to execute a decree for ejectment already obtained or to continue a suit for ejectment filed before the Act came into force.

There is considerable force in this argument and it is desirable that the Act be so amended that the point is made clear so that Ss. 3, 14 and 15 may be brought in line and the rights of the landlord and the tenant may, in all cases, that is, in case of a decree obtained before the Act came into force in a pending suit and in a case where a suit has been instituted after the Act came into force, be the same.

(18) The point, however, was considered by a Division Bench of this Court, to which one of us was a party — 'Sunder Lal v. Mohammad Ishaq', AIR 1954 All 111 (E), by which decision we are bound. The words "to file a suit" in a case where the decree had already been passed before the Act came into force were interpreted to mean "to institute proceedings for execution by ejectment of the tenant" and in the case of a suit pending on the date when the Act came into force to mean "to continue the same". In view of that decision this appeal must fail and has to be dismissed.

(19) There is, however, another reason why this appeal should fail. We have already said that on 8-12-1944, the plaintiff had given a notice to the defendant terminating the tenancy, as rent for four months was in arrears and a sum of Rs. 220/- was due. The suit for ejectment was filed on 10-1-1945 after the expiry of one month. The defendant did not pay the amount. On 11-12-1944 he sent a money order of Rs. 55/- only and when the money order was returned to him as refused, he sent another money order of Rs. 110/- on 2-1-1945. The defendant had thus made a wilful default within the meaning of S. 3(1)(a) of

the Rent Control and Eviction Act. That sub-section is as follows :

"that the tenant has wilfully failed to make payment to the landlord of any arrears of rent within one month of the service upon him of a notice of demand from the landlord."

We looked into the evidence as the lower appellate court had not recorded a finding on the point but the facts were really not in dispute. The fact that the rent for four months was due is admitted by the defendant himself. The defendant relied on the sending of the draft for Rs. 110/- on 2-11-1944 and having sent that draft on 2-11-1944, he considered that it was not necessary for him to either tender or to pay 220/- the whole amount due. He, therefore, sent a money order of Rs. 55/- and then a money order of Rs. 110/-, rent payable for two months. It is not even alleged by the defendant that there was an agreement between the parties that the plaintiff will accept the rent by a bank draft. If the defendant, therefore, sent a bank draft in payment and it did not reach the plaintiff and was lost in the post, the defendant must suffer the consequences. The plaintiff having demanded from the defendant the rent for four months there was no justification for the defendant not sending the whole amount.

(20) Learned counsel has, however, urged that this does not amount to 'wilful default' within the meaning of those words in S. 3. There are several decisions of this Court dealing with that point. It has been held in — 'Radhey Mohan v. Hamarain Das', AIR 1952 All 504 (F), that the words 'wilful default' only mean that it was not an unintentional failure or a failure by inadvertence but a deliberate failure where the mind has been brought into play and a man has, after taking the facts into consideration, refused to make the payment. In that case also the defendant had believed that he was liable to pay rent at a lower rate than the rate claimed by the plaintiff and had, therefore, refused to pay the amount for which the notice had been given. It was held that this amounted to 'wilful default'.

Here the defendant refused to make the payment as he thought that sending the bank draft amounted to payment. We have already pointed out that sending a bank draft did not amount to payment or even a tender of the amount due. In the circumstances the defendant must be deemed to have been guilty of wilful default.

(21) There is, therefore, no reason to interfere with the order passed by the learned single Judge. These appeals have no force and are dismissed with costs.

B/H.G.P. Appeals dismissed.

A.I.R. 1954 ALLAHABAD 484 (Vol. 41, C.N. 199)

MALIK, C. J. AND ROY J.

Balwant Singh, Appellant v. Maharaj Singh and others, Respondents.

Execution Second Appeal No. 1264 of 1949, D/- 17-12-1953, against decree of Dist. J., Moradabad, D/- 29-7-1949.

Civil P. C. (1908), O. 21, R. 53(3) — Decree attached in execution — Attaching decree-holder is not legal representative of decree-holder — Decree of attaching decree-holder struck off as fully satisfied — Decree-holder is not bound by the order.

The word "legal representative" is defined in the Code of Civil Procedure and the definition does not include an attaching decree-holder who has attached a decree in favour of his judgment-debtor. There is no provision in the Code of Civil Procedure that a decree-holder who has attached a decree in favour of his judgment-debtor in execution of his own decree becomes clothed with all the rights of that decree-holder. Order 21, R. 53 has merely introduced a legal fiction. It provides for attachment of a decree in favour of a judgment-debtor and it also gives such an attaching decree-holder the right to execute the attached decree. The words "deemed to be the representative of the decree-holder" in sub-r. (3) of R. 53 of O. 21 must be confined to the purpose mentioned in sub-rule (3). AIR 1940 PC 167, Relied on. (Para 8)

M obtained a decree for Rs. 4000/- against B. This decree was attached by Y in execution of his decree for Rs. 185/- against M. Y's decree having been satisfied, his execution against M was struck off as fully satisfied:

Held that M was not bound by the order of the executing court dismissing the execution of Y in full satisfaction. (Para 9)

Anno: Civil P. C., O. 21, R. 53, N. 10.

1953 Mulla: O. 21, R. 53, P. 841, N. "Sub-rule 3: representative" (6 Pts. extra in N. 10 to O. 21, R. 53 in AIR. Com.)

B. D. Gupta, for Appellant; Krishna Sahai, for Respondents.

CASES REFERRED: Paras

(A) (V17) AIR 1930 All 659: 1930 All LJ 945 6
(B) (V34) AIR 1947 All 174: 1946 All LJ 354 7
(C) (V27) AIR 1940 PC 167: 1940 All LJ 617 (PC) 8

MALIK C. J. :

This is judgment-debtor's appeal. Maharaj Singh and others filed a suit No. 139 of 1944 and obtained a decree for over Rs. 4,000/- against the appellant Balwant Singh. On 21-1-1948, Maharaj Singh applied for execution of the decree. The judgment-debtor, Balwant Singh, raised an objection that the whole decree had been satisfied. This objection has been overruled by the lower Courts except to this extent that the amount due to one Yad Ram was allowed to be deducted & the decree was held to be executable for the balance. It is against this order that this Execution Second Appeal was filed.

(2) Yad Ram had four revenue decrees for small amounts, the total of which was Rs. 185/- odd. In execution of those decrees it is said that Yad Ram had attached the decree in Suit No. 139 of 1944. Neither the attachment order nor the record of the revenue court has been summoned here, so we do not know the date on which such an attachment was made, but we may assume that the decree in Suit No. 139 of 1944 was attached.

(3) It is said that after having attached the decree in Suit No. 139 of 1944 Yad Ram applied for execution of that decree. The record of those proceedings has also not been summoned to this Court and, therefore, it is not possible for us to check up the statement of facts given by learned counsel.

Learned counsel has, however, stated that in this application for execution Yad Ram prayed that the decree in Suit No. 139 of 1944 be executed, certain moveable properties belonging to the judgment-debtor, Balwant Singh, be sold and the sum of Rs. 185/- odd due to Yad Ram be realised so that his decrees may be satisfied. The details of the amounts due under the four decrees

were given in the remarks column and the prayer has been read out by learned counsel from his brief.

On 21-10-1946, Yad Ram proceeded along with the Amin to have the property attached and then he made a statement to the Amin to the following effect:

"kul matalba munderje parwana kurki bad minhai fees kurki Balwant Singh madyun decree se vasul paye lihaza kurki karana manzur nahi hai."

Neither the statement nor the Amin's report on the basis thereof, nor the parwana kurki are before us, but it is urged by learned counsel that these words mean that Yad Ram had received the total amount of Rs. 4,000/- odd due under the decree in Suit No. 139 of 1944.

The lower Courts have not accepted this contention and we have no reason to differ from the conclusions arrived at by the lower Courts. Yad Ram was interested only in his sum of Rs. 185/- odd and he wanted to realise that amount by execution of the decree in Suit No. 139 of 1944 and when he said "kul matalba munderje parwana" it does not necessarily mean that he meant anything more than the amount due to him. However, on the basis of this statement the Amin made a report that Yad Ram had said that the amount mentioned in the 'parwana' had been received and on 2-11-1946, the learned Judge struck off the execution application filed by Yad Ram in full satisfaction.

(4) Great reliance has been placed by learned counsel on this order of 2-11-1946, but, if Yad Ram had executed the decree only for the purpose of realising the amount due to him, the fact that the execution application was dismissed in full satisfaction does not necessarily mean that the learned Judge intended to hold that the whole amount of Rs. 4,000/- odd due under the decree had been paid. The lower Courts have held that Yad Ram was paid only the amount due under his four decrees and that seems to us to be correct.

(5) Learned counsel for the respondents has urged that even if it be assumed that on 2-11-1946, the executing court had intended to hold that the whole amount of the decree in Suit No. 139 of 1944 had been paid, this cannot bind Mahraj Singh as no notice had been given to him and he cannot, therefore, be deemed to be a party to the proceedings. He has further urged that even if Balwant Singh had made any payment out of Court to Yad Ram in excess of the amount due to him such a payment cannot affect the rights of Mahraj Singh and the payment must be deemed to have been made by Balwant Singh at his own risk.

(6) On behalf of the appellant it is urged that Yad Ram must be deemed to be the legal representative of Mahraj Singh and, if in the presence of Yad Ram the decree was held to be satisfied and was struck off in full satisfaction, Mahraj Singh was bound by that order.

Reliance for this submission is placed on two decisions of this Court. In — 'The Unao Commercial Bank Ltd., Unao v. Mohar Gobind Rai', AIR 1930 All 659 (A), Sheo Nandan Prasad had a decree against two persons whose names need not be given. The Unao Commercial Bank and the Punjab National Bank held money decrees against Sheo Nandan Prasad. The Unao Commercial Bank applied for execution of the decree. The Punjab National Bank also filed an application for execution and both the banks attached the decree that Sheo Nandan Prasad had obtained against his judgment-debtors.

A sum of Rs. 1,000/- was paid to the pleader of the Unao Commercial Bank, decree-holder. This amount the pleader failed to deposit in court and he died. The Punjab National Bank claimed that this payment to the pleader of the Unao Commercial Bank should be deemed to be an unauthorised payment and the Punjab National Bank should be entitled to realise the whole amount due, ignoring the payment of Rs. 1,000/- by the judgment-debtors of Sheo Nandan Prasad. The question, therefore, arose of the rights of the decree-holders who have in execution of their own decrees attached the decree in favour of their judgment-debtor against a third party.

The learned Judges were of the opinion that an attaching decree-holder stepped into the shoes of the decree-holder of the decree attached and must be deemed to be the legal representative of such a decree-holder.

Reliance was placed by the learned Judges on O. 21, R. 53(3), Civil P. C. That case, however, does not help the appellant as the amounts due in favour of the Unao Commercial Bank and the Punjab National Bank were far in excess of the sum of Rs. 1,000/- and they or any of them had therefore the right to realise the amount and the payment made to the Unao Commercial Bank could not be deemed to be an unauthorised payment.

(7) In — 'Firm Ram Bux Nath Mal v. Firm Mansa-Ram Murli-Dhar', AIR 1947 All 174 (B), the point that arose for decision was whether a judgment-debtor under a decree that had been attached could raise the point that the decree in favour of the attaching decree-holder was time-barred.

The learned Judges were of the opinion that the attaching decree-holder was the legal representative of the decree-holder of the attached decree and the judgment-debtor could not raise an objection that the decree in favour of the attaching decree-holder was barred by limitation. The decision in that case has no bearing on the question for decision before us, but reliance is placed on certain general observations about the rights of the attaching decree-holder.

(8) The word "legal representative" is defined in the Code of Civil Procedure and the definition does not include an attaching decree-holder who has attached a decree in favour of his judgment-debtor. There is no provision in the Code of Civil Procedure that a decree-holder who has attached a decree in favour of his judgment-debtor in execution of his own decree becomes clothed with all the rights of that decree-holder. Order 21, R. 53, Civil P. C. has merely introduced a legal fiction. It provides for attachment of a decree in favour of a judgment-debtor and it also gives such an attaching decree-holder the right to execute the attached decree.

Sub-rule (3) of R. 53 of the Order provides that

"The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof."

Read as a whole the sub-rule means that the attaching decree-holder will have the right to execute the attached decree in any manner lawful for the holder of that decree. The words "deem-

ed to be the representative of the decree-holder" must be confined to the purpose mentioned in sub-rule (3).

Dealing with this question their Lordships of the Judicial Committee in — 'Radhakissen Chamria v. Durga Prosad', AIR 1940 PC 167 (C) said as follows:

"Two things are clear from this context, that he is a representative only by a legal fiction and that too for the purpose of lawfully executing the decree, i.e., enforcing it by process of the Court and 'satisfying his own decree' out of the proceeds of such execution."

Their Lordships have dealt with this matter at some length. It is not necessary to quote the whole of the passage but at another place in the same judgment their Lordships have said

"For all these reasons it appears to their Lordships that the intention of the legislature was to make the certificate-holder, by a legal fiction, the representative or agent of the holder of attached decree for the limited purpose of executing the decree, i.e., enforcing it by process of the Court and of 'satisfy his own decree' out of the proceeds of such execution. He was not to be an assignee of the decree, so as to acquire all the rights of the original decree-holder in the decree."

(9) There is, therefore, no force in the argument of the learned counsel that Mahraj Singh must be deemed to be bound by the order of the executing court dated 2-11-1946, dismissing the execution application in full satisfaction.

(10) The appeal has no force and is dismissed with costs.

B/R.G.D Appeal dismissed.

A.I.R. 1954 ALLAHABAD 486 (Vol. 41, C.N. 200)

V. BHARGAVA J.

Ramdeo Singh and others, Accused-Petitioners **v.** The State.

Criminal Reference No. 16 of 1952, D/- 27-11-1953, against order of 1st Class Magistrate, S. D. M. Sadar, D/- 14-7-1951.

(a) Civil P. C. (1908), Preamble — Precedents — Lower Court to follow ruling of High Court specifically dealing with the point and not those impliedly dealing with it — (Precedents).

When there is a specific ruling dealing with the point, the Sessions Judge is not justified in following the other cases which only impliedly accepted that point. The principle always is that a decision of the High Court is a ruling on a point which is specifically decided in that case and where such a specific decision is available, cases, in which action may have been taken contrary to that view, should not be followed. It is only when there is no specific decision by the High Court that it may be possible for the lower courts to follow the course adopted by the Court impliedly in other cases. (Para 2)

Anno: Civil P. C., Preamble, N. 15.

(b) Criminal P. C. (1898), S. 439 — Proceedings under U. P. Panchayat Raj Act — (U. P. Panchayat Raj Act, 26 of 1947) — AIR 1952 All 28 and Cr. Ref. No. 388 of 1950, D/-10-4-1951 (All) not followed.

The orders of the Panchayati Adalat and of the Sub-Divisional Magistrate under the U. P. Panchayat Raj Act are not subject to revision under Ss. 435 to 439, Criminal P. C. AIR 1952 All 38, Foll.; AIR 1952 All 28; Cri. Ref. No. 388 of 1950, D/- 10-4-1951 (All), Not followed. (Para 2)

Anno : Cr. P. C., S. 439, N. 1.

1949 Mitra: S. 439, (Topic discussed in N. 1 to S. 439 covered in various notes in Mitra).

Gopalji Mehrotra, for Petitioners; Man Singh, for the State.

CASES REFERRED: Paras

(A) ('50) Cri. Ref. No. 388 of 1950, D/- 10-4-1951 by Mushtaq Ahmad, J. (All) 2

(B) (V39) AIR 1952 All 28: 1951 All LJ 682 2

(C) (V39) AIR 1952 All 38: 1951 All LJ 654 2

ORDER: This is a reference by the learned Additional Sessions Judge of Jaunpur, recommending that this Court be pleased to set aside the orders of the Panchayati Adalat and the learned Sub-Divisional Magistrate and to quash the proceedings. The learned Sessions Judge has purported to make this reference under S. 438, Criminal P. C. on the basis of an application presented before him for exercise of his powers under S. 435, Criminal P. C.

(2) The reference raises only one question and is whether the orders of the Panchayati Adalat and of the Sub-Divisional Magistrate under the U. P. Panchayat Raj Act can be subject to revision under Ss. 435 to 439, Criminal P. C. In making this reference the learned Sessions Judge has referred to — 'State v. Gaya Din Tewari', Criminal Ref. No. 388 of 1950 (A), which was accepted by a learned Single Judge of this Court though it was made against the proceedings before a Panchayati Adalat. The learned Judge has further relied on another decision of a Single Judge of this Court reported in — 'Pahla v. Makhdoom', AIR 1952 All 28 (B), in which case also a reference under the Code of Criminal Procedure was accepted by the Court.

At the same time, the learned Sessions Judge had before him the case of — 'Banshi v. State', — 'AIR 1952 All 38 (C), decided by another learned Single Judge of this Court. The learned Sessions Judge, in applying these three cases, did not realise that he was going wrong in not following the last case and basing his order of reference on the other two cases. Both the cases relied upon by the learned Sessions Judge were certainly cases of reference under the Code of Criminal Procedure which were accepted by this Court under S. 439, Criminal P. C. but, in neither of these two cases, this Court went into the question whether the reference was competent and whether the provisions of S. 439, Criminal P. C. could at all be applied to the proceedings under the U. P. Panchayat Raj Act.

The only case, in which this point was specifically considered and decided, is the third case of — 'AIR 1952 All 38 (C), referred to above. When there was a specific ruling dealing with this point, the learned Sessions Judge was not justified in following the other two cases which only impliedly accepted that point. The principle always is that a decision of the High Court is a ruling on a point which is specifically decided in that case and where such a specific decision is available, cases in which action may have been taken contrary to that view, should not be followed. It is only when there is no specific decision by this Court that it may be possible for the lower courts to follow the course adopted by the Court impliedly in other cases.

With all respect, if I may say so, I entirely agree with the view of my brother Agarwala, J., in the

case of 'AIR 1952 All 38 (C), and I do not consider it necessary to refer the case to a Division Bench because, as I have said above, the point was not specifically dealt with and decided in the case of 'AIR 1952 All 28 (B). The proceedings under the Code of Criminal Procedure in the court of the learned Sessions Judge were not competent and this reference, therefore, does not lie.

(3) The reference is accordingly rejected.

B/R.G.D. Reference rejected.

A.I.R. 1954 ALLAHABAD 487 (Vol. 41, C.N. 201)

(LUCKNOW BENCH)

KIDWAI AND RANDHIR SINGH JJ.

Mewa Ram Ram Charan, Plaintiff-Appellant v. United Provinces, Defendant-Respondent.

First Appeal No. 54 of 1947, D/- 21-1-1954, against decree of Civil J., Malihabad, Lucknow, D/- 10-2-1947.

(a) Government of India Act (1935), Ss. 240, 243 — Applicability of S. 240 to members of police force — (Interpretation of Statutes — Constitutional law) — (Words and Phrases — Conditions of service).

A perusal of S. 243 shows that the constitutional safeguards provided in S. 240, Government of India Act, against the termination of services of Civil Servants were not made available to police forces whose conditions of service were to be governed by the Acts relating to those forces. With the policy of the legislature or with the wisdom thereof the courts are not concerned and it is, therefore, not necessary to discuss as to why the meagre safeguards which were available to other Civil Servants were not made available to the police forces. The conditions of their service are to be governed by the Police Act and by the regulations framed under the Police Act. AIR 1950 All 212, Rel. on. (Para 6)

The words 'conditions of service' are deemed to include termination of service by dismissal. AIR 1949 PC 112, Rel. on. (Para 7)

(b) Civil P. C. (1908), S. 9 — Departmental inquiry and dismissal under Police Act, 1861 — Jurisdiction of courts to interfere — (Police Act (1861), S. 7).

It is not open to the Court to enter into or examine the correctness of the findings arrived at by the Deputy Inspector General of Police or the Superintendent of Police in a departmental inquiry conducted against a Sub-Inspector of Police under the Police Act, 1861 and the regulation thereunder, or the merits of the order of dismissal. It is only the breach of any statutory duty or obligation on the part of the authorities dealing with the Sub-Inspector that can give him a cause of action. If there has been no breach of any statutory provisions, the officer would not be entitled to seek relief in a court of law against the order of dismissal passed against him by a competent authority. (Paras 9, 13)

Anno: C. P. C., S. 9 N. 53.

1953 Mulla: S. 9, P. 30 N. "Suits expressly barred" (Topic discussed in N. 53 to S. 9 in AIR Com. not independently dealt with in Mulla — AIR Com. note exhaustive of the particular topic).

Anno: Police Act, S. 7, N. 1.

(c) Civil Services (Classification, Control and Appeal) Rules, R. 3 — Applicability of rules to departmental trials under S. 7, Police Act — (Police Act (1861), S. 7).

It has been expressly mentioned in R. 3 that the rules would not apply to persons of whose appointment and conditions of employment special provision is made by or under any law for the time being in force. The procedure provided in the Civil Services (Classification, Control and Appeal) Rules would not therefore apply to departmental trials of police officers under S. 7 of the Police Act. (Para 10)

Anno: Police Act, S. 7 N. 1.

(d) U. P. Police Regulations (1944), Para 479 (b) — Powers under — Order of dismissal of Sub-Inspector by I. G. of Police — Validity.

Powers of Inspector General of Police and the Deputy Inspector General of Police under para 479(b) with regard to punishment to be inflicted on Sub-Inspectors are concurrent and both have the right to punish Inspectors of Police. The Inspector-General of Police had therefore, even under the police regulations in force in 1944, the right to pass an order of dismissal of a Sub-Inspector of Police. (Para 12)

R. B. Lal, Harish Chandra and R. B. Chaudhari, for Appellant; B. K. Dhaon, for Respondent.

CASES REFERRED: Paras

(A) (V37) AIR 1950 All 212: 1949 All LJ 546 6

(B) (V36) AIR 1949 PC 112: 75 Ind App 343: 50 Cri LJ 383 (PC) 7

(C) (V32) AIR 1945 FC 47: 1945 FCR 103 (FC) 12

RANDHIR SINGH J.:

This is a plaintiff's appeal arising out of a suit for a declaration that the order of dismissal passed against him by the Inspector General of Police was wrongful, illegal & ultra vires & for a decree for damages to the extent of Rs. 14,000/-. An alternative prayer asking for a decree for Rs. 2,653/8/- on account of arrears of salary together with station allowance had also been asked for in case the order of dismissal against the plaintiff was held to be 'ultra vires' and void.

(2) The plaintiff was a Sub-Inspector of Police in U. P., having been appointed by the Inspector General of Police in the year 1921. He was posted at police station Payagpur in 1943 and was suddenly transferred to police station Sujauli on 24-3-1944. Some confidential enquiry was made against him presumably on receipt of some information by the Superintendent of Police. On 17-4-1944 an order of suspension of the plaintiff was passed by the Superintendent of Police and this order was served on the plaintiff on 20-4-1944. He was ordered to hand over charge and to report his arrival at the police lines which he did on 22-4-1944. A departmental-trial under S. 7 of the Police Act followed and a number of witnesses were examined in support of the allegations against the plaintiff. Charges were framed on the basis of the evidence adduced, and this charge sheet was served on the plaintiff on 25-4-1944. He was asked to produce evidence in defence which he did.

The enquiry concluded at the end of May, & the Superintendent of Police reported to the Deputy Inspector General of Police on 12-6-1944, that most of the charges brought against the plaintiff had been satisfactorily established and further recommended the dismissal of the plaintiff from the police force. The Deputy Inspector General of Police agreed with the report and the recommendation of the Superintendent of Police and called

upon the plaintiff to show cause as to why he should not be dismissed from the police force. The plaintiff then made his representation orally which was recorded and ultimately the Deputy Inspector General of Police reported to the Inspector General of Police recommending the dismissal of the plaintiff. The Inspector General of Police finally agreed with the recommendation and passed the order of dismissal of the plaintiff on 1-8-1944.

(3) The plaintiff then went up in appeal to the Provincial Government but his appeal was dismissed and he then instituted the suit on 29-3-1946 which has given rise to this appeal after serving the notice under S. 80, C. P. C. on the Government.

(4) The suit was contested by the defendant on various grounds. It was pleaded that the order of dismissal was perfectly valid, that the suit was barred by limitation and that it was also not maintainable. The lower Court came to the conclusion that although the enquiry resulting in the dismissal of the plaintiff-appellant was not regular and the dismissal was wrongful but as there had been no breach of any statutory duty and the order of dismissal was passed by a competent authority, the plaintiff had no right to maintain a suit. The plea of limitation raised by the defendant was repelled but in view of the finding that the suit for a declaration was not maintainable the suit was dismissed. The plaintiff has now come up in appeal.

(5) The plaintiff has mentioned in the plaint the various grounds on which he challenged the regularity and legality of the proceedings which terminated in the order of dismissal. It was alleged by him that he was not given a reasonable opportunity to defend himself and that his application for postponement of the hearing of the evidence was rejected by the Superintendent of Police. It has also been mentioned in the plaint that the Superintendent of Police and the other officers connected with the enquiry against the plaintiff were biased against him and the enquiry was not conducted in a free and impartial atmosphere. The plaint does not conform to the rules of pleadings and matters which should not have found a place in the pleadings such as arguments, have been put into the plaint. The main question, however, which arises for determination in this appeal is whether the order of dismissal passed against the appellant can be challenged in a suit and whether the plaintiff was entitled to a decree for the recovery of pay or for damages if the dismissal was found to be wrong.

(6) In order to appreciate the arguments advanced on behalf of the appellant in this case it may be necessary to examine the factual state of law and regulations applicable to the plaintiff on the date the departmental trial took place and the order of dismissal was passed. The Government of India Act, 1935 came into force on 1-4-1937 and Police regulations which were in force in 1944 were corrected and brought-up-to-date in April 1942. Chapter II of the Government of India Act dealt with Civil Services. Certain safeguards had been provided in S. 240 against the termination of services of Civil Servants in India.

One of these safeguards embodied, in S. 240 was that no person shall be dismissed or reduced in rank until he had been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. This provision was applicable to All Civil Servants but an exception was made by S. 243, Government of India Act and S. 243 runs as follows:

> "Notwithstanding anything in the foregoing provisions of this Chapter, the conditions of service of the subordinate ranks of the various police forces in India shall be such as may be determined by or under the Acts relating to those forces respectively."

A perusal of S. 243, therefore, shows that the constitutional safeguards provided in S. 240, Government of India Act against the termination of services of Civil Servants were not made available to police forces whose conditions of service were to be governed by the Acts relating to those forces. With the policy of the legislature or with the wisdom thereof we are not concerned and it is, therefore, not necessary to discuss as to why the meagre safeguards which were available to other Civil Servants were not made available to the police forces. The conditions of service of the subordinate ranks of the police forces in India were to be governed, therefore by the Acts relating to those forces. The plaintiff was a member of the police force and as such the conditions of his service were to be governed by the Police Act and by the regulations framed under the Police Act.

A detailed discussion on this point may not be necessary as the question was discussed at length in a ruling of this Court reported in — 'Gulzar Ahmad Jafri v. Government of U. P.', AIR 1950 All 212 (A). In this reported case which was also instituted by a dismissed Sub Inspector a question arose as to whether S. 240, Government of India Act was applicable to members of the police force and it was held that in view of the provisions of S. 243, Government of India Act the provisions of S. 240 would not be applicable to members of the Police force and the conditions of their services will be determined by the Police Act.

(7) In another case reported in — 'North West Frontier Province v. Suraj Narain Anand', AIR 1949 PC 112 (B), the question was as to whether the words "conditions of Service" would include the termination of service also and it was held that the words "conditions of service" will be deemed to include termination of service by dismissal. In view of these rulings it cannot now be disputed that the conditions of service including termination of service of a police officer was not affected by the safeguards provided in S. 240, Government of India Act, 1935.

(8) It remains now to be seen if the departmental trial of the plaintiff and the order of dismissal passed against him were not in accordance with the provisions of the Police Act or the regulations framed thereunder. The procedure of a departmental trial under S. 7 of the Police Act is provided by regulations 489 to 491 of the Police Regulations. Unlike the enquiry conducted in other departmental trials it was provided by these regulations that the evidence in support of the accusation shall be produced first and after the evidence had been adduced, the accusation shall be reduced to the form of a charge which shall be served upon the party proceeded against. The party was to be given an opportunity to cross-examine the witnesses and the explanation to be offered by the accused officer was then to be recorded by the enquiring officer. The accused officer had then the right to produce evidence in his defence and the enquiring officer was then to submit his report to the Deputy Inspector General of Police in case the officer happened to be a Sub Inspector or an Inspector.

It is not alleged on behalf of the plaintiff that the enquiry was not conducted in the manner provided in the police regulations, and his main grievance is that he was not given sufficient time

to put up his defence. The enquiry started on 22nd of April & continued up to the end of May although the main prosecution evidence had been recorded within the first three days. The Superintendent of Police sent his report and the recommendation for the dismissal of the plaintiff on 12-6-1944, and the Deputy Inspector General of Police after he had considered the report of the Superintendent of Police directed the plaintiff on 29-6-1944 to show cause why he should not be dismissed on the charges framed against him by the Superintendent of Police.

This order of the Deputy Inspector General of Police requiring the plaintiff to show cause, though issued on 29-6-1944 was actually served on the plaintiff on 8-7-1944. He turned up on the 12th of July and made a statement in which he definitely stated that he had received a copy of the charges and had understood them. He did not ask for any further time nor did he make any complaint that the time given to him for making the representation or the statement was insufficient. He made certain allegations in his statement against the Circle Inspectors and the Superintendent of Police. These allegations were considered by the Deputy Inspector General of Police and he came to the conclusion that the findings arrived at by the Superintendent of Police on the charges were correct. He then recommended the action proposed by the Superintendent of Police to the Inspector General of Police.

Under the police regulations the report of the Superintendent of Police in such matters had to be sent through the District Magistrate and in this case also the Superintendent of Police sent his report through the District Magistrate. The District Magistrate had also concurred with the findings of the Superintendent of Police. The order of dismissal passed by the Inspector General of Police, a copy of which has been filed vide Ex. A5, shows that he had considered the report and the evidence adduced against the plaintiff with care and thoroughness. He has pointed out in his order the omissions made by the Superintendent of Police in framing the charge and in conducting the enquiry. He, however came to the conclusion that these irregularities did not affect the merits of the charge against the applicant & concurring with the recommendation of the Deputy Inspector General of Police he passed the order of dismissal of the plaintiff.

(9) The learned counsel for the Appellant has not been able to show in what manner the conduct of the enquiry was unlawful. It is not open to this Court to enter into or examine the correctness of the findings arrived at by the Deputy Inspector General of Police or the Superintendent of Police or the merits of the order of dismissal. It is only if there has been a breach of any statutory duty imposed by law in making the enquiry or in passing the order of dismissal that a Court of law can interfere.

(10) The learned Civil Judge has held the enquiry to be irregular as it was not in accordance with the provisions of R. 55 of the Civil Services (Classification, Control and Appeal) Rules. It appears that the learned Civil Judge overlooked the provisions of R. 3 of these rules. It has been expressly mentioned in R. 3 that the rules would not apply to persons for whose appointment and conditions of employment special provision is made by or under any law for the time being in force. The procedure provided in the Civil Services (Classification, Control and Appeal) Rules would not, therefore apply to departmental trials under S. 7 of the Police Act and they will be governed by the Police Act or by any regulations framed under the Police Act. As remarked above, the procedure provided for departmental trials under S. 7 of the Police Act was in some particulars different from the one provided under R. 55 of the Civil Services (Classification, Control and Appeal) Rules.

(11) Another ground on which the learned Civil Judge has held that the dismissal was wrongful and defective was that the notice issued to the plaintiff to show cause against his dismissal had been issued by the Deputy Inspector General of Police and not by the Inspector General of Police. It is not disputed that the plaintiff had been appointed by the Inspector General of Police who was, it appears, the appointing authority in the year in which the plaintiff was appointed. By the regulations which were in force in 1944 the Deputy Inspector General of Police was the appointing authority in the case of Sub Inspectors of Police and he had also the right to dismiss them. In the present case the order of dismissal was passed by the Inspector General of Police and the question as to whether the Inspector General of Police had the right to dismiss the plaintiff does not in fact arise.

(12) It had been argued on behalf of the appellant that if the police regulations in force in 1944 be deemed to apply to the case of the plaintiff, the order of dismissal should have been passed, if at all, by the Deputy Inspector General of Police and not by the Inspector General of Police. Paragraph 479 (b) of the police regulations empowers the Inspector General of Police to punish Inspectors and all police officers of lower rank. The powers of the Inspector General of Police and the Deputy Inspector General of Police with regard to punishment to be inflicted on Sub-Inspectors are, therefore, concurrent and both have the right to punish Inspectors of Police. The Inspector General of Police had, therefore, even under the police regulations in force in 1944, the right to pass an order of dismissal of the plaintiff.

As regards the notice to be given to an accused petitioner to show cause against the proposed order of dismissal, it has been contended by the learned counsel for the appellant that this notice to show cause could be given only by the person who ultimately passed the order of dismissal. It has been observed in some cases vide — 'Secretary of State v. I. M. Lall', AIR 1945 FC 47 (C) that a reasonable opportunity of showing cause against the proposed order of dismissal should be given by the person who is competent to dismiss the officer. It is primarily the sphere of the appointing authority, who is also competent to dismiss a person, to make up his mind whether the charges had been established against the person sought to be dismissed, and if he was of opinion that punishment by dismissal, reduction in rank or removal was called for, before the accused officer is called upon to show cause against the proposed punishment, it would evidently not be proper for anybody else, who is not competent to dismiss an officer, to arrive at a tentative decision as to whether dismissal was the proper punishment in that case.

These considerations, however, do not arise in the case of the plaintiff. As S. 240 becomes inapplicable to the case of the plaintiff in view of S. 243, Government of India Act the departmental enquiry as also the subsequent proceedings up to the passing of the order of dismissal would be governed by the Police Act or the regulations framed thereunder. Originally there was no provision in the police regulations requiring the enquir-

ing officer to ask the accused officer to show cause against the proposed punishment but an amendment was made on 20-5-1943 to para. 490(7) of the Police Regulations. It was provided as follows:

"Should the Superintendent of Police consider that either dismissal, removal or reduction is an appropriate punishment he should give the officer charged an opportunity to show cause why such punishment should not be inflicted."

Paragraph 490(7) as amended in 1943 further underwent an amendment in 1946 but we are not concerned with that amendment as that came into force after the order of dismissal had been passed against the plaintiff. Under the regulations, as they stood in 1944, the Superintendent of Police was required to give the officer charged an opportunity to show cause as to why the punishment which he proposed should not be inflicted. In the case of the plaintiff the Superintendent of Police did not ask the plaintiff to show cause against the proposed punishment but it was the Deputy Inspector General of Police who gave him this opportunity. Evidently the plaintiff can make no grievance out of this procedure inasmuch as an opportunity to show cause against the proposed punishment had been given to him by the Deputy Inspector General of Police and he was heard before the Deputy Inspector General of Police who recommended the dismissal of the plaintiff to the Inspector General of Police. The only opportunity which was to be given to the plaintiff was the one provided under the police regulations and not under S. 240, Government of India Act and this opportunity had been given.

(13) It would thus appear that the departmental trial of the plaintiff had been conducted according to the regulations framed under the police Act and the order of dismissal was also passed by a competent authority. It is only the breach of any statutory duty or obligation on the part of the authorities dealing with the plaintiff that can give him a cause of action. If there has been no breach of any statutory provisions the plaintiff would not be entitled to seek relief in a court of law against the order of dismissal, passed by a competent authority. We are clearly of opinion that the order of dismissal passed by the Inspector General of Police was by a competent authority and it was, therefore, a good order binding upon the plaintiff.

(14) The last and the only remaining submission on behalf of the appellant is in respect of the quantum of damages and salary which should be awarded to the plaintiff. This question does not arise in view of our findings on the first point. In view of what we have held above, the plaintiff is not entitled to a decree for any damages or arrears of salary.

(15) As a result, the appeal fails and is dismissed with costs to the respondent.

A/D.R.R. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 490 (Vol. 41, C.N. 202)

V. BHARGAVA J.

Babu Ram, Applicant v. Co-operative Seeds Store and others, Opposite Party.

Civil Misc. Writ No. 125 of 1953, D/- 12-1-1954.

(a) Constitution of India, Art. 226 — Parties — Wrong description — Effect of.

Error in name and business of opposite party No. 1 in petition under Art. 226 — Relief sought particularly against him — Correct description averred in counter affidavit by opposite party — But no attempt to amend and correct the petition made by petitioner — Failure to amend petition and implead the correct party held was itself sufficient ground for dismissal of petition. (Para 1)

(b) Co-operative Societies Act (1912), S. 43 — Rules under — U. P. Rr. 115 and 116 — Validity — (Arbitration Act (1940), S. 46).

Rules 115 and 116 do not go beyond the scope of the express power mentioned in Cl. (1) of sub-section (2) of S. 43 of the Act. To say that R. 116 could not give the power to be exercised arbitrarily by the Registrar to choose whether he should himself decide the dispute or refer it to one arbitrator or two arbitrators or three arbitrators is not correct because the rule making power itself laid down in R. 115 that the discretion to refer to arbitration should be that of the Registrar and not that of the State Government.

When the Registrar was given the power to decide the dispute himself or at his discretion to make a reference to arbitration, the power granted to him under R. 116 to further decide whether there shall be one or two or three arbitrators is also well within the scope of the Act and it cannot be said that the power is very arbitrary. This is a provision which is very much in line with the scheme of the Indian Arbitration Act and the power granted to the Registrar cannot be said to be so wide as to invalidate the rule. (Para 2)

Nor is the R. 116 inconsistent with the provisions of the Indian Arbitration Act and even if there be any inconsistency, in view of S. 46, Arbitration Act, such inconsistency would not make the provisions of the U. P. Co-operative Societies Act or rules made thereunder invalid. (Para 3)

Anno: Co-operative Societies Act, S. 43 N. 1, 3.

Ambika Pd., for Applicant; Standing Counsel, for Opposite Party.

ORDER: This is a petition by one Babu Ram under Article 226, Constitution of India directed against the Co-operative Seeds Store, Sakit, district Etah, the District Co-operative Officer, Etah the Registrar, Co-operative Societies, Lucknow, the Collector of Etah, the State of Uttar Pradesh, and Damodar Das Attra. Babu Ram petitioner alleged that he was a member of a registered society known as the Co-operative Seed Store, Sakit, district Etah which has been impleaded in these proceedings as opposite party No. 1. It, however, appears from the counter-affidavit that there is no registered society of the name of the Sakit Co-operative Seed Store, Sakit, district Etah.

There is, in fact, a registered society known as the Co-operative Sahkari Sangh Sakit, district Etah, and this registered society hereinafter referred to as Sangh owns a Co-operative Seed Store, Sakit, district Etah, under which name the business of the seed store is carried on by the Sangh. This averment in the counter-affidavit is not met in the rejoinder affidavit and in spite of the fact that there is this error in the petition, no attempt was made on behalf of the petitioner to amend the petition, and correct the name of opposite party No. 1. The relief is sought particularly against opposite party No. 1 and this failure to amend the petition and implead the correct party is, therefore, by itself a sufficient ground for the dismissal of the petition.

(2) Since the petition was, however, heard by me on merits, I deal with the remaining points raised in it. For the purpose of dealing with the petition on merits, I assume that wherever the petitioner has referred to the Sakit Co-operative Seed Store, Sakit, district Etah, as a registered society, he intended to refer to the Sangh. The petitioner's case is that in his capacity as a member of the Sangh, he borrowed 25 maunds of wheat seed after executing a contract bond in the year 1951 under which he was required to repay the quantity borrowed with an extra 25 per cent. on 31-5-1951. The grain borrowed was not returned by the agreed date and the time agreed upon was not extended. There was a condition that, in case the petitioner did not give back the grain within the agreed time, he would be liable to pay a penalty which was to be determined by the Provincial Marketing Federation.

The petitioner in his affidavit did not mention that the rate of penalty was ever prescribed by the Provincial Marketing Federation in accordance with the terms of the bond but the counter-affidavit shows that the rate of penalty was fixed by the Provincial Marketing Federation by letter No. C-2 65/11/16 Seed dated 21-6-1950, issued by the Registrar Co-operative Societies U. P. who was the President of the Provincial Marketing Federation. The penalty was levied in accordance with the rate laid down in this letter, and the contention in the affidavit of the petitioner that the realisation of penalty without its being fixed by the Provincial Marketing Federation was illegal consequently has no force.

It appears that having fixed the penalty, attempts were made to realise the price of the wheat seed and the extra quantity of wheat seed and penalty payable by the petitioner by issuing processes for realisation of the amount found due as arrears of land revenue. Various proceedings were taken and the petitioner was at one stage arrested and later on he was released. The present stage at which the petition has been moved, is, however, one when no proceedings for realisation of the amount are at present pending.

At this stage, the intention is to refer the dispute to the Registrar, Co-operative Societies Uttar Pradesh in accordance with R. 115 of the rules framed under the Co-operative Societies Act, so that the Registrar may proceed in accordance with R. 116. This reference is being made on the ground that a dispute has arisen touching the business of the Sangh which is a registered Society and this dispute is between the Sangh and a member of the society viz., the petitioner. The petitioner by this writ petition has sought a declaration that the rules framed under the Co-operative Societies Act, 1912, be declared ultra vires, null and void and a writ of mandamus or other suitable writ be issued restraining the opposite parties from proceeding under the Arbitration Rules framed under the Co-operative Societies Act of 1912.

There is another prayer for the issue of a writ of mandamus or other suitable writ restraining the opposite parties from proceeding under the provisions of Land Revenue Act for the realisation of the dues payable by the petitioner. It appears that the main prayer which is sought by the petitioner at this stage is a declaration that the rules framed under the Co-operative Societies Act, 1912, are ultra vires. In this connection it does not appear to be necessary to consider the validity of all the rules. The only relevant rules that apply to the dispute at present are Rr. 115 and 116 and consequently I have confined the case to the consideration of the validity of these two rules only.

Learned counsel for the petitioner drew my attention to Rr. 133 to 137 which relate to appeals, revisions or reviews against orders of the Registrar or award of arbitrators and the procedure to be followed in enforcing awards of arbitrators or decision of an Assistant Registrar or the Registrar and contended that some of these rules are also ultra vires. I do not consider it appropriate to go into the validity of these rules at this stage, as no question has at present arisen which would be governed by any of these rules.

The only question at present is whether a reference can be made to the Registrar of the dispute that exists between the Sangh and the petitioner and whether that dispute can be dealt with in accordance with R. 116 framed under the Co-operative Societies Act, 1912. Learned counsel submitted that Rr. 115 and 116 are ultra vires of the State Government as they are not within the scope of the powers granted to the State Government by S. 43 of the Co-operative Societies Act, 1912 and further that they amount to a delegation of too much power to the Registrar and are also contrary to the provisions of the Indian Arbitration Act.

The power of the State Government to frame rules is given in general terms in sub-section (1) of S. 43 and is a very wide power. Sub-section (2) of S. 43 lays down that in particular and without prejudice to the provisions of the foregoing power granted under sub-section (1), such rules may provide for a number of matters which are enumerated in Cls. (a) to (l) in that section. Clause (1) is the relevant clause which permits the State Government by rule to provide that

> "any dispute touching the business of a society between members or past members of the society or persons claiming through a member or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators and the enforcement of the decisions of the Registrar or the awards of arbitrators."

Having examined Rr. 115 and 116 of the rules framed under these provisions, I have failed to find any provision which goes beyond the scope of the express power mentioned in Cl. (1) of sub-section (2) of S. 43 of the Act. Rule 115 prescribes that the dispute shall be referred to the Registrar and shall be decided either by the Registrar or by arbitration. Clause (1) had distinctly conferred power on the State Government to make the rule prescribing that the dispute be referred to the Registrar to be either decided by himself or referred to arbitration. Learned counsel, when called upon to show what part of this rule was beyond the scope of Cl. (1), failed to point out any particular portion of this rule.

Rule 116 lays down that, on receipt of a reference, the Registrar may either decide the dispute himself or refer it for decision to an arbitrator, or to two joint arbitrators appointed by him or to three arbitrators, of whom one shall be nominated by each of the parties to the dispute and the third by the Registrar who shall appoint one of the arbitrators to act as chairman. Clearly the provisions of this rule are also fully covered by the provisions of Cl. (1) of sub-section (2) of S. 43 of the Act. The option to the Registrar to decide

the dispute himself given by the rule is also mentioned in Cl. (1). Similarly, a reference to arbitration by the Registrar mentioned in the rule is also clearly laid down in Cl. (1).

Learned counsel's argument was that the rule could not give the power to be exercised arbitrarily by the Registrar to choose whether he should himself decide the dispute or refer it to one arbitrator or two arbitrators or three arbitrators. Here again Cl. (1) of sub-section (2) of S. 43 shows that the legislature itself under the rule making power gave such discretion to the Registrar as the rule making power itself laid down that the rule should prescribe that the dispute shall be referred to the Registrar for decision, or if he so directs, to arbitration. The rule making power itself laid down that the discretion to refer to arbitration should be that of the Registrar and not that of the State Government. It is the same discretion that has been granted by Rule 116.

When the Registrar was given the power to decide the dispute himself or at his discretion to make a reference to arbitration, the power granted to him, to further decide whether there shall be one or two or three arbitrators is also well within the scope of the Act and it cannot be said that the power is very arbitrary. In this connection it may be noticed that even S. 4, Arbitration Act lays down that parties by an agreement can nominate a person who may be authorised to nominate an arbitrator to settle their dispute. In this case, the statute has nominated the Registrar and authorised him to nominate the arbitrator or arbitrators. The statute, therefore, lays down a provision which is very much in line with the scheme of the Indian Arbitration Act and the power granted to the Registrar cannot be said to be so wide as to invalidate the rule.

(3) Learned counsel's further argument was that R. 116 was inconsistent with the provisions of the Indian Arbitration Act and was, therefore, void. Firstly, he has not been able to point out any provisions of the Indian Arbitration Act between which and R. 116 there might be any inconsistency. Secondly, even if there had been any inconsistency S. 46 Arbitration Act would indicate that in cases where the arbitration is under any enactment for the time being in force and not under the Indian Arbitration Act, a special provision made under the enactment would prevail over general provisions of the Indian Arbitration Act, and except for the inconsistent portions, the rest of the Indian Arbitration Act would apply to such arbitration. Consequently, even if there had been any inconsistency, such inconsistency would not make the provisions of the U. P. (?) Co-operative Societies Act or rules made thereunder invalid. The effect only would have been that the inconsistent provisions of the Indian Arbitration Act would not have applied to such arbitration.

The question is, however, immaterial because, as I have said above, learned counsel has not pointed out where the inconsistency exists. Consequently, Rr. 115 and 116 of the U. P. (?) Co-operative Societies Act, 1912, are valid and cannot be declared ultra vires, null and void. On this ground, the first and the third prayer mentioned in the petition must fail. So far as the second prayer is concerned that a writ of mandamus or other suitable writ be issued restraining the opposite parties from proceeding under the provisions of Land Revenue Act for the realisation of the said dues, it appears that this prayer need not be considered at this stage as no proceedings under the provisions of Land Revenue Act are at present threatened and if any such proceedings are taken, it will be open to the petitioner to challenge those proceedings.

(4) The petition consequently fails and is dismissed with costs to opposite parties nos. 2 to 5 who are represented by the learned Standing Counsel; opposite parties nos. 1 and 6 being unrepresented.

A/H.G.P. Petition dismissed.

A.I.R. 1954 ALLAHABAD 492 (Vol. 41, C.N. 203)

(LUCKNOW BENCH) MUKERJI AND CHATURVEDI JJ. (23-2-1954)

Sm. Raj Rani Sekhri, Applicant v. U. P. Govt. and another, Opposite Party.

Civil Misc. Appln. No. 33 of 1953.

Constitution of India (1950), Art. 226 — Person entitled to apply.

On the authorities cancelling a coal quota licence an application was filed for the issue of a writ of mandamus directing the authorities to withdraw the order of cancellation and to allot hard and soft coke to the petitioner to enable her to continue to carry on the business of a coal depot holder. While the petitioner asserted in the petition that she was the licensee the Court found as a matter of fact that she was not the licensee but an institution represented by her was the licensee. The petition did not disclose facts from which it was possible to say that she was acting on behalf of and for benefit of the institution. On the other hand, all facts which were material for Court to know in order to determine the rights of the petitioner and grant her the appropriate relief were suppressed:

Held (i) that the petition was liable to be thrown out on the ground alone of the suppression of material facts: AIR 1951 All 746, (FB), Rel. on. (Para 9)

(ii) that the petitioner was not entitled to the relief on merits also as she was not the holder of the permit or licence and as such had no right to challenge it in her own right the order cancelling the licence. (Para 8)

(iii) that it was not possible to treat the application as one on behalf of the institution when the petition failed to disclose facts from which it could be said that the petitioner was acting on behalf of and for the benefit of the institution. (Para 9)

CASE REFERRED: Para

(A) (V38) AIR 1951 All 746: 1951 All LJ 576 (FB) 9

R. B. Lal, for Applicant; B. N. Roy, for Opposite Party.

MUKERJI J.:

This is a petition by Shrimati Rajrani Sekhri under Art. 226, Constitution of India praying for a writ in the nature of mandamus directing the opposite parties, viz., the Government of Uttar Pradesh and the District Supply Officer of Lucknow, to withdraw an order made by a letter dated the 25th February, 1953. The petitioner further prays that this Court should issue a direction to the opposite parties to grant to the petitioner a quota for hard and soft coke so that she may be able to carry on the business of a coal depot holder which business she had been carrying on since 1949.

(2) The petitioner's case was that she had been granted "depot holder's" licence and that as such licensee she had been carrying on the trade of selling coal and making profits out of those sales. She further stated that she was able to get this permit because she had been a refugee who had migrated from Pakistan in August 1947 and further because she had started an institution called "Shri Kamla Nehru Mahila Shilp Shiksha Kendra" at Lucknow for imparting free training to refugee women in tailoring and embroidery. Her assertion further was that the allotment of a "coal depot" holder's licence was to her, in her personal capacity, and not in any sense connected with the institution viz. Shri Kamla Nehru Mahila Shilp Shiksha Kendra.

(3) On behalf of the opposite parties, the right of the petitioner to make this petition has been challenged. It has been stated on behalf of the opposite parties that the petitioner is not a "coal quota holder", nor was she ever such a coal quota holder. It was pointed out in the counter affidavit filed on behalf of the opposite parties that the petitioner applied for being given a coal quota not in her personal capacity but on behalf of the institution named above. It was pointed out that the allotment which followed the application of the petitioner must, therefore, be deemed to have been an allotment in favour of the institution, and not the petitioner individually.

The order made by the opposite party No. 2, which has been assailed by the petitioner in this petition viz. the order of the 25th February, 1953 which is an order in these terms:

"Under instructions from the Government the Coal/Coke quota of the following institutions and depot holders is cancelled with immediate effect. They will not be allowed any quota in future.

1. Kamla Nehru Mahila Shilp Shiksha Kendra.
2. Head Master, Sanatan Dharma Mission School.
3. Krishan Sahai Srivastava.
4. Amar Nath Nagpal.

....."

From the afore-quoted order it will be clear that the cancellation of the coal quota which was made effective by the above order was not the quota of the applicant but of the Shri Kamla Nehru Mahila Shilp Shiksha Kendra.

(4-7) This petition, therefore, raises a question of fact for determination before any other questions of constitutional law could arise, the question of fact that calls for determination being who was the coal quota holder—whether it was the petitioner or it was the institution named Shri Kamla Nehru Mahila Shilp Shiksha Kendra. In our judgment, the materials on the record can lead us to no other conclusion but that it was the institution Shri Kamla Nehru Mahila Shilp Shiksha Kendra that was allotted the coal quota and not the petitioner. (His Lordship after stating the reasons which led him to that conclusion proceeded further to state:)

(8) From what we have stated above, we are satisfied that the petitioner was not the holder of the permit or licence but that it was the institution. The petitioner, therefore, has no right to challenge the order which was made by Government cancelling the quota of coal which was being so far allotted to the institution.

(9) Learned counsel appearing for the petitioner prayed that we should treat this application as one on behalf of the institution. We do not think it is possible for us to do so. The petition which is before us does not disclose the necessary facts on which we could say that the petitioner was acting on behalf of and for the benefit of the institution. On the other hand, the petition is one asserting the personal rights of the petitioner. The petitioner has not placed all the materials which should have been placed before the Court. We are constrained to hold that in this case the petitioner has been guilty of suppressing facts which were material for the determination of the rights of the petitioner and all facts necessary for the Court to know before it could grant an appropriate relief to the petitioner. We could have thrown out the petition on the ground alone, for it has been held by a Full Bench of this Court in — 'Asiatic Engineering Co. v. Achhru Ram', AIR 1951 All 746 (A) that where a Court finds that a petitioner suppresses material facts, in such a case the petitioner should be refused any relief by the Court, but we did not choose to take that short cut but went into the merits of the case and we have come to the conclusion that on the merits the petitioner has no right to claim the relief which she has by this petition.

(10) We accordingly dismiss the petition with costs. We assess the costs of the petition at Rs. 150/-.

A/M.K.S. Petition dismissed.

A.I.R. 1954 ALLAHABAD 493 (Vol. 41, C N. 204)

(LUCKNOW BENCH) (FULL BENCH) KIDWAI, CHATURVEDI AND RANDHIR SINGH JJ. (25-2-1954).

Sobha Nath, Defendant-Appellant v. Ram Baran Plaintiff and another, Defendant-Respondents.

Second Appeal No. 200 of 1947, against decree of Civil Judge, Fyzabad, D/- 30-1-1947.

(a) Tenancy Laws — U. P. Tenancy Amendment Act (10 of 1947), S. 31 — Change of forum — Decree passed by Civil Court — Amending Act changing forum subsequently, during pendency of appeal — Decree is not affected — (Civil P. C. (1908), Preamble).

A decree passed by a Civil Court before the coming into force of the Amending Act 10 of 1947, which was validly passed according to law then in force, will not be set aside in appeal only because the Amending Act, which had come in force during the pendency of the appeal had prescribed a different forum viz. the Revenue Court, for such suits. AIR 1949 All 542, Relied on. (Paras 7, 9)

So far as substantive law goes, no retrospective effect can be given to it unless there is a clear provision to that effect in the Amending Act, but so far as laws of procedure are concerned, an amending act shall have a retrospective effect but only in so far as it does not affect the rights already created or vested. Where a decree had already been passed in favour of the plaintiff by a competent Court, and so long as the decree stands as a good decree on merits, the decree-holder has a subsisting right to execute the decree and to this extent he acquires a vested interest and subsequent change during the pendency of the appeal in the forum of the suit, would not affect the decree. (Para 6)

Apart from this view of the general effect of an amendment of the procedural law, a plain reading of S. 31 of Act X of 1947, also shows that it was not the intention of the legisla-

ture that the decrees passed in civil cases pending in appeal at the time of the amendment should be reviewed in the light of the procedural amendment. AIR 1953 All 219, Relied on. (Para 8)

Anno: Civil P. C., Preamble N. 3.

(b) Civil P. C. (1908), Ss. 100-101 — Finding of fact — Finding as to possession.

Finding of the lower appellate Court that the plaintiff had been in possession of the plot within 12 years before the suit and that the defendant had not been in possession of the plot for over 12 years when the suit was instituted, is a finding of fact and is binding in second appeal. (Para 10)

Anno: Civil P. C., Ss. 100-101 N. 36.

1953 Mulla: S. 100, P. 370 N. "A second..... of facts" (Compare Ns. 34 to 51 to Ss. 100-101 in AIR Com. — AIR Com. notes exhaustive, analytical and illustrative).

CASES REFERRED: Paras

(A) (V26) AIR 1939 FC 74: 1939 FCR 193 (FC) 5
(B) (V28) AIR 1941 FC 5: 20 Pat 429 (FC) 5
(C) (V40) AIR 1953 All 254: 1952 All LJ 92 6
(D) (V39) AIR 1952 All 188: 1952 All LJ 132 6
(E) (V36) AIR 1949 All 542: 1949 All WR HC 121 7
(F) (V40) AIR 1953 All 219: 1952 All LJ 87 3

Ram Bharose Lal, for Appellant; Hyder Husain, for Respondent (No. 1).

RANDHIR SINGH J.:

This is a second appeal which has been referred to us by one of us sitting singly and before whom the appeal originally came up for hearing as it appeared that the authorities on the points of law involved in this case were not all clear and consistent.

(2) The appeal arises out of a suit for possession instituted by one Ram Baran against Sobha Nath and Ram Bilas on the allegations that Ram Baran and Ram Bilas, defendant No. 2, were joint tenants of plot no. 958, having an area of 9 biswas, situate in village Kakrapur, district Faizabad and that defendant no. 1 was a licensee on behalf of the plaintiff and defendant no. 2. This licence was, according to the plaintiff, revoked in 1353 Fasli but defendant no. 1 did not relinquish the land. The plaintiff also claimed a sum of Rs. 15/- as damages.

(3) Defendant no. 1 contested the suit mainly on the ground that it was he who was the tenant of the land and that the plaintiff or defendant no. 2 were not the tenants. An issue of tenancy was framed and was then referred to the revenue court for a finding. The revenue court held that the plaintiff and defendant no. 2 were not the tenants. On receipt of this finding the learned Munsif dismissed the suit on the 9-10-1946.

(4) The plaintiff then went up in appeal. The learned Civil Judge who heard the appeal, however, disagreed with the view taken by the trial Court and allowed the appeal, holding the plaintiff and defendant no. 2 joint tenants of the plot in dispute. Dissatisfied with the decree passed in appeal defendant No. 1 has now come up in second appeal.

(5) The first point which has been urged on behalf of the appellant is that the amendment of the U. P. Tenancy Act made by Act 10 of 1947 which came into force on the 14-6-1947 had made an alteration in the law which should be given effect to by setting aside the decree passed earlier by the trial Court.

Prior to the amendment of the U. P. Tenancy Act by Act 10 of 1947 the law, so far as it governed Avadh, was that suits by tenants against trespassers could be maintained only in the civil court. The suit instituted by Ram Baran on the 26-10-1945 in the civil court was, therefore, validly instituted in the proper forum.

The effect of the amendment, which came into force on the 14-6-1947, was that all suits by tenants against trespassers were also to be instituted only in the revenue court.

It is now urged that, even though the suit had been instituted in the proper forum on the date when it was filed, the decree being in appeal in this Court, the amended law should be given a retrospective effect, and a fresh decree should be passed giving effect to the law as it stood now.

Reliance has been placed on the two rulings — 'Shyamakant Lal v. Rambhajan Singh', AIR 1939 FC 74 (A) and — 'Lachmeshwar Prasad v. Keshwar Lal', AIR 1941 FC 5 (B) for the proposition that once an appeal is instituted, the case has to be re-heard and a decree has to be passed in accordance with the provisions of law as they stood on the date of the hearing of the appeal.

We have carefully gone through the two rulings cited above, and it appears to us that the principles of law enunciated in these two rulings have hardly any application to the facts of the present case.

Both the reported cases relate to Bihar Money Lenders Act (7 of 1939). Under the Bihar Money Lenders Act certain rights of debtors qua money lenders in respect of debts were determined and such rights were also given a retrospective effect. These rights had to be recognised not only in decrees to be passed in future but also in decrees which had already been passed. Therefore once the appellate Court came to the conclusion that the decree as passed was not a good decree in view of the amendment in law and a fresh decree should be substituted, it became necessary to examine the law as it stood on the date when the fresh decree was to be passed.

None of these two cases is an authority for the proposition that the mere institution of an appeal against a decree would automatically result in a re-hearing of the suit as if it were pending in the trial Court. A decree is a good decree till it is set aside in appeal, and in fact no confirmation of a decree in appeal is necessary in order to give validity to it. The question as to what law should be given effect to would arise in an appeal only if the decree was not a good decree or had ceased to be a good decree & the appellate Court decides to set aside the decree passed by the trial Court, but if it is found that the decree already passed had been passed by a competent court and would also be a good decree on the merits under the law as it stood on the date when the appeal came up for hearing, such a decree would not be affected by any amendment of the procedural law made subsequent to the passing of the decree.

(6) It has been argued on behalf of the appellant that an amendment in procedural law takes a retrospective effect and would, therefore, affect suits instituted before the date of the amendment.

There is no doubt that so far as substantive law goes, no retrospective effect can be given to it unless there is a clear provision to that effect in the Amending Act, but so far as laws of procedure are concerned, an amending act shall have a retrospective effect but only in so far as it does not affect the rights already created or vested.

In two other cases reported in — 'Soman v Kedar Nath', AIR 1953 All 254 (C) and — 'Bhikham v. Natha', AIR 1952 All 188 (D), it was held by this Court that suits, which were pending on the date when the Amending Act 10 of 1947 came into force, would be governed by the procedure laid down in the amending law. There can be no doubt that amendment of procedural law takes effect immediately and also retrospectively to the extent that all pending suits would be governed in the matter of procedure by the amending law unless a contrary intention appears from the amending law itself or there is some sort of vested interest acquired by a party under the procedure prescribed by the law as it stood originally which was taken away by the Amending Act.

In the present case a decree had already been passed in favour of the plaintiff by a competent Court, and so long as the decree stood as a good decree on merits, the decree-holder had a subsisting right to execute the decree and to this extent he had also aquired a vested interest. The rulings referred to above are no authority for the proposition propounded on behalf of the appellant that a decree passed by a competent Court would lose its effect if by a subsequent amendment of the law the jurisdiction to entertain the suit is vested in another Court of the same status.

(7) No authority has been cited in support of the contention that a decree passed before the amendment came into force would be set aside merely because an amending act, prescribing a different forum for suits had been passed after the decree had been obtained. We have, on the other hand, before us the contrary view taken by a Division Bench of this Court — 'Basdeo Singh v. Bharat Singh', AIR 1949 All 542 (E). It was held in that case that a decree passed by a Civil Court before Act 10 of 1947 came into force, even though it may be inappeal, would not be affected merely because a dierent forum had been prescribed for such suits. We respectfully agree with the views expressed by the learned Judges in that case. It is unfortunate that this ruling was not cited at the time when the reference was made by one of us.

(8) Apart from the view we have taken of the general effect of an amendment of the procedural law, a plain reading of S. 31 of Act 10 of 1947, also shows that it was not the intention of the legislature that the decrees passed in civil cases pending in appeal at the time of the amendment should be reviewed in the light of the procedural amendment.

In — 'Bhagwati Chaube v. Raj Adhar Chaube', AIR 1953 All 219 (F), a similar question came up for decision before a learned Judge of this Court, and it was held that S. 31 of the Amending Act 10 of 1947 did not take away the jurisdiction of civil Courts even in respect of suits pending in the civil courts.

The question as to whether the general principles governing the effect of amendment of a procedural law apart from S. 31 of the Act, would or would not affect suits, pending in the civil Courts at the time of the amendment was, however, not raised or considered in the appeal and the authority of that ruling may be restricted to the application of S. 31 of the Amending Act 10 of 1947.

(9) We are, therefore, clearly of opinion that an amendment of procedural law, though it has a retrospective effect, will not affect the validity of decrees already passed by a competent Court, only on the ground that the law of procedure, as subsequently amended, had prescribed a different forum for the institution of such suits. We are therefore unable to agree with the contention raised by the learned counsel for the appellant that the decree passed by the lower appellate Court in this case should be set aside on this ground.

(10) The only other point which has been urged in arguments is that the appellant had been in possession of the plot for over 12 years before the suit was instituted by the respondent and as such a suit was barred.

The lower appellate Court has found as a matter of fact that the plaintiff had been in possession of the plot within 12 years before the suit and that the defendant had not been in possession of the plot for over 12 years when the suit was instituted. This is a finding of fact and is binding on us in second appeal. The point of limitation raised by the learned counsel has, also therefore, no force.

(11) No other point has been pressed in arguments before us.

(12) As a result, the appeal fails and is dismissed with costs to the respondents.

A/R.G.D. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 495 (Vol. 41, C.N. 205)

MALIK C. J. AND SAPRU J. (7-1-1954)

Messrs. Rekh Chand Nop Chand through Phul Chand, Applicant v. The Governor-General in Council and others, Respondents.

Civil Revn. No. 867 of 1953, against decree of Sm. C. C. Judge, Azamgarh, D/- 24-7-1948.

Civil P. C. (1908), S. 80 — Statement in plaint.

The fact that the provisions of S. 80 are to be strictly complied with, does not mean that in drafting the plaint the exact words of S. 80 are to be repeated and even if the purport of that section is conveyed in a different language the plaint is to be rejected. Where notice in accordance with S. 80 (b) was given by registered post and the notice was duly served, and the acknowledgment due receipt duly signed on behalf of the defendant was filed in Court, the mere fact that the plaintiff mentioned in the plaint that he had 'given' notice instead of mentioning that the notice had been 'delivered' did not justify the dismissal of the suit. If the Court was of opinion that there was any defect it should have allowed the plaintiff to amend his plaint. Case law discussed. (Para 3)

Anno: Civil P. C., S. 80 N. 17.

1953 Mulla: S. 80 (Topic discussed in N. 17 to S. 80 in AIR Com., extra).

CASES REFERRED: Paras

(A) (V24) AIR 1937 Sind 291: 32 Sind LR 67 3

(B) (V14) AIR 1927 PC 176: 54 Ind App 338 (PC) 3

(C) (V36) AIR 1949 Pat 93 3

(D) (V39) AIR 1952 Mad 502: 1951-1 Mad LJ 463 3

Ambika Prasad, for Applicant; G. Mehrotra, for Respondent.

MALIK C. J.:

220 bales of piece-goods cloth were sent to Khurason Railway Road station in the district of Azamgarh and the consignee was the plaintiff, Messrs. Rekh Chand. The consignment arrived at the railway station and open delivery was obtained by the plaintiff on 24-7-1946. It was found that there was a shortage in the quantity of cloth

delivered and the value of such shortage was Rs. 262-3-0. The plaintiff claimed this amount as damages with interest and certain other expenses that he had to incur in serving notices. The lower Court held that it was proved that the plaintiff had suffered damages to the extent of Rs. 304-7-3. Notice under S. 80, Civil P. C. had been sent by registered post to the Governor-General in Council and the acknowledgment due receipt was filed by the plaintiff. It was however held by the lower Court that inasmuch as it was not stated in the plaint that the notice had been delivered or 'left' at the office of the Governor-General the plaint was defective and it was on this ground alone that the plaintiff's suit was dismissed.

(2) Paragraph 7 of the plaint is as follows:

"That the plaintiff gave notices to defendants Nos. 2 and 3 under Ss. 77 and 140 of the Indian Railways Act on 3-10-1946 and notice under S. 80 to defendant No. 1 (Governor-General in Council) on 15-4-1947 within the time prescribed by law)."

The learned Judge has held that it was necessary for the plaintiff to have stated in the plaint that the notice had been delivered to the Governor-General in Council.

Reliance is placed by the learned Judge on the language of S. 80, the relevant portion of which is as follows:

"80. No suit shall be instituted against the Government, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of

....

(b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;

....

and the plaint shall contain a statement that such notice has been so delivered or left."

(3) The objection is that in the plaint it was alleged that the plaintiff had 'given notice' under S. 80 to defendant No. 1 and it was not said that the notice had been 'delivered'. In our view this is hypercriticism and the lower Court has taken a very technical view. The lower Court relied on a judgment of the Court of Judicial Commissioners, Sind, — 'Gangaram and Rupchand and Co. v. Secretary of State', AIR 1937 Sind 291 (A). The learned Judicial Commissioners relied on a decision of the Privy Council and were of the opinion that the decision of their Lordships of the Judicial Committee concluded the matter. We have looked into the decision of the Judicial Committee in — 'Bhagchand Dagadusa v. Secretary of State', AIR 1927 PC 176 (B). The point did not arise in that case and the observations were only to this effect that the provisions of S. 80 were to be strictly complied with. That does not mean that in drafting the plaint the exact words of S. 80 are to be repeated and even if the purport of that section is conveyed in a different language the plaint was to be rejected.

In — 'Mohammad Farooq v. Governor-General in Council', AIR 1949 Pat 93 (C), Imam J., as he then was, observed:

"While one must strictly enforce the provisions of S. 80 of the Code, it seems to me that the question of interpretation of the plaint as to what it means is another matter.... In the case before me, the notice had been given under a registered post. The respondent admitted having received the notice. The acknowledgment due also shows that the notice had been delivered to the Secretary, Central Government. In these circumstances there had been a sufficient compliance with the provisions of S. 80 of the Code."

In — 'Sankunni Menon v. South Indian Railway', AIR 1952 Mad 502 (D), a learned Judge of the Madras High Court held that though S. 80 of the Civil P. C. was mandatory it was equally well settled that the Court should not be hypercritical in examining the language used but should interpret the same in a free and liberal spirit. It is not denied that notice in accordance with S. 80 (b) was given by registered post and the notice was duly served. In the plaint it was mentioned that notice had been given. The acknowledgment due receipt duly signed on behalf of the defendant was filed in Court. The mere fact that the plaintiff mentioned that he had given notice instead of mentioning that the notice had been delivered did not justify the dismissal of the suit. If the learned Judge was of opinion that there was any defect he should have allowed the plaintiff to amend his plaint.

(4) We must, therefore, allow this revision, set aside the decree passed by the lower Court and decree the plaintiff's suit for Rs. 304-7-3 with interest at 6 per cent. per annum up to the date of the filing of the suit and thereafter till the date of payment at 3½ per cent. per annum. The plaintiff will get his costs in both the Courts.

B/D.H.Z. Revision allowed.

A.I.R. 1954 ALLAHABAD 496 (Vol. 41, C.N. 206)

BRIJ MOHAN LAL J. (13-1-1954)

Shabd Saran, Applicant v. Haji Mohd. Zulfiquarulla, Opposite Party.

Civil Revn. Nos. 562 and 1124 of 1953, against Order of Munsif, West Allahabad, D/- 25-4-1953.

Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (30 of 1947), S. 7-B — "Landlord".

The term 'landlord' means a person in whom the title to the accommodation in question is vested for the time being. If he happens to be a person who has acquired the property after the date of its allotment to the tenant he is as such entitled to maintain an application under S. 7-B as the original landlord was. To accept the contention that the term 'landlord' as used in sub-sec. (1) of S. 7-B means the person who was the owner of the property at the time when allotment was made to the tenant and does not include a person who may, by act of parties or operation of law, have acquired title to the house after the date of allotment to the tenant, would lead to startling results. It would mean that if a person purchases the house in which a tenant is already residing he can never maintain an application under Section 7-B. The original landlord will have no longer any interest in moving such an application because his title to the property has ceased to exist. The result would be that the tenant shall be at liberty to go on making defaults in paying rent with impunity and will enjoy complete immunity from being proceeded against under S. 7-B. This could never have been the intention of the legislature. (Para 4)

Shabd Saran, in person; Sadiq Ali, for Opposite Party.

ORDER: These two civil revisions have been filed by the same applicant. He is a tenant of an

accommodation situate in 22, Queens Road, Allahabad. He has been in arrears of rent for over three months.

The opposite party took proceedings against him under S. 7B of the Temporary Control of Rent and Eviction Act, 1947 (Act No. 3 of 1947). This section permits a landlord to serve a notice of ejectment through the Munsif's Court on a tenant who has not paid rent for more than three months. The Munsif, while serving the notice, calls upon the tenant to pay up the arrears within fifteen days or to show cause within the said period why an order directing him to be evicted from the accommodation be not passed against him.

Sub-section (7) of this section provides that it is open to the tenant to file an objection (other than an objection in respect of costs) and in the event of such an objection being filed the landlord can, on payment of court-fee, convert the proceedings into a suit. The objections filed by the tenants are then to be decided in that suit. But a proviso added to this sub-section lays down that a tenant "shall not be permitted to file any objection unless he has deposited in court the amount mentioned in the notice."

(2) The applicant, when served with notice by the learned Munsif, filed an objection but made no deposit. The learned Munsif, however, granted him an extension of time to make such deposit. Before the expiry of this extended period the applicant came up in revision to this Court. He has contended before me that the Court below had no jurisdiction to entertain a petition under S. 7B at the instance of the opposite party.

(3) To appreciate this contention it is necessary to narrate a few facts which are undisputed between the parties. When the accommodation in question was let out to the applicant by the order of the Rent Control Officer, one Ghazanfar Ullah was described as the owner of the accommodation. Later on a partition took place between him and his brother Zulfiqar Ullah (opposite party) and by means of a registered deed of partition the accommodation in question was allotted to Zulfiqar Ullah.

After the partition Ghazanfar Ullah informed the applicant that the house had thenceforward become the property of his brother Zulfiqar Ullah. The applicant tendered rent to him (Ghazanfar Ullah) but the latter refused to accept it informing him that the rent was payable to Zulfiqar Ullah. Zulfiqar Ullah and his counsel have shown the registered deed of partition to the applicant to satisfy him that the accommodation in question has been allotted to Zulfiqar Ullah. Yet the applicant contends that Zulfiqar Ullah could not maintain a petition against him under Section 7-B of the Act.

(4) The applicant's contention is that the term 'landlord' as used in sub-section (1) of Sec. 7-B means the person who was the owner of the property at the time when allotment was made to the tenant and does not include a person who may, by act of parties or operation of law, have acquired title to the house after the date of allotment to the tenant. He has not been able to cite any authority in support of this contention. Nor is there any merit in this argument.

The term 'landlord' means a person in whom the title to the accommodation in question is vested for the time being. If he happens to be a person who has acquired the property after the date of its allotment to the tenant he is as much entitled to maintain an application under Section 7-B as the original landlord was. The contention put forward by the applicant will lead to startling results. It would mean that if a person purchases the house in which a tenant is already residing he can never maintain an application under Section 7-B.

It may also be pointed out that the original landlord will have no longer any interest in moving such an application because his title to the property has ceased to exist. The result, therefore, would be that the tenant shall be at liberty to go on making defaults in paying rent with impunity and will enjoy complete immunity from being proceeded against under Section 7-B of the Act. This could never have been the intention of the legislature. I am, therefore, unable to accept the applicant's contention.

In my opinion the term 'landlord' means a person in whom the property for the time being vests. Zulfiqar Ullah is now the owner of the property and he can certainly maintain the petition.

(5) There is no force in these revisions. They are hereby dismissed with costs.

(6) The interim stay orders dated 6-5-53 and 12-10-1953 are vacated.

B/M.K.S. Applications dismissed.

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(FULL BENCH)

MALIK C. J., SAPRU AND V. BHARGAVA **JJ.** (10-2-1954).

Deoria Sugar Mills Ltd., Deoria, Applicant **v.** Govt. of U. P. and others, Opposite Party.

Civil Misc. Writ Nos. 184 and 214 of 1950.

Constitution of India, Art. 226 — Tribunal having jurisdiction to decide question, wrongly deciding it — No writ can issue — Proper remedy.

The High Court in exercise of its writ jurisdiction cannot convert itself into a Court of appeal for the purpose of judging the correctness or incorrectness of a decision of a Tribunal which, admittedly, was rightly seized of the matter and had jurisdiction to give a decision therein. (Para 6)

Merely because a decision may be incorrect on the ground that the inferior Court wrongly interpreted some provisions of law, or, has wrongly applied some provision of law, which was not applicable, in arriving at its decision, it cannot be said that that Court has exercised jurisdiction not vested in it, or, has committed an error apparent on the face of the record or proceeding which justify interference by issue of a writ of certiorari. (Para 7)

An incorrect decision, whether on a question of fact or on a question of law, by a Court or tribunal in proper exercise of jurisdiction vested in it is not contemplated by by the words, "error on the face of the record or proceeding", used by their Lordships of the Supreme Court in the cases of AIR 1952 SC 179 and AIR 1952 SC 192. Such an error would be merely a wrong decision on a question of law which can be re-examined only by a Court of appeal and not in proceedings for issue of a writ under Art. 226 of the Constitution. (Para 7)

The Industrial Court (Sugar), Lucknow, had jurisdiction to decide the question whether the members of the staff of the petitioners-Companies at Calcutta were or were not workmen for purposes of the orders of the Government, directing payment

of bonus by the petitioner-Companies to their workmen. In order to decide this question, the Industrial Court had to refer to the provisions of the U. P. Sugar Factories Control Act, 1938 and the rules framed thereunder. The Industrial Court (Lucknow) held that Calcutta workers were not workers.

Held that if the Courts committed an error in interpreting those provisions and came to a wrong conclusion, the decision by the Industrial Court could not be held to be one without jurisdiction or in excess of it and could not consequently, be challenged by issue of a writ under Art. 226 of the Constitution. Case law Ref. (Para 6)

Held that the appropriate remedy for the petitioners, if any, could be by way of an application for special leave to appeal to the Supreme Court against the decision of the Industrial Court (Sugar), Lucknow, in case they wanted to seek redress against a decision which they contended was incorrect. (Para 7)

CASES REFERRED : Paras

(A) (V39) AIR 1952 SC 319: 1952 SCR 696 6
(B) (1888) 21 QBD 313: 57 LJ QB 513 6
(C) (V40) AIR 1953 All 260: 1953 All LJ 29 6, 10
(D) (V39) AIR 1952 SC 179: 1952 SCR 519 7
(E) (V39) AIR 1952 SC 192: 1952 SCR 583 7

G. S. Pathak, R. S. Pathak and V. D. Bhargava, for Applicant; G. Mehrotra, J. Swarup and S. S. Srivastava, for Opposite Party.

Per MALIK C. J. and V. BHARGAVA J. delivered by V. BHARGAVA J. :

The petitioners in these petitions for issue of writs in the nature of 'certiorari, mandamus' and prohibition are the Deoria Sugar Mills, Ltd., Deoria, and Shri Sita Ram Sugar Company, Ltd., Baitalpur, District Deoria.

(2) The facts alleged on behalf of the petitioner in Writ Petition No. 184 of 1950 are that, under the orders of the Government of Uttar Predesh, the petitioner-company was directed to pay out a fixed amount as bonus for the year 1947-48 in the year 1949 to the workers of the sugar factory, the definition of 'workers' being as given in sub-rule 8 of rule 11 of the Rules framed under the U. P. Sugar Factories Control Act, 1938. Interpreting this order as including workers employed at the Head Office of the Company at Calcutta the petitioner-company made pro rata payments to the workers employed at Deoria as well as to those employed at the Head Office at Calcutta.

The Deoria Chini Mill Mazdoor Union, representing the workmen employed in the company at Deoria, contended that no bonus was payable to the members of the staff at the Head Office at Calcutta and that the entire amount of bonus should have been disbursed to the workmen at Deoria who had received proportionately larger amounts.

This gave rise to an industrial dispute which was taken cognizance of by the Regional Conciliation Board, Gorakhpur, which gave an award respecting the dispute but stayed its decision on the issue whether bonus was rightly paid to the workmen at Calcutta pending the decision of the same issue in a previous case which was pending before the Industrial Court (Sugar), Lucknow.

Against this award, appeals were filed by the petitioner-company as well as by the Deoria Chini Mill Mazdoor Union, Deoria, before the Industrial Court (Sugar), Lucknow. The Industrial Court, after hearing the appeals, submitted its report to the Government of Uttar Pradesh, holding that the factory should distribute the entire amount of bonus to the workmen at Deoria and, consequently, recommended that the petitioner-company should be directed to distribute the amount, which it had wrongly distributed to the Head Office staff at Calcutta, amongst the workmen at Deoria.

On this finding, the appeal of the petitioner-company was dismissed. The State of Uttar Pradesh, on the basis of this report, issued an order No. 900 (ST)/XVIII-430(ST)/48, dated 27-3-1950, by which it enforced the findings of the Industrial Court (Sugar), Lucknow, contained in the report mentioned above.

(3) The facts of the other case (Miscellaneous Writ Case No. 214 of 1950) are exactly similar. In that case also, a specified amount was payable as bonus to the workmen for the year 1947-48 by the petitioner-company in 1949 and, in distributing the bonus, workmen employed at the Head Office at Calcutta were included. An industrial dispute was raised by the Rashtriya Chini Mill Mazoor Sangh, Baitalpur, representing the workmen employed by the petitioner-company at Baitalpur. The dispute was first decided by the Regional Conciliation Board, Gorakhpur, on 24-5-1949, and, on appeal, the Industrial Court (Sugar), Lucknow, formulated its report on 30-11-1949, to the same effect as in Miscellaneous (Writ) Petition No. 184 of 1950. The State Government, on the basis of this report, issued Order No. 4301(ST)/XVIII-469(ST)/48, dated 17-12-1949.

(4) By these writ petitions, the petitioner-companies challenge the validity of these orders of the State Government, praying for issue of writs in the nature of certiorari quashing the reports of the Industrial Court (Sugar), Lucknow, and the orders of the Government of Uttar Pradesh based on those reports, dated 27-3-1950 and 17-12-1949.

A second prayer was made for issue of writs in the nature of mandamus directing opposite party No. 1, the Government of Uttar Pradesh, to forebear from prosecuting or taking any other action under its orders, dated 27-3-1950, and 17-12-1949.

The third prayer was that writ in the nature of prohibition be issued to opposite party No. 1, the U. P. Government, restraining it from taking any action under its orders dated 27-3-1950, and 17-12-1949, against the petitioners.

(5) The correctness of the facts alleged by the petitioners is not contested by the opposite parties who are three in number in each case. The Govt. of Uttar Pradesh and the Industrial Court (Sugar), Lucknow, are the first two opposite parties in both these cases. In Writ Petition No. 184 of 1950, the third opposite Party is the Deoria Chini Mill Mazdoor Union, Deoria, whereas the third opposite party in Writ Petition No. 214 of 1950 is the Rashtriya Chini Mill Mazdoor Sang, Baitalpur, district Deoria.

(6) The contention on behalf of the petitioners in these two cases is that the definition of "workers" given in R. 11(8) of the Rules framed under the U. P. Sugar Factories Control Act, 1938, was wrongly applied by the Industrial Court (Sugar), Lucknow and this resulted in an incorrect Interpretation of the orders of the U. P. Government, directing payment of bonus to the workers by the petitioner-companies.

According to the Industrial Court (Sugar), Lucknow, the definition of 'workmen', as given in sub-rule 8 of rule 11 of the Rules framed under the U. P. Sugar Factories Control Act, 1938, is very wide and included both the Head office staff as well as the farm staff but, in view of S. 1(2), U. P. Sugar Factories Control Act, 1938, which shows that the Act extends to the State of Uttar Pradesh only, the Head Office staff which worked at Cal-

cutta outside the State of Uttar Pradesh, could not be included within the definition of the word 'workmen' as given in R. 11(8) and, consequently, no bonus was payable to the staff at Calcutta.

It was submitted that this decision on a question of law was wrong and that, therefore, the reports of the Industrial Court (Sugar), Lucknow, & the orders of the Government of Uttar Pradesh passed thereon should be quashed.

Learned counsel for the petitioners did not contend before us that the Industrial Court (Sugar), Lucknow, had no jurisdiction to decide the industrial disputes which were referred to it, nor was it contended that the State Government, in any way, exceeded its statutory powers in passing orders based on the reports of the Industrial Court.

The contention is that the view taken by the Industrial Court (Sugar), Lucknow, that, in order to interpret the definition of the word 'workmen', as given in R. 11(8) of the Rules framed under the U. P. Sugar Factories Control Act, 1938, the provisions of S. 1(2) of the Act should be taken into account, is clearly wrong. These contentions make it clear that, by these petitions for issue of writs under Art. 226 of the Constitution, what the petitioners seek are writ to quash the decision of the Industrial Court (Sugar), Lucknow, and the orders of the Government of Uttar Pradesh which are admitted to be within their jurisdiction.

The jurisdiction of this Court to issue writs, orders or directions under Art. 226 of the Constitution cannot be exercised for such a purpose. In — 'Ebrahim Aboobakar v. Custodian General of Evacuee Property', AIR 1952 SC 319 (A), the Supreme Court held:

"It is plain that such a writ cannot be granted to quash the decision of an inferior court within its jurisdiction on the ground that the decision is wrong. Indeed, it must be shown before such a writ is issued that the authority which passed the order acted without jurisdiction or in excess of it or in violation of the principles of natural justice. Want of jurisdiction may arise from the nature of the subject-matter, so that the inferior court might not have authority to enter on the inquiry or upon some part of it. It may also arise from the absence of some essential preliminary or upon the existence of some particular facts collateral to the actual matter which the court has to try and which are conditions precedent to the assumption of jurisdiction by it. But once it is held that the court has jurisdiction but while exercising it, it made a mistake, the wronged party can only take the course prescribed by law for setting matters right inasmuch as a court has jurisdiction to decide rightly as well as wrongly."

The Supreme Court, in the same case, approved of the principles laid down by Lord Esher, Master of the Rolls in — 'Reg v. Income Tax Commrs.', (1888) 21 Q B D 313 (B).

The question as to when a writ under Art. 226 of the Constitution can be issued to quash the proceedings of an inferior court was discussed by a Division Bench of this Court in — 'Sundar Lal Saxena v. Hindustan Commercial Bank, Ltd.', AIR 1953 All 260 (C) the principle, laid down by the Supreme Court in — 'AIR 1952 SC 319 (A)', was followed and a number of English cases on the subject were also discussed.

In that case, an industrial dispute was referred to the Industrial Tribunal at Calcutta by the Central Government and the language, in which it was referred, required an Industrial Tribunal to decide the disputes relating to retrenchment, discharge or dismissal of workmen after a specified date and to stoppage of their increments and withholding of promotions. There was a further note that specific cases were to be cited by the employees. The petitioner, in that case, contended that he was a workman and that, his case having been referred to the Tribunal, the Tribunal was bound to decide it.

The Tribunal, however, on going into the facts, held that the petitioner was not a workman and, consequently, refused to entertain his claim. The Bench held that the determination of the question whether the petitioner was a workman was not the determination of a preliminary or collateral fact on which depended the exercise of jurisdiction by the Tribunal. That question was involved in the decision by the Tribunal of the very dispute which had been referred to it. The only authority, that was to decide the question, could be the Industrial Tribunal itself and nobody else, and, consequently, that question was one which was referred to the Tribunal for its decision and was intrinsic of the matter which was for decision before the Tribunal.

The decision on such a matter by the Tribunal in exercise of its jurisdiction could not, consequently, be challenged by a writ of 'certiorari' as the Tribunal had jurisdiction to determine it and as long as it had jurisdiction it, could determine that fact rightly or wrongly. Even a wrong determination of a fact would not amount to exercise of jurisdiction not vested in it, or, refusal to exercise jurisdiction vested in it. We hold that the principle, laid down in that case, was correct and should be applied by us to the present cases also.

In these cases, the Industrial Court (Sugar) Lucknow, had jurisdiction to decide the question whether the members of the staff of the petitioners-Companies at Calcutta were or were not workmen for purposes of the orders of the Government, directing payment of bonus by the petitioner-companies to their workmen. In order to decide this question, the Industrial Court had to refer to the provisions of the U. P. Sugar Factories Control Act, 1938, and the rules framed thereunder. Even if the Courts committed an error in interpreting those provisions and came to a wrong conclusion, the decision by the Industrial Court cannot be held to be one without jurisdiction or in excess of it & cannot, consequently, be challenged by issue of a writ under Art. 226 of the Constitution. This Court in exercise of its writ jurisdiction, cannot convert itself into a court of appeal for the purpose of judging the correctness or incorrectness of a decision of a Tribunal which, admittedly, was rightly seized of the matter and had jurisdiction to give a decision therein.

(7) Shri Pathak, learned counsel for the petitioners, referred, us to two other decisions of the Supreme Court in — 'Parry & Co., Ltd. v. Commercial Employees' Association, Madras', AIR 1952 SC 179 (D) and — 'Veerappa Pillai v. Raman and Raman, Ltd.', AIR 1952 SC 192 (E) and, on their basis, contended that, in these cases, there was an error apparent on the face of the record and, consequently this Court had jurisdiction to issue a writ of certiorari, quashing the incorrect orders of the Industrial Court.

In the former case, their Lordships of the Supreme Court held:

"The Commissioner was certainly bound to decide the questions and he did decide them. At the worst, he may have come to an erroneous conclusion, but the conclusion is in respect of a matter which lies entirely within jurisdiction of the Labour Commissioner to decide and it does

not relate to anything collateral, an erroneous decision upon which might affect his jurisdiction. The records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by the Labour Commissioner which goes contrary to the principles of natural justice. Thus there was absolutely no grounds here which would justify a superior court in issuing a writ of 'certiorari' for REMOVAL of an order or proceeding of an inferior tribunal vested with powers to exercise judicial or quasi judicial functions.

What the High Court has done really is to exercise the powers of an appellate court & correct what it considered to be an error in the decision of the Labour Commissioner. This obviously it cannot do. The position might have been different if the Labour Commissioner had omitted to decide a matter which he was bound to decide and in such cases a 'mandamus' might legitimately issue commanding the authority to determine questions which it left undecided; but no 'certiorari' is available to quash a decision passed with jurisdiction by an inferior tribunal on the mere ground that such decision is erroneous."

In the latter case, their Lordships, dealing with the writ jurisdiction of a High Court under Art. 226 of the Constitution, observed:

"Such Writs, as are referred to in Art. 226, are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice.

However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made."

Neither of these two cases, in our opinion supports the submission of Shri Pathak that we would be entitled, in these cases, to examine the correctness or incorrectness of the decision of the Industrial Court (Sugar), Lucknow which was given in exercise of jurisdiction vested in it.

Merely because a decision may be incorrect on the ground that the inferior court wrongly, interpreted some provisions of law, or, has wrongly applied some provision of law, which was not applicable, in arriving at its decision, it cannot be said that that court has exercised jurisdiction not vested in it, or, has committed an error apparent on the face of the record or proceeding which justify interference by issue of a writ of 'certiorari'. It is obvious that an incorrect decision, whether on a question of fact or on a question of law, by a court or tribunal in proper exercise of jurisdiction vested in it is not contemplated by the words, "error on the face of the record or proceeding", used by their Lordships of the Supreme Court in the cases referred to above. Such an error would be merely a wrong decision on a question of law which can be re-examined only by a court of appeal and not in proceedings for issue of a writ under Art. 226 of the Constitution. The appropriate remedy for the petitioners if any could be by way of an application for special leave to appeal to the Supreme Court against the decision of the Industrial Court (Sugar), Lucknow, in case they wanted to seek redress against a decision which they contended was incorrect.

(8) These writ petitions are, consequently, not maintainable and are dismissed with costs to opposite-party No. 1, the Government of the State of Uttar Pradesh, which was the only party that appeared before us to contest these writ petitions. We assess the costs to opposite party No. 1 at Rs. 200/- in each case.

SAPRU J.:

(9) I agree. I do not propose to set out the facts which have given rise to these two petitions as that task has been performed for us by my brother V. Bhargava.

(10) The short question which these petitions raise is whether this Court would be justified in quashing the decision of the Industrial Court (Sugar), Lucknow and the orders of the Government of Uttar Pradesh thereon when admittedly, as has been pointed out by my brother V. Bhargava, in doing so they did not exceed the jurisdiction that was vested in them.

For the contention which has been put forward on behalf of the petitioners is not that the Industrial Court had no jurisdiction to decide the industrial disputes which had been referred to it or that the State Government went beyond its statutory powers in passing orders on the report of the Industrial Court, but that the Industrial Court could not, in interpreting the word "workman" as defined by R. 11(8) of the Rules framed under the U. P. Sugar Factories Control Act, 1938, ignore the provisions of S. 1(2) of the Act.

The point for consideration, therefore really is whether the word 'workmen' has been correctly interpreted by the Industrial Court and the U. P. Government in these particular cases and, if not, whether this Court can interfere with orders passed by the Uttar Pradesh Government.

Reference on this point has been made by my brother V. Bhargava to the relevant decisions of the Supreme Court and the case in — 'AIR 1953 All 260 (C)' and it is unnecessary to dilate at length on those decisions or to examine the facts on which they were based. Suffice it to say that viewing these points in the light of the cases just referred to it cannot be said that the Industrial Court and the U. P. Government either exceeded the jurisdiction that was vested in them or even passed orders based on errors which can be held to be "apparent on the face of the record". The mere fact that this Court would have arrived at a different conclusion in regard to the interpretation to be given to the word "workmen" would not entitle it to interfere with the orders of the U. P. Government based upon an interpretation of the word 'workmen' by the Industrial Court.

Article 136(1) of the Constitution authorises the Supreme Court in its discretion to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. Clearly if the petitioners feel aggrieved by the orders in question, they have the remedy of applying for special leave to appeal to the Supreme Court and it is on their so doing for that Court to consider whether the interpretation of the word 'workmen' as given by the Industrial Court and the orders of the U. P. Government based on it is or is not correct.

I am referring to this aspect of the case as, in my opinion, in exercising our writ jurisdiction under Art. 226 in cases where writs of 'certiorari' or 'prohibition' are called for, it is incumbent on us to bear in mind that for a wrong interpreta-

tion of law by a quasi-judicial tribunal or court the Constitution has provided in many cases a remedy which cannot be described as inadequate merely because the right to grant special leave to appeal is completely discretionary with the Supreme Court.

(11) For the reasons given above, I would hold that the petitions are not maintainable and would dismiss them. I would assess costs to opposite party No. 1 which is the only party which has appeared before us at Rs. 200/- in each case.

BY THE COURT:

(12) These petitions under Art. 226 of the Constitution are not maintainable and are dismissed with costs to the Opposite Party No. 1, the Government of the State of Uttar Pradesh, which was the only party which appeared before us to contest these writ petitions. We assess the costs at Rs. 200/- in each case.

A/R.G.D. Petitions dismissed.

****A.I.R. 1954 ALLAHABAD 501 (Vol. 41, C.N. 208)**

DESAI AND ASTHANA JJ. (18-12-1953)

T. B. Mukerji, Convict-Appellant v. The State, Opposite Parties.

Criminal Appeal No. 1012 of 1950.

(a) Criminal P. C. (1898), S. 233 — Joint trial in doubtful cases.

The Court should not take unnecessary risk in holding joint trials in doubtful cases. It is nothing short of foolishness to hold a joint trial, unless its legality is beyond dispute, and take the risk of the trial being held to be invalid by higher Court. If the higher Court does not order retrial, there may arise serious miscarriage of justice from the holding of the joint trial. If it orders retrial, though justice may be done ultimately, it would be done after a waste of public time and money and unnecessary expenditure and inconvenience to the parties. There can be no excuse for all this. The law is that a joint trial may be held and not that it must be held. A Court is never obliged to hold a joint trial. Even where it can hold it, it is open to it to hold separate trials for the various offences. A prudent Judge would, therefore, always hold separate trials whenever he has the slightest doubt about the validity of a joint trial. Further, when a Judge passes one sentence for the various offences committed by an accused or passes separate sentences but makes them concurrent, the holding of a joint trial in doubtful cases is all the more indefensible. The Public Prosecutor also is charged under the duty of seeing that the joinder of charges or persons is legal and of advising the Judge not to hold a joint trial in a doubtful case. (Para 3)

Anno: Criminal P. C., S. 233 N. 1.

(b) Criminal P. C. (1898), S. 233 — Exceptions to separate trial — AIR 1953 All 228, Dissented from.

The exceptions are to be construed strictly. There are exceptions to the normal rule in S. 233 and they are all specified in the section. They are "the cases mentioned in Ss. 234, 235, 236 and 239". There are no other exceptions and any joinder of charges which is not covered by the above-mentioned Section is illegal. A joint trial for which no principle can be found would prima facie be invalid and would not be covered by any of the exceptions. On the other hand, the mere fact that a joinder of charges is based on one of the principles on which the exceptions are founded would not make it valid if it is not covered by the provisions of the exceptions. One of the principles is that a joinder of charges in certain circumstances would save multiplicity of proceedings; but a Court would not be justified, in order to prevent a multiplicity of proceedings, in joining two or more charges if the joinder is not covered by the language of any of the sections. AIR 1952 Bom 177, Rel. on; AIR 1953 All 228, Dissented from. (Paras 4, 5)

Anno: Criminal P. C., S. 233 N. 1.

(c) Criminal P. C. (1898), Ss. 233, 239 — "Except in the cases mentioned in Ss. 234, 235, 236 and 239" — AIR 1953 All 228, Dissented.

What is meant by excepting the S. 234 etc. from the normal rule is that a joint trial can be had in circumstances mentioned in S. 234, or S. 235 or S. 236 or S. 239. The word "and" is used because there are four exceptions and they are enumerated. It is certainly not the meaning that a joint trial is permitted only where the case is covered by provisions of all the four sections. The word "and" is not used in a cumulative sense; it is used in the sense of the word "or". The plain meaning of S. 233 is that each of Secs. 234, 235 etc. is an exception to the normal rule. Each exception is different from the other exceptions. If the provisions of two of the sections can apply to a case, both must be applied; the Court cannot ignore the provisions of one Section on the ground that those of the other have been applied. But the provisions of each section must be applicable to the whole of the case; it is not open to a Court to split up a case into two parts and apply the provisions of one section to one part and those of the other section to the other part. AIR 1953 All 228, Dissented from. (Para 6)

Anno: Criminal P. C., S. 233 N. 1; S. 239 N. 2.

(d) Criminal P. C. (1898), Ss. 233, 234 and 239 — Applicability of S. 234 to more persons.

Section 234 governs the case where there is only one accused. Case law Rel. on. (Para 7)

Anno: Criminal P. C., S. 233 N. 1; S. 239 N. 5a.

(e) Criminal P. C. (1898), Ss. 233, 235 and 239 — Applicability of S. 235 to more persons.

Section 235 deals with a case in which there is only one accused. A case in which there are two or more accused is expressly provided for in S. 239 (a) and (d). Section 235 (2) and (3) stand on a different footing from those of S. 234 and S. 235 (1) which essentially deal with the joinder of distinct offences. Even after holding that a case is governed by S. 234 or S. 235 (1), the Court may have to consider and give effect to the provisions of S. 235 (2) or (3) when framing the charge. In other words, both these provisions can be applied together in one case. There is nothing in S. 235 (2) and (3) to indicate that the validity of the joinder depends upon there being only one accused. (Paras 8, 10)

Anno: Criminal P. C., S. 233 N. 1; S. 239 N. 5a.

(f) Criminal P. C. (1898), Ss. 234, 235, 236, 239 — Whether mutually exclusive.

It cannot be held that the provisions of Ss. 234, 235 and 236 are mutually exclusive. Those of S. 234 and of S. 235 (1) are certainly mutually exclusive but not the others. Sec-

tion 236 deals with the question which does not take into account the number of the accused. Its provisions apply whether there is only one accused in the case or there are several. If there are several accused, there is nothing to prevent its being applied against each one of them. Its applicability is not controlled by any other provision. Like S. 235 (2) and (3), it lays down a rule regarding joinder of charges for one offence, and not joinder of offences. Its provisions contain nothing to indicate that they cannot be applied in a case governed by S. 234 or S. 235 (1). Just as the provisions of S. 235 (2) (or S. 235 (3)) and S. 234 (or S. 235 (1)) can be simultaneously applied in a case, so also those of Sections 236 and 234 (or S. 235 (1)).

This simultaneous application does not at all militate against the rule that the whole of a joint trial must be permitted by one section or another. The provisions of S. 234 and S. 239 cannot be simultaneously applied. Just as the provisions of S. 234 cannot be combined with those of S. 239, so also those of S. 235 (1) cannot be combined with them. The provisions of Ss. 239 and 236 can be simultaneously applied in a case. The provisions of S. 234 to S. 236 are made applicable to a case governed by S. 239 but only "so far as may be." If the provisions of S. 234 and S. 235 (1) cannot be applied, there is nothing in this provision of S. 239 to make them applicable. On the other hand, it makes the provisions of S. 235 (2) and (3) and S. 236 applicable because they can be applied. Case law discussed.

(Paras 11, 13, 17a, 18, 19, 20, 21)

Anno: Criminal P. C., S. 239 N. 2.

†** (g) **Criminal P. C. (1898), S. 239 — Clauses of S. 239 whether mutually exclusive.**

The different clauses of S. 239 are mutually exclusive i.e., it is not possible to combine the provisions of two or more clauses in any one case or to justify a trial of several persons partly by applying the provisions of one clause and partly by applying the provisions of another clause or other clauses. A trial of several persons is valid only if the joinder of all the persons is permitted by any one of the clauses. AIR 1938 Sind 164, Rel. on.

(Paras 17, 44, 45)

Anno: Criminal P. C., S. 239 N. 2a.

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(Z8) (V23) AIR 1936 All 337: 37 Cri LJ 794 20
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(Z13) (V13) AIR 1926 All 261: 48 All 236: 27 Cri LJ 143 34

R. C. Ghatak, for Appellant; J. R. Bhatt, Asst. Government Advocate, for the State.

DESAI J.:

The following question has been referred to us by our brother Chaturvedi for our opinion:

"Are the different clauses of section 239, Cr. P. C. mutually exclusive or can recourse be had to two or more of them for the purposes of jointly trying more than one person?"

The question arose before our learned brother when he was hearing an appeal filed by Mukerji and Chotey Lal against their convictions under sections 120B, 420 and 477A, I. P. C.

(2) The case against the appellants is as follows: Chotey Lal is a partner of a firm carrying on business in Hardoi. Mukerji is a railway employee in charge of a railway grain shop at Allahabad. There was a contract between the railway and Chotey Lal for the supply of grains to the railway grain shop. According to the contract, the grains had to be booked at Hardoi for Allahabad by 25-1-1947. The firm, however, booked the grains after 25-1-47. Under the contract it was liable to pay a penalty to the railway for the delay in booking them. Chotey Lal entered into a conspiracy with the other appellant to defraud the railway and in pursuance of the conspiracy the other appellant prepared a false document known as S. 10 on 1-3-47 stating that the grains had been booked on 25-1-47. He took delivery of the grains and no penalty was charged from the firm. Thus he and Chhotey Lal were guilty of a conspiracy, and in addition Mukerji was guilty of the offence of S. 477 and Chhotey Lal of abetting it, and Chhotelal was guilty of the offence of S. 420 (for obtaining payment for the grains without having to pay a penalty with the help of the false document S. 10) and Mukerji for its abetment.

The above was one transaction; there were two other and similar transactions of 22-4-47 and 24-5-47. The two appellants were prosecuted jointly for committing three offences of S. 120-B, three offences of S. 477A, three offences of abetment of the offence of S. 477A, three offences of S. 420 and three offences of abetment of the offence of S. 420. They were tried before the Additional Sessions Judge who has convicted both under Ss. 120-B, Mukerji also under S. 477A and S. 420 read with S. 109 and Chhotey Lal also under S. 420 and S. 477A, read with S. 109, Penal Code.

In the appeal they contended before our brother Chaturvedi that their trial for three offences committed by each of them in each of three different transactions was illegal. It was contended on their behalf that the various clauses of S. 239, Criminal P. C. are mutually exclusive and that two or more than two of them cannot be combined to validate a joint trial. 'On behalf of the State, it was contended that the various clauses of the section can be combined to justify a joint trial and that Ss. 234 to 239 can also be combined to justify a joint trial'. Our learned brother being of the view that the question raised is of general importance and has not been authoritatively dealt with by this Court has referred it to a Bench for its decision.

(3) Before I deal with the question 'I must deprecate courts' taking unnecessary risk in holding joint trials in doubtful cases. I consider it nothing short of foolishness to hold a joint trial, unless its legality is beyond dispute, & take the risk of the trial being held to be invalid by higher court'. If the higher court does not order retrial, there may arise serious miscarriage of justice from the holding of the joint trial. If it orders retrial, though justice may be done ultimately, it would be done after a waste of public time and money and unnecessary expenditure and inconvenience to the parties. There can be no excuse for all this. 'The law is that a joint trial may be held and not that it must be held. A court is never obliged to hold a joint trial'. Even where it can hold it, it is open to it to hold separate trials for the various offences. A prudent Judge would, therefore, always hold separate trials whenever he has the slightest doubt about the validity of a joint trial.

Further, when a Judge passes one sentence for the various offences committed by an accused or passes separate sentences but makes them concurrent, the holding of a joint trial in a doubtful case is all the more indefensible. In the present case, the learned Sessions Judge has not passed separate sentences for the eighteen offences. When he passed one sentence for three offences committed by each of the appellants it was nothing but an act of imprudence to try him for all the three offences and incur the risk of the joint trial being held to be invalid. The Public Prosecutor also is charged under the duty of seeing that the joinder of charges or persons is legal and of advising the Judge not to hold a joint trial in a doubtful case.

(4) The normal rule is that

> "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately,"

see S. 233 of the Code. There are exceptions to this normal rule and they are all specified in the section. They are "the cases mentioned in Ss. 234, 235, 236 and 239". There are no other exceptions and any joinder of charges which is not covered by the above-mentioned sections is illegal. This is made clear in the illustration to the section which says that if A commits a theft in one transaction and causes hurt in another transaction, he "must be" separately charged and separately tried for the two offences. The exceptions are to be construed strictly. In — 'Shanker v. Emperor', 11 All L J 188 (A), Knox, J. observed:

> "A court cannot and ought not to treat a case before it as in exception to the general and broad rule, unless it is satisfied that the charge should be brought within one of the four exceptions."

(5) Joint trial is permitted under Ss. 234 etc. on certain principles. These principles are obvious from the provisions of the section themselves. A joint trial for which no principle can be found would prima facie be invalid and would not be covered by any of the exceptions. On the other hand, the mere fact that a joinder of charges is based on one of the principles on which the exceptions are founded would not make it valid if it is not covered by the provisions of the exceptions. The court's duty is to enforce the law and not to enact it. One of the principles is that a a 'joinder of charges in certain circumstances would save multiplicity of proceedings; but a court would not be justified, in order to prevent a multiplicity of proceedings, in joining two or more charges if the joinder is not covered by the language of any of the sections'. With great respect to the learned Judges deciding — 'Mangi v. The State', AIR 1953 All 228 at pp. 230, 231 (B), I do not think that the mere fact that

> "every one suffers and none gains by the interpretation sought to be put upon the section on behalf of the accused"

is a valid reason for rejecting the interpretation. If everyone suffers and no one gains by the interpretation which is in accordance with the canons of interpretation, the remedy must be left to the legislature. I think the correct view is that taken by Rajadhyaksha, J. in — 'D. K. Chandra v. The State'. AIR 1952 Bom 177 (C) .

(6) What is meant by excepting the Ss. 234 etc. from the normal rule is that a joint trial can be had in circumstances mentioned in S. 234 or S. 235 or S. 236 or S. 239. The word "and" is used because there are four exceptions and they are enumerated. It is certainly not the meaning that a joint trial is permitted only where the case is covered by provisions of all the four sections. The word "and" is not used in a cumulative sense; it is used in the sense of the word "or". It cannot be doubted that it can be used in disjunctive sense; see — 'L. H. Sugar Factory v. Moti', AIR 1941 All 243 (D). It can be interpreted in conjunctive sense and can also be interpreted in disjunctive sense, but in a given case it must be interpreted only in one sense and can never be interpreted in both senses on different occasions. Since the word in S. 233 cannot always be used in conjunctive sense, it follows that it must be used in disjunctive sense. It was remarked in the case of Mangi at pp. 230, 231 (B) that the use of the word "and" instead of "or" tends to support the view that a joint trial need not be justified by the provisions of only one of the excepted sections and can be justified by the provisions of all of them taken jointly.

I do not think that the use of the word "and" lends any such support. Of course, so far as the mere figures "234" "235" are concerned, there is nothing to prevent their being taken into consideration jointly. But we are not concerned merely with the figures, "234", "235" etc.; we are really concerned with the provisions of these sections.

Whether they can be combined together in a case depends upon their language. If there is anything in the language to prevent any two of them being applied to a case, both cannot be applied to it. The plain meaning of S. 233 is that each of the Ss. 234, 235 etc., is an exception to the normal rule. Each exception is different from the other exceptions. A joint trial of two or more persons or for two or more distinct offences, is valid if it is permitted by provisions of any of the four sections; the whole of the joint trial must be permitted by anyone of them. Section 233 refers to the validity of the whole trial and not of parts of it. If a part of a joint trial is permitted by one section and another part by another, the whole joint trial cannot be said to be permitted by any one section. Every provision of law must be given effect to so far as it can be. It is not expressly laid down in any of the four sections that if a case is covered by it, the provisions of the other sections must not be applied to it.

If the provisions of two of the sections can apply to a case, both must be applied, the court cannot ignore the provisions of one section on the ground that those of the other have been applied. But the provisions of each section must be applicable to the whole of the case; it is not open to a court to split up a case into two parts and apply the provisions of one section to one part and those of the other section to the other part. If the facts in a case attract the applicability of Ss. 234 and 235(2), certainly both can be given effect to and there is no law to prohibit its being done.

(7) A person, who is accused of more offences than one of the same kind committed within the space of twelve months, may be charged with and tried at one trial for any number of them not exceeding three; S. 234. This provision governs the case where there is only one accused see — 'Budhai Sheikh v. Tarap Sheikh', 33 Cal 292 (E); — 'Karam Singh v. Emperor', 12 Cri LJ 208 (Lah) (F); — 'Mahbub Ali v. Emperor', 12 Cri LJ 266 (Lah) (G); — 'Ram Prasad v. Emperor', AIR 1921 All 246 (2) (H) and — 'Ram Sahai v. Emperor', AIR 1921 All 408 (2) (I). In — 'Budhai Sheik's case (E)', the learned Judge observed on page 294:

> "It appears to us, therefore, that the Legislature intended to and did by these sections differentiate between the cases of a single and several accused, and that it cannot be said that all the sections prior to S. 239 apply to both these cases, though in terms they refer to one only, viz., that of a single accused. The existence of S. 239 specifically dealing with the case of several accused and the arrangement of the sections to which we have referred constitutes such a repugnancy in the context as prevents us from reading 'a person' in S. 234 as including several persons."

In — 'Ram Prasad's case (H)', it was pointed out by a Bench of this Court that the Legislature intended to, and did by these sections differentiate between the cases of a single and several accused and that the existence of S. 239 specifically dealing with the case of several accused constitutes such a repugnancy in the context as prevents us from reading "a person" in S. 234 as including several persons. The case of several persons being accused of more offences than one of the same kind committed within the space of twelve months is dealt with in S. 239(c), if the word "person" in S. 234 included "persons" there would have been no necessity of the clause (c) of S. 239. The word "jointly" in the clause (c) is important. Unless the various persons committed the offences jointly, there would be no logic behind trying them jointly. If the word "person" in S. 234 included "persons" the requirement of jointness in committing the offences would be missing and A and B would be liable to be tried jointly under Ss. 323 and 323 (sic) I. P. C. even though they had not committed these offences jointly.

Another fact to be noted is that S. 234 requires the sameness of offences and not of transactions. The offences of which a person is accused must be of the same kind; it is not enough if the transactions in which he committed various offences are same. This has been made clear in the case of — 'Budhai Sheik (E)'; — 'Sheo Saran Lal v. Emperor', 7 All LJ 225 (J) and — 'Chuhar Mal Nirmal Das v. Emperor', AIR 1938 Sind 164 (K). If a person commits several offences in one transaction and those very offences in another similar transaction, the case is not covered by section 234, — 'Sheo Saran Lal v. Emperor (J)'.

(8) If in one series of acts forming one transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for all of them. This is S. 235(1). This provision also deals with a case in which there is only one accused. A case in which there are two or more accused is expressly provided for in S. 239 (a) and (d). There would have been no necessity of these clauses if the word "person" in S. 235(1) included "persons". The offences mentioned in S. 235(1) may be of the same nature or of different natures. If they are of the same nature, they can be tried together regardless of their number. The limit of three offences which governs the joinder of charges when the offences are committed in different transactions does not govern the joinder of charges when they are committed in one transaction. It was stated in the case of — 'Budhai Sheik (E)' that S. 234 does not control S. 235(1). Since Ss. 234 and 235(1) deal with mutually exclusive circumstances, they cannot possibly be applied simultaneously to any case. If the offences in a given case were committed in one transaction, it must be governed by S. 235(1); if they were committed in different transactions they can be tried jointly if it is governed by S. 234. As we cannot have a case in which the offences are committed in one transaction and also in different transactions, we cannot apply the provisions of Ss. 234 and 235(1) simultaneously. It was laid down in the cases of —'Sheo Saran Lal (J)' and — 'Janeshar Das v. Emperor', AIR 1929 All 202 (L) that these two provisions are mutually exclusive. That these provisions cannot be combined was laid down in — 'Raghavendra Rao v. Emperor', 12 Cri LJ 567 (M); — 'Raman Behari Das v. Emperor', AIR 1915 Cal 296 (N); — 'Shujauddin v. Emperor', AIR 1922 All 214 (1) (O); — 'Dubri Misir v. Emperor', AIR 1931 Oudh 86 (P) and — 'D. K. Chandra v. The State (C)'.

(9) In — 'Rex v. Daya Shanker', AIR 1950 All 167 (Q), the accused was charged under S. 477A for making false entries in six registers in different transactions or, in the alternative, under S. 408, I. P. C. It was held that the trial of the six charges under S. 477A was illegal. As it was a case of offences committed in more than one transaction, S. 235 did not apply to all. Section 239 also did not apply because it was a case of only one accused. The trial of six charges could be valid if at all only under S. 234. But not more than three offences could be tried together under that provision. Therefore, the trial for the six

offences of S. 477A was illegal. The question of the joinder of the charge under S. 408 did not arise at all because regardless of the joinder of that charge the trial was illegal. But the learned Judges went into the question of the joinder and held that the charges could be joined together. That was clearly obiter.

The learned Judges applied the test whether the joinder would confuse the jury or the Judge or prejudice the accused in the joint trial for three offences under S. 477A. With great respect to them, I think that that is not the correct test. The law has specified the charges which can be joined together. Though the legislature seems to have selected the charges that can be joined together on considerations of convenience, avoidance of multiplicity of proceedings and expenditure, embarrassment etc., it has not laid down any law to the effect that any joinder of charges which would not cause greater confusion to the jury or the Judge or greater prejudice to the accused than the joinder that is permissible under S. 234 etc. is also permissible. In — 'Ram Kishoon Parshad v. Emperor', AIR 1934 Pat 232 (R), one charge under S. 408, I. P. C. consisting of three items was held to be jointly triable with S. 477A. Again, that decision was given by way of obiter because it was not required for the decision of the case before the Bench.

(10) If the acts alleged constitute an offence falling within two or more separate definitions of any law, the person accused of them may be charged with and tried at one trial for each of them, this is S. 235(2). If several acts of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined and for any offence constituted by any one or more of such acts; this is S. 235(3). In these provisions, the word "person" includes persons because there is nothing in the context to show that the word was used only in singular. If an act is punishable under two different sections and the accused can be tried jointly for both, it does not matter whether he is tried singly or jointly with others. There are no similar provisions expressly applicable to a case in which there are two or more accused.

Surely the legislature did not intend that in a case in which there are two or more accused, they must be tried separately for the two or more offences constituted by the act done by them. These provisions simply lay down the rule as to how charges should be framed for an offence. This rule would be applicable whether there is one accused or there are two or more. These provisions thus stand on a different footing from those of Ss. 234 and 235(1) which essentially deal with the joinder of distinct offences. Therefore, the question whether they can be applied to a case simultaneously with provisions of another section such as 234, or 235(1) or 239 may not be answered in the same way as the question whether, the provisions of Ss. 234, 235(1) and 239 can be simultaneously applied in one case. I think a mistake has been committed in some cases in thinking that either the provisions of Ss. 234 to 239 can be simultaneously applied in one case or no two provisions contained in these sections can be applied simultaneously, the difference in the nature of the provisions contained in the various sections has not been taken into account.

A provision dealing with the question whether certain two offences can be tried together or not and another dealing with the question under what sections charges can be framed for an offence cannot be said to be mutually exclusive; both questions may arise in one case. Even when the court decides to try an accused jointly for two offences, it may have to decide how to frame charges in respect of those two offences. Thus, even after holding that a case is governed by S. 234 or section 235(1), it may have to consider and give effect to the provisions of S. 235(2) or (3) when framing the charge. In other words, both these provisions can be applied together in one case. There is nothing in S. 235(2) and (3) to indicate that the validity of the joinder depends upon there being only one accused. They do not deal with the number of distinct offences which can be tried together; they deal only with the nature of charges which can be framed for one criminal act of offence. They can be availed of against several accused who are jointly tried in a case; what is permissible as against one can be permissible as against the others.

(11) I respectfully differ from the wide proposition contained in the case of — 'Janeshar Das (L)' that the provisions of Ss. 234, 235 & 236 are mutually exclusive. Those of S. 234 and of S. 235(1) are certainly mutually exclusive but not the others. In the case of — 'D. K. Chandra (C)', it was laid down that the provisions of Ss. 234, 235 and 236 cannot be combined and supplemented so as to contravene the provisions of any of these. I do not think there arises any question of infringing provisions of any of the sections. All these sections are of a permissive nature; they only permit certain joinders of charges. They do not contain any mandatory or prohibitory clause. Therefore there is nothing in them which can be infringed. If a joinder is not covered by the language of any section, it may be said that it is permitted by it but it cannot be said that it infringes its provisions.

As regards combining the provisions of Ss. 234 and 235(1), I agree with what was said in — 'D. K. Chandra's case (C)', but not as regards combining the other provision. It was recognised in that case at page 181 that S. 234 etc. can be made use of in co-operation but a condition was added that the co-operation must not lead to contravention of any of the sections. If a joinder of two charges is permitted under one provision but not under another, it cannot be said that it contravenes the other. It is impossible to say that every joinder must be permitted by all the provisions. What the law requires is that a joinder must be permitted by any of the sections; if it is, there is no longer any necessity of considering the other provisions. But a joinder of charges may be permitted by two provisions applied simultaneously, though a joinder of distinct offences must be permitted by the provision of only one section.

(12) In 'In re Bal Gangadhar Tilak', 33 Bom 221 (S), the accused printed two articles on two different dates. For each publication he was charged under Ss. 124A and 153A. He was tried for the two offences of S. 124A and only one offence of S. 153A. The three offences were held to have been committed in one transaction and the joinder was justified under S. 235(1). But it was held that even if the two publications were not done in one transaction, the joinder was permitted by combination of the provisions of Ss. 234 and 235 (2) or 236.

In — 'Emperor v. Tribhuwan Das', 33 Bom 77 (T), the trial of Tribhuwan Das for offences of Ss. 124A and 153A committed through the publication of an article in a paper on one date and of

the same offences through the publication of an article in the same paper on another date was held to be valid under S. 234, I.P.C. It was held to be a trial for only two offences and not four, though he was charged with four offences.

The offences were held to be of the same nature, though they were punishable under different Ss. 124A and 153A. Heaton, J. pointed out 'at page 86' that S. 234 does not say that a trial must be limited to three charges. It says it must be limited to three offences and the offences must be of the same kind. He read the word "section" in S. 234 as including "sections". The first offence was punishable under the same Ss. 124A and 153A as was the second offence; so they were of the same nature. I respectfully agree with him.

(13) It is stated in S. 236 that if it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any of such offences and any number of charges may be tried at one trial or he may be charged in the alternative with having committed some one of them. Section 237 provides that in such a case if the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under S. 236, he may be convicted of the offence which he is proved to have committed. These provisions, like the provisions of S. 235(2) and (3), deal essentially with the question how to frame a charge for an offence and not with the question how many offences can be tried together.

It deals with the question which does not take into account the number of the accused. Its provisions apply whether there is only one accused in the case or there are several. If there are several accused, there is nothing to prevent its being applied against each one of them. Its applicability is not controlled by any other provision. Like S. 235(2) and (3), it lays down a rule regarding joinder of charges for one offence, and not joinder of offences. Its provisions contain nothing to indicate that they cannot be applied in a case governed by S. 234 or 235(1). Just as the provisions of Ss. 235(2) (or 235(3)) and 234 (or 235(1)) can be simultaneously applied in a case, so also those of Ss. 236 and 234 (or 235(1)). I should make it clear here that this simultaneous application does not at all militate against the rule that the whole of a joint trial must be permitted by one section or another. The reason is that framing two or more charges for an offence in accordance with the provisions of S. 235(2) or (3) or S. 236 is really not trying an accused jointly for two or more offences. The normal rule contained in S. 233 is in respect of distinct offences, whereas the charges that are permitted to be framed by these provision are not for distinct offences. It is the whole joinder of distinct offences (not the whole joinder of charges) that must be permitted by any one section.

(14) Any number of alternative charges can be framed under S. 236. No limit is placed; there can be more than three alternative charges for an offence. Section 234 permit a joinder of not more than three offences. Neither is there any conflict between these two provisions nor is one controlled by the other. A charge is not the same thing as an offence. Section 234 limits the number of offences, not of charges. Two charges can be framed though only one offence is committed; so an accused can be tried for six charges framed in respect of three offences, whenever he can be tried jointly for those offences (i.e. when they are of same nature committed within twelve months, or in one transaction). Though there are six charges, he will be convicted of three only, and he will be convicted on each of the three counts under the same section. He is tried for three offences only and not six. In — 'Keshav Lal v. Emperor', AIR 1944 Bom 306 (U), it was said at page 311 that the provisions of the two sections can be combined in one case.

In — 'Shib Charan v. Emperor', AIR 1931 All 49 (V), King, J. observed at page 50:

> "I cannot understand why Ss. 235 and 236 should be regarded as mutually exclusive so that whenever a person is tried for two or more offences committed in the course of the same transaction, S. 236 must be deemed to have been expunged from the Code. It is a general rule of interpretation that effect must be given to every part of a Statute and I see no reason in the present case why S. 235(1) should not be supplemented by S. 236."

In that case Shib Charan, who was charged with the offences of Ss. 363 and 379 committed in one transaction, was held to be rightly convicted under S. 411; the case was really governed by the provisions of Ss. 235(1) and 236 with S. 237. The same view was taken by Niamatullah, J. in — 'Kashi Nath v. Emperor', AIR 1932 All 25 (W).

Under the law it is not necessary to charge a person with alternative offences; S. 237 allows an accused to be convicted of an offence of which he could have been charged under S. 236 but was not. If without charging him in the alternative he can be convicted, it follows that he is not prejudiced by his being charged in the alternative. If he is charged in the alternative, that would be less prejudicial to him because then he would know what are the possible charges that he has to meet and of which he may be found guilty. The legislature could not have intended that framing charges in the alternative would cause an illegality, though framing only one of the alternative charges would not. In dealing with this question, one must also take into consideration the provisions of S. 403 of the Act and the effect of holding separate trials for the offences which can be joined in one trial under S. 235(2) or (3) or S. 236. If it be said that these provisions cannot be given effect to along with other provisions such as those contained in section 234 or 235(1) or 239 and if the accused are tried and acquitted of an offence, their trial for the other offences with which they could have been charged under these provisions may become barred by section 403.

(15) It would also cause difficulties in the trial for perjury for making two contradictory statements. If the accused are tried separately for the two statements, the prosecution may fail to prove that either of them is false. The prosecution may succeed only if they are tried in the alternative for making one statement or the other falsely.

(16) 'In re Sriranga Chariar', AIR 1934 Mad 673 (X), the accused was acquitted of the offence of S. 380 and his trial for an altogether different offence of section 467 was held to be not barred. He was alleged to have stolen a blank ticket and made some forgeries in it. The acts were done by him in one transaction and he could have been tried for both under S. 235(1). It was argued that he could have been charged in the first trial for the offence of S. 467 also and could have been convicted of it even if not charged and that he could not be tried again for that offence. The argument was repelled on the ground that Ss. 235(1) and 236 are mutually exclusive and

that if a case is governed by one of them it cannot be governed by the other.

The more correct reason would have been that the provisions of S. 235(1) are permissive and not mandatory and that a person can be tried separately for the distinct offences committed by him in one transaction. There really did not arise any question in that case whether the provisions of Ss. 235(1) and 236 are mutually exclusive or not. Section 236 did not apply to the facts of the case at all and the accused could not have been convicted under S. 467 in the first trial. So the second trial was not barred.

(17) Section 239 lays down which persons may be charged and tried together. It is in seven clauses (a) to (g). Clause (a) is to the effect that persons accused of the same offence committed in the course of the same transaction can be tried together. It is to be noted here that the words used are "same offence", and not "same charge". So long as the offence is the same, it does not matter under what sections the accused are charged. Clause (b) is to the effect that persons accused of an offence and persons accused of its abetment or attempt to commit it can be tried together. Clause (c) is to the effect that persons accused of more than one offence of the same kind within the meaning of S. 234 committed by them jointly within the period of twelve months can be tried together. This provision is analogous to that of S. 234; it was necessary to be made because S. 234 deals with only one accused.

Any number of offences can be tried together. Probably the legislature thought that rarely there would be a case in which several persons are accused of having jointly committed within the period of twelve months more than three offences of the same nature. Here also the word used is "offence" and not "charged". Clause (d) is to the effect that persons accused of different offences committed in the course of the same transaction can be tried together. This is analogous to S. 235(1). Clause (e) deals with the joint trial of thieves and receivers of stolen property. Clause (f) deals with the joint trial of receivers of property stolen through one theft. And cl. (g) deals with counterfeiters of coins. Though the section has seven clauses, each clause is unconnected with, and independent of, the other clauses. The legislature could have as well enacted seven sections instead of seven clauses in one section.

What is laid down by S. 239 is that persons accused of the same offence committed in the course of the same transaction can be tried together, persons accused of an offence and those accused of its abetment or attempt to commit it can be tried together, persons accused of more than one offence of the same kind committed by them jointly within twelve months can be tried together, persons accused of different offences committed in the course of the same transaction can be tried together and so on. Thus each clause mentions which persons can be tried together. When the legislature has specified the various groups of persons who can be tried together it means that no other groups can be tried together. These groups are the only exceptions to the normal rule that every person should be tried separately.

Each group consists of persons who are connected with one another in some way; it is because of the connection that they all are allowed to be tried together. In order that persons may be liable to be tried together, it is essential that they are connected with one another in one of the ways described in the clauses. No other connection would do; certainly not an indirect connection or connection through a third person. If A and B are liable to be tried together, it is because of a direct connection between them, and not because they are connected with each other through C. If A can be tried jointly with B because of a certain connection and A can be tried with C because of another connection, it does not follow that A, B and C or B and C also can be tried together.

The connections described in the clauses are mutually exclusive; no two of them can exist simultaneously in any case. One cannot, therefore, have in any case persons connected with one another in two or more of the ways. In other words, persons included in two or more of the groups cannot all be tried together. There is absolutely nothing to connect one group with any other, the persons of one group cannot, therefore, be tried with those of any other.

I do not think anyone can seriously contend that A and B jointly committing a murder can be jointly tried with C and D jointly committing a theft in another transaction, or with C and E who abets C (and D) to commit theft, or with E and F, who receives the stolen property; or with F and G, who is another receiver of the stolen property. A and B can be tried jointly; so also C and D, C and E, E and F or F and G; but there is no reason for permitting joint trial of persons included in two or more of these groups. The bare fact that a person is a member of two or more groups does not supply any connection between them; it is a mere accident in the case. So long as one cannot spin out a connection between two or more of the clauses from the language itself, the persons described in them cannot all be tried together.

Clauses (a), (b), (c) and (d) refer to offences in general and other clauses refer to particular offences only (such as theft, receiving stolen property, counterfeiting coins etc.); naturally clause (a) or (b), (c) or (d) cannot be applied simultaneously with clause (e) or (f) or (g). Clauses (a) and (d) deal with offences committed in one transaction only while clause (c) deals with offences committed in different transactions; naturally no case can be governed by clauses (a) and (c) both of clauses (d) and (c) both. The language of S. 239 leads to the same result.

The law says that persons accused of offences committed in the course of the same transaction can be tried together; it follows that only they can be tried together and no other persons can be tried along with them. If a rule lays down that certain combinations are allowed, it is inherent in the rule that combinations of combinations are not allowed unless there is a specific provision for the same. Had there been an eighth clause in S. 239 to the effect that persons mentioned in any two or more of the previous clauses can be tried together, then and then only would it be possible to try together persons described in any two or more of the clauses. But there is no such clause.

The question whether two or more of the clauses can be simultaneously applied to a case is similar to the question whether there can be simultaneous application in a case of the provisions of Ss. 234, 235(1) or Ss. 234 and 239 or of Ss. 235(1) and 239. That is why I have discussed at length to what extent, if at all, the provisions of Ss. 234, 235 and 236 can be simultaneously applied in a case. The provisions of S. 239, dealing with the

question which persons can be tried together, are similar to those of Ss. 234 and 235(1) and dissimilar to those of Ss. 235(2) and (3) and 236. When the question arises what charges should be framed against the persons who are tried jointly in accordance with the provisions of S. 239, one must have regard to the provisions of Ss. 235(2) and (3) and 236; i.e., a case can be governed by the provisions of all these sections.

(17a) The provisions of Ss. 234 and 239 cannot be simultaneously applied; — 'Ram Prasad v. Emperor (H)'. The most important reason is that the two sections deal with mutually exclusive circumstances; one deals with a case where there is only one accused and the other deals with a case when there are two or more accused. Obviously a case cannot be governed by the provisions of both. In — 'Ram Prasad's case (H)', A, B, C and D jointly committed three offences of S. 396 in three transactions and their joint trial was held to be invalid. In the trial of A, B, C and D for one dacoity, which would have been valid under S. 239(a), the charges of the other two offences of S. 396 could not be combined with the charge of the third offence against any of the men by applying S. 234.

In — 'Ah Kit v. Emperor', AIR 1925 Rang 198 (Y), the joint trial of A charged with offences of Ss. 408, 408 and 408 committed in three transactions within one year and of B charged with abetment of the first two offences of S. 408 was held to be invalid. A and B could be tried jointly for the offence of S. 408 and its abetment under S. 239(b) but neither could A be tried in addition for the other two offences of S. 408 by applying the provisions of S. 234 nor could B be tried in addition for the other offence of abetment of S. 408 by applying the same provisions.

In the case of — 'AIR 1929 All 202 (L)', Dalal, J. observed on page 203:

> "When more persons than one are tried jointly reference cannot be made to provisions of the Code previous to S. 239 indiscriminately,"

and on page 204 he observed:

> "The provisions of S. 239 stand by themselves and the scope thereof cannot be extended by use of the provisions of sections not referred to in S. 239."

I agree so far as Ss. 234 and 235(1) are concerned, but not as regards 235(2) and (3) and 236. It was rightly pointed out in the case of — 'AIR 1952 Bom 177 (C)' at p. 184 that:

> "To construe these sections as supplementing each other would necessarily result in enlarging the scope of each exception. Each section is self-contained and the limits of each have been carefully laid down according to the circumstances contemplated in those sections."

The provisions of S. 234 cannot be combined with those of S. 234 (sic 239?). If a person commits four offences of the same kind, he cannot be tried for all of them even if they are committed within the space of twelve months.

A joint trial for three of the offences would be valid under S. 234 but it cannot be contended that by again applying the provisions of this section, the trial of the fourth offence would be valid. In — 'Raghavendra Rao's case (M)', the trial of A for the offences of Ss. 403 and 426 for trees cut in eight different transactions was held to be invalid. In — 'Raman Lal v. Emperor', AIR 1927 All 223 (Z), Raman Lal's trial for more than three offences of S. 408 committed in several transactions spreading over a period of more than one year was held to be illegal.

In the case of — 'Daya Shanker (Q)', it was held that a person cannot be tried for six offences of S. 477A committed in different transactions in a period of seventeen months. If the provisions of S. 234 could be applied twice in one case there would have been no use of the limit of one year. If the provisions of S. 234 could be combined with those of section 235(1), there is no reason why they cannot be combined with those of S. 234 itself.

(18) Just as the provisions of S. 234 cannot be combined with those of S. 239, so also those of S. 235(1) cannot be combined with them. Which persons can be tried for offences committed in one transaction is exhaustively laid down in clauses (a) and (d) of S. 239; neither can other persons be tried along with them nor can charges for other offences be added against them.

(19) In — 'Puttoo Lal v. Emperor', AIR 1924 All 316 (Z1), the trial of five men for the offences of Ss. 147 and 325, I. P. C. committed in one transaction and of Ss. 147, 323 and 342 committed in another transaction was held to be illegal. They could be tried for the two offences of S. 147 and 147 (if committed within 12 months), but the charge for the offence of S. 325 could not be added against them on the ground that since it was committed in the same transaction as the first offence of S. 147, they could be tried also for it under S. 235(1).

It was stated in — 'Karam Singh v. Emperor (F)' and — 'Gunno v. Emperor', AIR 1934 Oudh 325 (Z2) that S. 239(d) deals with a case in which the different offences are committed in one transaction only. Similarly S. 239(a) also deals with a case when the same offence is committed by different persons in one transaction. Where A, B and C committed an offence in one transaction and A and B committed an offence of the same kind in another transaction, it was held that A, B and C could not be tried together for the offences committed in both the transactions; see — 'Ram Sahai v. Emperor (I)'.

There are numerous cases laying down that an accused cannot be tried in one trial for offences X and Y committed in one transaction; and for the same offences in another transaction for example see — 'Sheo Saran Lal v. Emperor (J)'; — 'Raman Behari Das v. Emperor (N)'; — 'Shujauddin v. Emperor (O)'; — 'Emperor v. Mata Prasad', 30 All 351 (Z3); — 'Dubri Misir v. Emperor (P)' and — 'Nagendra Nath v. Emperor', AIR 1932 Cal 486 (Z4). Similarly it was held in — 'Emperor v. Puttu Lal (Z1)' and — 'C. Tamiez Khan v. Rajjab Ali', AIR 1927 Cal 330 (Z5) that A and B could not be tried in one trial for offences X and Y committed by them jointly in one transaction and for the same offences committed by them jointly in another transaction.

In — 'Babu Lal v. Emperor', AIR 1938 PC 130 (Z6), the Judicial Committee had to deal with a case in which A and B were charged with conspiracy and several thefts committed in pursuance of it in a period of thirteen months and B was charged in addition with several thefts committed by him in another place in a period of nine months. The Judicial Committee held the trial to be valid because all these thefts and the conpiracy were held to be one transaction. The whole trial was. therefore, governed by S. 239(d). The Judicial Committee refused to apply the limit of three offences contained in S. 234.

They observed on page 133 that clause (d)

"does not import either expressly or by implication the limitation set out in S. 234.....or the limit contained in S. 235(1)."

In other words, a case governed by S. 239 was held to be not governed by Ss. 234 and 235(1). It is noteworthy that the Judicial Committee referred to only Ss. 234 and 235(1) and not to Ss. 235(2) and (3) and 236. If a case could be governed simultaneously by the provisions of S. 239 and those of S. 234 or 235(1), the Judicial Committee would not have made the above observation. In the case of — 'Chuhar Mal (K)', the joint trial of A, B and C for various offences under the Excise and Opium Acts and of C also for abetment of those offences was held to be illegal.

With regard to the clauses of S. 239, Davies, J. C. observed on page 167:

"They are, we think mutually exclusive in the sense that they cannot be added one to another so as to bring some of the persons charged under one clause and some under another and so to put them upon their trial all together at one and the same time.....If more than one person are to be tried and charged together, their case must be brought within one of the clauses....."

The learned Judicial Commissioner also observed that there is no reason to think that the word "offence" in S. 239 does not include a minor or alternative offence; he thought that the provisions of S. 239(c) can be applied simultaneously with those of S. 235(2) or of S. 236 in a case. 'Kashi Nath v. Emperor (W)' and — 'Ram Kishoon Prasad v. Emperor (R)' are the authorities for the proposition that the provisions of Ss. 239 and 236 can be simultaneously applied in a case.

(20) In — 'Niranjan v. Emperor', AIR 1934 All 811 (Z7) and — 'Emperor v. Mathuri', AIR 1936 All 337 (Z8), it was held that the provisions of S. 239(a) can be combined with those of S. 234 in a case. In the case of — 'Niranjan (Z7)' A, B and C were tried for an offence of S. 411 committed jointly and B in addition for two other offences of S. 411 of different stolen properties. A, B and C could be tried for the offence of S. 411, I. P. C. under clause (a) and by applying the provisions of S. 234 the addition of the other two charges against B was held to be valid.

In — 'Mathuri's case (Z8)' which followed — 'Niranjan's case (Z7)' and dissented from — 'Ram Sahai's case (I)' and — 'Ram Prasad's case (H)'. A and B were tried for the offences of Ss. 302 and 457 committed in one transaction, C for that of S. 460 committed in the same transaction and D and E for the offence of S. 411 for being in possession of the property stolen in that transaction. The trial was held illegal as not permitted by clause (c). But by way of obiter it was remarked that if A and B could be tried for the offence of S. 457 jointly with D and E for that of S. 411, A and B could be also tried in the trial for the offence of S. 302. With respect to the learned Judges, I disagree.

In — 'Niranjan's case (Z7)', Bennet, J. remarked on page 812 that:

"There is nothing in the section specifically stating that as regards one or more of the persons accused, there should be no application to that person or persons of the previous sections, such as S. 234."

That is true, but the absence of a specific bar in S. 239 is not the only criterion. Section 234 does not govern a case in which there are two or more accused. 'Mathuri's case (Z8)' was decided by Harries and Rachpal Singh, JJ. The learned Judges said on page 342 that:

"If persons can properly be charged and tried together under S. 239, Cr. P. C., there is nothing to prevent other charges being added against one or more persons if the addition of such charges is permissible by the Code."

That also was by way of obiter. More charges can certainly be added against one or more of such persons, but only as permitted under S. 235(2) or (3) or S. 236. In — 'Michael John v. Emperor', AIR 1931 Pat 349 (Z9), M was tried under S. 408 for embezzlement committed in different transactions but within one year and under S. 477A for falsification of accounts, in those transactions and the trial was held to be legal. The court apparently applied the provisions of Ss. 234 and 235(1). This in my view could not be done.

In the case of — 'Ram Kishoon Prasad (R)', the learned Judges followed the case of — 'Michael John (Z9)' and stated on page 234 that:

"There is no more reason for holding that Ss. 234 and 235 are mutually exclusive than that one or other of these provisions and either S. 236 or S. 239 are mutually exclusive or that Ss. 236 and 239 are so."

For the reasons already stated, I respectfully differ from the view that the provisions of Ss. 234 and 235(1) stand on the same footing as those of Ss. 235(2) and (3) and 236.

(21) It is laid down at the end of S. 239 that "the provisions contained in the former part of this chapter shall, so far as may be, apply to all such charges."

Section 239 is included in chapter 19 which is divided under two heads, (1) of "Form of charges" containing Ss. 221 to 232 and (2) of "Joinder of charges" containing Ss. 233 to 240. It was stated by Dalal, J. C. in — 'Bishambhar Nath Tandon v. Emperor', AIR 1926 Oudh 161 (Z10) that the words "former part" mean the part headed by "Form of charges". In — 'Babu Lal Chowkhani's case (Z6)', the Judicial Committee at page 133 interpreted the words to mean "in regard to the form and joinder of charges". Therefore, the words are not restricted to the part headed by "Form of charges" as stated by Dalal, J.

All the provisions of the chapter upto S. 238 are covered by the words. The provisions of Ss. 234 to 236 are made applicable to a case governed by S. 239 but only "so far as may be". If the provisions of Ss. 234 and 235(1) cannot be applied for the reasons stated earlier, there is nothing in this provision of S. 239 to make them applicable. On the other hand, it makes the provisions of Ss. 235(2) and (3) and 236 applicable because they can be applied.

(22) Great chaos and abnormality would result if it were held that the provisions of Ss. 234, 235(1) and of the various clauses of S. 239 can be applied simultaneously in a case. I take by way of an illustration a case in which A and B commit a theft on 1-1-53, A commits another theft on 1-6-53 and a third theft on 1-11-53, D joins with him in the commission of the second theft, E abets D in the commission of that theft and causes a simple hurt to F who interferes with his abetment, E causes a simple hurt to G in an altogether different transaction within a year, H and J separately receive properties stolen during the third theft knowing them to be stolen property and J has in his possession on the same date property stolen by K. By applying the provisions of vari-

ous sections and clauses, A, B, C, D, E, F, G, H, J and K can all be tried together for all the offences mentioned above.

I do not know if anything can be more absurd than this. Such a joint trial may not take place in practice, but the question is not whether it would take place in practice but what the legislature permits. Certainly the rule is not "the more the merrier". Nor is that the greater the multifariousness of charges and persons the more is the trial legal. Take another instance. Suppose A and B in one transaction commit an offence of S. 323, A and C in another transaction commit an offence of S. 323 and C and D commit in a third transaction an offence of S. 323. If Ss. 234 and 235(1) can be combined, A, B, C and D can be tried together for the three offences. But can A be tried for the two offences of S. 323 jointly with D only or can B be tried jointly with only D? Obviously they cannot because there is no provision under which they can be.

If they cannot, it would be absurd to hold that their joint trial will become legal if in the former case B and C are tried with them and in the second case A and C are tried with them. There is no law which makes it obligatory to join two charges in a trial. All the provisions pertaining to joinder of charges are permissive. There may arise an illegality if there is a joinder of charges or persons but under the law there cannot possibly arise any illegality on account of omission to include a charge or a person in a trial. If the result of an interpretation of the provisions of Ss. 234 etc. is that the addition of a person in the trial would convert an illegal trial into a legal trial, it would go against the law that separate trials cannot possibly be illegal.

It would be converting a permissive provision into a mandatory one; in the above illustration the prosecution would be obliged to try A, B, C and D jointly in order to make the trial of two or more offences legal. There is no provision of law under which the addition of an accused in a trial would make an illegal trial of other accused a legal one. Therefore, in the above illustration either the joint trial of A and D or that of B and D was not illegal or the joint trial of A, B, C and D would not be legal. There is no doubt about the illegality of the former; it follows that the latter is not legal. The law is that the prosecution cannot be worse off by omiting to prosecute any person; therefore we must not interpret S. 234 etc. in such a manner as would make a joint trial of some accused illegal on the ground that another person is not tried jointly with them.

(23) Suppose A, B and C jointly commit one theft on 1-1-53, another theft on 1-6-53 and third theft on 2-1-54. They can be tried jointly for the first and the second thefts or for the second and the third thefts under Cl. (c), but that clause would not permit their being tried jointly for all the three thefts. If A, B and C are tried jointly for the first two offences and if it were possible to apply the provisions of S. 234 or 235(1) to a part of the joinder of charges, one can try A, B and C for the third theft also.

One can argue that the third theft was within twelve months of the second theft and that consequently they could be tried for the second and the third thefts jointly. If it were thus possible to try A, B and C for all the three thefts, it would have been quite useless for the Legislature to prescribe the limit of twelve months in S. 234 and in Cl. (c). One could get round the limit by applying the provisions of various sections and clauses to different parts of a joint trial. This illustration would make it clear that each provision permitting a joinder of offences must be considered as excluding the operation of every other provision permitting joinder of other offences.

(24) It may be interesting to note that it is not even pleaded in some cases that a joint trial is permitted by the combined operation of two or more provisions permitting joinder of offences. I have come across several cases in which the joint trial has been held to be invalid and no attempt had been made on behalf of the State to justify it in this manner. For example see — 'Karam Singh v. Emperor (F)'; 'Mahbub Ali v. Emperor (G)'; 'Emperor v. Mata Prasad (Z3)'; 'Michael John v. Emperor (Z9)';'Nagendra Nath v. Emperor (Z4)'; 'Krishna Ji v. Emperor', AIR 1932 Bom 277 (Z11) and — 'Ram Sahai v. Emperor (I)'.

(25) In — 'Akhil Bandhu v. Emperor,' AIR 1938 Cal 258 (Z12), joint trial for various offences of conspiracy and principal offences was held to be valid because all the offences were deemed to be parts of one transaction.

(26) The question should, therefore, be answered accordingly.

ASTHANA J.:

(27) The question which has been referred to us for decision is whether the different clauses of S. 239, Cr. P. C. are supplementary to each other or they are mutually exclusive.

(28) It was contended on behalf of the State that not only the different clauses of S. 239 of Cr. P. C. but also Ss. 234 to 236, which are exceptions to the general rule embodied in S. 233, Cr. P. C. that there shall be a separate charge for every distinct offence and every such charge shall be tried separately, are supplementary to each other and are not mutually exclusive.

On behalf of the accused it was argued that the exceptions provided in Ss. 234 to 236 and the different clauses of S. 239, Cr .P. C. were not supplementary to each other but were mutually exclusive and, in order to decide whether the different offences against the same person or different persons could be tried together one had to see whether the case fell within any of the Ss. 234 to 236 or any of the clauses of S. 239, Cr. P. C. and not whether all these sections and the different clauses of S. 239 taken together could enable the court to try the different persons of the different offences or a single person of the different offences together in one trial.

(29) In order to decide this question it is necessary to reproduce Ss. 234 to 236 and the different clauses of S. 239, Cr. P. C, which are exceptions to the general rule embodied in S. 233, Cr. P. C.

S. 234 (1) when a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, 'whether in respect of the same person or not,' he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or any special or local law:

Provided that, for the purpose of this section, an offence punishable under S. 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under S. 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local haw, shall be

deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

S. 235 (1) If, in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with, and tried at one trial for every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(4) Nothing contained in this section shall affect the Indian Penal Code, Section 71.

S. 236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

S. 239. The following persons may be charged and tried together, namely:

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(c) 'persons accused of more than one offence of the same kind within the meaning of section 234 committed by them jointly within the period of twelve months';

(d) persons accused of different offences committed in the course of the same transaction;

(e) 'persons accused of an offence which includes theft, extortion, or criminal misappropriation and persons accused of receiving or retaining, or assisting in the disposal or concealment of property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last named offence';

(f) 'persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the' possession of which has been transferred by one offence; and

(g) 'persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence';

(30) It will appear from a perusal of the above sections that Ss. 234 and 235 are applicable only in those cases where the different offences have been committed by one and the same person and not by different persons. The section which is applicable to those cases where different offences have been committed by more than one person is S. 239, Cr. P. C. Section 234 is applicable where more than one offence of the same kind are committed by a single person within the space of twelve months, and provides that he can be tried for not more than three of such offences.

Section 235 provides that if more offences than one are committed by the same person in the same transaction he can be charged with all of them at one trial. If the two sections, i.e., Ss. 234 and 235 are considered to be supplementary to each other and not mutually exclusive the result will be that more than three offences committed within a period of twelve months in three separate transactions can be combined against the same person at one trial. This will be inconsistent with the provisions of Ss. 234 & 235 taken individually.

To take a concrete case,-A commits criminal breach of trust on 15-1-1950 and in order to conceal that offence he falsifies the accounts on the same day in the course of the same transaction. He thereby committed two distinct offences in the same transaction one under S. 406 and the other under S. 477A. He committed similar offences on two other occasions, i.e., on 15th April and 1-11-1950. According to S. 234, Cr. P. C. he could be tried at one trial of only three offences either under S. 406, I. P. C. or under S. 477A, I. P. C. According to S. 235, I. P. C. he could be tried together of the two offences under Ss. 406 and 477A which were committed in the same transaction on any of these three dates.

If, however, the two sections are combined together, the result will be that he can be tried of three offences under S. 406 and three offences under S. 477A I. P. C. at one and the same trial which will be contrary to the provisions of Ss. 234 and 235, Cr. P. C. considered individually. In my opinion the legislature could not have intended this effect as it would lead to a lot of confusion and complications and the accused will be very much prejudiced if the different offences committed by him at different times and in the course of the same transaction were combined together.

(31) The question has been the subject of decisions in the different High Courts & I will now proceed to consider the various authorities which have been cited at the Bar on this point. I shall first consider the cases of this Court. The earliest case is — '7 All LJ 225 (J)'. In this case the accused was charged and tried at one and the same trial for three offences under S. 408, I. P. C. and three offences of forgery under S. 467, I. P. C. and was convicted and sentenced in respect of all the six offences.

It was held by Tudball, J. that the trial of a person in respect of six offences at one and the same trial although they might have been committed within the space of twelve months contravened the rule laid down in S. 233 even when read with S. 234, Cr. P. C. and as clause (1) of S. 235 and S. 234 must be mutually exclusive, to hold that S. 234 covered all the offences committed in the course of similar and separate transactions when the number of offences committed was more than three would be straining the language of the section beyond all bounds. He, therefore, set aside the conviction and sentence and directed a retrial of the accused in accordance with law.

(32) The next case is — '11 All LJ 128 (A)'. In this case six persons were committed for trial of the offences under Ss. 302 and 323, I. P. C. It was held by Knox and Rafiq, JJ. that the trial of all these persons for the different offences which were not committed in the course of the same transaction was illegal.

In the course of their judgment their Lordships observed:

"The rule embodied in S. 233, Cr. P. C. is made subject to four exceptions. But a court cannot and ought not to treat a case before it as an exception to the general and broad rule, unless it is satisfied that in the case before it the charge should be brought within one of the four exceptions and it would be safer if the Magistrate or the Sessions Judge showed in the charge sheet or in his judgment that he had reasons for bringing the case before him under one of those separate sections. The exception mentioned in S. 236 has obviously no application in the present case.

The case before the judge was a case in which more persons than one were accused of the same offences, and S. 239 would apply. But S. 239 has this limitation attached to it that the provisions contained in the former part of Chapter 19 apply to all charges falling under S. 239. Thus, S. 239 is in turn governed by Ss. 234 and 235, Criminal P. C. Section 234 has no application to the present case. It refers to offences of the same kind, and offences of the same kind are defined in cl. (2) of S. 234."

Later on they observed that S. 235, cl. (2) and (3) had no application to the case. With due deference to their Lordships, I am afraid I am unable to agree with the view that S. 239 is governed by Ss. 234 and 235, Cr. P. C. The words

"and the provisions contained in the former part of this chapter shall, so far as may be, apply to all such charges"

at the end of S. 239, Cr. P. C., in my opinion, do not refer to Ss. 234 to 238, Cr. P. C., but only to Ss. 221 to 232 which fall under the heading "Form of Charges". The next heading "Joinder of Charges" begins from S. 233. If Ss. 234 and 235 govern S. 239 and are supplementary to each other there does not appear any satisfactory reason why the exceptions mentioned in Ss. 234 and 235 should have been reproduced in S. 239.

Section 239 (a) refers to the trial of different persons accused of the same offence committed in the course of the same transaction. Section 239 (c) refers to the trial of persons accused of more than one offence of the same kind within the meaning of S. 234 committed by them jointly within the period of twelve months. No doubt there is no restriction in this clause of three offences as is mentioned in S. 234, Cr. P. C. Section 235(d) relates to the trial of different persons accused of different offences committed in the course of the same transaction. It appears from a perusal of S. 239 and its different clauses that this section is complete and independent and is not to be supplemented by the provisions of Ss. 234 and 235 because if it were so there was no necessity for the reproduction of the provisions of those sections in this section.

(33) The next case is 'AIR 1922 All 214 (1) (O)'. It is a decision of a single Judge of this Court. It was held by Gokul Prasad, J. that it was not legal to try an accused person at the same trial of three charges under S. 408 and one under S. 477A, I. P. C. It appears from a perusal of the judgment that his Lordship was first inclined to the view that a joint trial was possible having regard to the provision of S. 234 read with the provision of S. 235. But on a consideration of the case '7 All LJ 225 (J)', which was followed by him, he came to the conclusion that a joint trial was not possible.

He seems to have agreed with the view of Tudball, J. in the above case that the provisions of Ss. 234 and 235 were not supplementary to each other but were mutually exclusive, and before the different offences could be tried together the case should fall under one of the several exceptions taken individually and not cumulatively.

(34) The next case is — Faujdar Mahto v. Emperor', AIR 1926 All 261 (Z13). It is also a decision of a single Judge and was decided in 1925. In this case two girls were kidnapped by the accused on different dates and were passed off as Chhattri girls to one BR, who wanted a wife for himself & a wife for his brother, and who paid money to the accused for them.

It was held by Mukerji, J. that although S. 234 of the Criminal P. C. would allow the trial of two cases of kidnapping together and similarly S. 235 would allow the trial of the offence of kidnapping with respect to one girl and cheating with respect to the same girl together, yet the operation of the sections could not be combined and it was impossible to combine all the four charges, two of kidnapping and two of cheating in one trial. The cases 'AIR 1922 All 214 (1) (O)' and '7 All LJ 225 (J)', were referred and seem to have been followed.

The following passage from the judgment may be quoted:

"The question now is whether Ss. 234 and 235 allow a combination of charges so that there may be one joint trial in respect of one kidnapping and cheating as a part of the same transaction with another and independent offence of kidnapping together with cheating with respect to the girl kidnapped, as a part of the same transaction. Even if there were no authority for the proposition, I would have no hesitation in coming to the conclusion that the operations of the two Ss. 234 and 235 cannot be combined. The reasons are obvious. If this were permitted the whole object of the rule laid down in S. 233 would have been frustrated.

The main principle is that there should be a separate trial for every distinct offence. Two exceptions are allowed (so far as the facts of this case are concerned) viz., those enacted in Ss. 234 and 235. The present case in its entirety does not come under S. 234, nor does it come in its entirety within S. 235. If we permit a joint trial in respect of two sets of separate and independent transactions in which different offences have been committed, we would create such an amount of confusion as would in most cases end in a distraction of the minds of the judges and jury and the accused persons themselves."

(35) The next case is of — 'AIR 1929 All 202 (L)'. It was also a decision of a single judge. It was held by Dalal, J. that the provisions of Ss. 234, 235 and 236 were mutually exclusive and the provisions of S. 239 stood by themselves and the scope thereof could not be extended by the use of the provisions of sections not referred to in S. 239. In this case two accused, namely, Janeshar Das and Khushi Ram were charged with three offences and each offence was framed in the alternative either of criminal breach of trust or abetment thereof. They both were tried together at one trial of all these offences. The question arose whether their joint trial was legal. As already stated above, it was held to be illegal. In the course of the judgment his Lordship referred to — 'AIR 1921 All 246 (2) (H)', decided by Kanhaiya Lal and Wallach, JJ.

The observations of their Lordships have been reproduced in this case and they may be quoted with advantage:

"The four accused could also have been tried jointly in one trial for any one of the three

dacoities in which they are alleged to have taken part, but all could not be tried together at one trial for the three dacoities, as these offences were not committed in the same transaction. Section 234 is one of a number of sections which are grouped together under the heading of "joinder of charges". This may, and in fact does, refer to charges both against single and several accused. But the sections under S. 233 lays down a general rule that for every distinct offence there is to be a separate charge and that every such charge is to be tried separately, except in the cases mentioned in Ss. 234, 235, 236 and 239.

Sections 234 to 238 by their terms refer to the case of a single accused. Section 239 deals with the case where more persons than one are accused. The legislature intended to, and did by these sections, differentiate between the cases of a single and several accused. It cannot be said that all the sections prior to S. 239 apply to both these cases, although in terms they refer to one only, viz., that of a single accused. The existence of a section (239) specifically dealing with the case of 'several' accused, and the arrangement of the sections to which we have referred, constitutes such a repugnancy in the context as prevents us from reading "a person" in S. 234 as including several persons."

At page 204 Dalal, J. made the following observation:

"The learned Judge refused to extend the exception mentioned in S. 234 by adding to it the exception mentioned in S. 235 (1). So far as this Court is concerned, the opinion has been that the provisions of Ss. 234, 235 and 236 are mutually exclusive. There is all the more reason, therefore, to hold that the provisions of S. 239 stand by themselves and the scope thereof cannot be extended by the use of the provisions of sections not referred to in S. 239."

(36) The next case is — 'AIR 1932 All 25 (W)'. It was held by Niamatullah, J. in this case that if both the sections viz., Ss. 235 and 236 are in terms applicable to a case, and if their application does not lead to any anomalous result, they can be so applied. It was, further, held that where several charges have been rightly joined against the same accused under S. 235 there can be no objection to one of such charges being in the alternative as provided by S. 236 nor can there be any objection to another accused being joined under S. 239 as regards one of those charges.

In my opinion the proper section which is applicable to this case, where more than one accused were on trial is S. 239 and not S. 235 which refers to the case of a single accused only. According to cl. (d) of S. 239 persons accused of different offences committed in the course of the same transaction could be tried together. There is no limit to the number of offences of which they could be tried. If several offences were committed in the course of the same transaction, the accused could be charged of all those offences at one trial or he could be charged of some of them in the alternative. In view of this fact it could not be said there was any illegality in the trial. I am, however, unable to agree with the view that both Ss. 235 and 239 can be applied together.

(37) The next case is — 'AIR 1934 All 811 (Z7)'. In this case three persons were charged under S. 411 with receiving stolen property and one of them was in addition charged under S. 411, I. P. C. with receiving other stolen properties within twelve months and the three accused were tried together. It was held by Bennet, J. that there was nothing in S. 239, Cr. P. C. specifically stating that as regards one or more of the persons accused there can be no application to that person or persons of the provisions of sections such as S. 234 Cr. P. C. and if these two sections were combined together there was no illegality in the trial. I am afraid I am unable to agree with this view. If the persons mentioned in the different clauses of S. 239 can be jointly tried with the person or persons in respect of the offences committed by them either within a period of twelve months or in the course of the same transaction then it will be difficult to find a case where different offences committed by the same person or different persons cannot be tried together.

Section 234 restricts the number of offences which can be tried together to three whereas S. 239 (c) does not put any such restriction. Section 234 refers to the offences of the same kind whereas S. 235 refers to offences of different kinds committed in the course of the same transaction. If Ss. 234 and 235 are combined it may mean that an accused person may be tried at one trial of more than three offences which may not be of the same kind and which all may not have been committed in the course of the same transaction. Combination of these two sections may lead to an inconsistency of the provisions of either of them. Again, if the different clauses of S. 239 are considered supplementary to each other and the persons falling under the different categories according to the different clauses can be tried together at one trial it will lead to an impossible position, lot of confusion & great prejudice to the accused because they will find it very difficult to meet the several & different charges lumped together.

A and B committed three dacoities within a period of twelve months. During the commission of one of these dacoities they also committed murder. C and D are accused of offences under Ss. 411 and 414, I. P. C. in respect of stolen property the possession of which has been transferred by another offence. They have nothing to do with the three dacoities. If clauses (c), (d) and (f) are considered supplementary and not mutually exclusive then A, B, C and D are all to be tried together at one trial of the three dacoities and the murder and under Ss. 411 and 414, I. P. C. which, in my opinion, could never be the intention of the legislature.

(38) The next case is 'AIR 1950 All 167 (Q)'. In this case the accused Daya Shanker Jaitly was employed as a cashier in the office of the Garrison Engineer at Kanpur. He was charged under S. 477A, I. P. C. for falsification of accounts during the period from 11-5-1945 to 10-12-1946. In the alternative he was charged under S. 408, I. P. C. for criminal breach of trust in respect of a sum of Rs. 45,002/10/- during the period from 20-11-1945 to 8-11-1946. The question which arose for consideration was whether he could be tried jointly of these charges.

The question whether Ss. 234, 235, 236 and 239 were mutually exclusive or supplementary to each other has been discussed at page 174 in the following words:

"The general rule mentioned in S. 233 is subject to the exceptions mentioned in Ss. 234, 235, 236, & 239. It is a general rule of construction that the provision of an Act of the legislature must be read as full and in the absence of anything showing a contrary intention, every part of it must be read as supplementary to and completing the other part. There is nothing in S. 233 to indicate that Ss. 234,235, 236 and 239 cannot be read together. An examination of the provisions of these sections leads to the conclusion

that the legislature intended that they should be read as supplementary to each other."

In this case there were three charges for criminal misappropriation in respect of the three items; besides these three charges there were three other charges for falsification of accounts arising out of the same three transactions in respect of which the criminal misappropriation had been committed. It was held by their Lordships that in view of the provisions of Ss. 235 and 236 read together these charges which arose out of three transactions could be tried together.

(39) The next case is — 'AIR 1953 All 228 (B)'. It was decided in 1952 by a division Bench of this Court. It was held by Dayal and Agarwala JJ. that the true effect of S. 234 was not to create a prohibition that more than three offences could not be tried together.

But its true effect was to provide for an instance in which more than one offence, but not exceeding three committed in different transactions, could be tried together, that Ss. 234, 235, 236 and 239 were exceptions to the general prohibition contained in S. 233 and that the true construction to be placed upon the four preceding sections was that they laid down the circumstance in which joinder of trials could take place and when there were more than one exceptions to the prohibition all of them have to be read together because they carved out an area which was not covered by the prohibition, that so long as a particular joint trial was permitted by one section or the other taken either singly or jointly it could not be said to be contrary to the intention of the legislature though on the face of it, it may appear to go beyond one of the provisions of the enactment.

(40) In — '33 Bom 221 (S)', it was held by Scott, C. J. and Batchelor J. that Ss. 234, 235, 236 and 239, Cr. P. C. mentioned as exceptions to S. 233, were not mutually exclusive and if it had been intended that S. 235 (2) or S. 236 could not be made use of in co-operation with S. 234 this intention could have easily been expressed. In this case the accused was charged in respect of two articles published on 12-5-1908 and 9-6-1908 in the newspaper "Kesari". It was alleged that the accused had committed offences punishable under Ss. 124A and 153A, I. P. C. in respect of each of the two articles.

There can be no doubt that S. 234 or 235, considered individually, did not apply to the case nor the accused had been charged of both the offences, (124A and 153A, I. P. C.) committed on two different occasions in one trial. It was only when Ss. 234, 235 and 236 were supplementary to each other and could be read together in order to decide what offences and persons can be tried together that they could be tried together of these offences.

(41) In — 'AIR 1938 Sind 164 (K)', it was held by Davis and Havelivala, JJ. that the different clauses of S. 239, Cr. P. C. were mutually exclusive in the sense that they could not be added one to another so as to bring some of the persons charged under one section and some of another and so to put them upon their trial together at one and the same time. But they were not mutually exclusive in the sense that persons accused of an offence and accused of abetment or of attempt could only be tried at one trial because the case comes under clause (b). But if more than one person were to be tried and charged together their case must be brought within one of the clauses of S. 239 before they could be tried together.

In this case Chuhar Mal was charged jointly with others with the abetment of offences under S. 43(1)(a) and (1)(i), Abkari Act and S. 9(a) and (d), Opium Act. It was held that as the different offences of which the accused was charged did not fall within any of the clauses of S. 239 he could not be tried together of all these charges. There could be no doubt that if the different clauses of S. 239 and Ss. 234 and 235 were considered supplementary to each other and not independent and mutually exclusive the accused can be tried of all these offences at one and the same trial.

(42) The last case on the point is — 'AIR 1952 Bom 177 (C)'. It is a Full Bench decision. In this case the accused was charged under S. 409, I. P. C. for criminal breach of trust committed in respect of a sum of Rs. 2,500/- on 12-4-1949 and in the alternative was charged under S. 420, I. P. C. for having cheated in respect of that sum on the same day. He was also charged under S. 409, I. P. C. with intended criminal breach of trust in respect of a sum of Rs. 900/- on 20-4-1949 and in the alternative with having cheated in respect of the same sum on the same day.

The question that arose for consideration was whether these four charges could be tried together at one trial. It was held by the Full Bench that the joinder of the four charges did not fall within any of the three exceptions laid down in S. 233 and therefore was contrary to law. In order to decide whether the accused person could be tried of different offences committed by him at one trial the court has to consider whether his case fell within any of the exceptions contained in S. 234, 235 or 236.

It was observed by Rajadhyaksha, J. that to construe Ss. 234, 235, 236 and 239 as supplementing each other would necessarily result in enlarging the scope of each exception, that each section was self-contained and the limits of each had been carefully laid down according to the circumstances contemplated in these sections, and to combine these sections must necessarily involve the widening of the scope of each and would result in the destruction of the essential elements of these sections.

(43) I have already pointed out above that if the different clauses of S. 239 are considered supplementary to each other and not mutually exclusive and independent and if the different accused charged with different offences or some offences committed at different times or in separate transactions were tried together at one trial it would result in lot of confusion and would be prejudicial to the accused in properly defending themselves. The different clauses of S. 239 mention the categories of persons who can be tried together at one trial.

It could never be the intention of the legislature that the different categories of persons mentioned in the different clauses could all be tried together for the different offences committed by all of them either jointly or severally. If the different clauses of S. 239 are considered supplementary to each other and not independent and exclusive of each other, then persons falling in clause (e) could be tried with persons falling in clauses (f) and (g). In other words persons accused of theft, extortion or criminal misappropriation, receiving or retaining stolen property or assisting in the disposal or concealment of the same, or attempting and abetting the commission of any of these offences can be tried with persons accused of offences relating to counterfeit coin. I agree with the views expressed by the Full Bench of the Bombay High Court and by the Sind Court.

(44) My answer to the question is that the different clauses of S. 239, Cr. P. C. are mutually exclusive and not supplementary to each other and in order to decide the question whether different persons accused of different offences the court has to look to these clauses and if their case fell within any of these clauses considered individually then they would come under the exceptions and could be tried together. If they do not fall within any of the exceptions mentioned in the different clauses of S. 239 then they cannot be tried together.

JUDGMENT OF THE COURT:

(45) Our answer to the question is that the different clauses of S. 239 are mutually exclusive i.e., it is not possible to combine the provisions of two or more clauses in any one case or to justify a trial of several persons partly by applying the provisions of one clause and partly by applying the provisions of another clause or other clauses. A trial of several persons is valid only if the joinder of all the persons is permitted by any one of the clauses.

A/D.H.Z. Answer accordingly.

A.I.R. 1954 ALLAHABAD 515 (Vol. 41, C.N. 209)

V. BHARGAVA J. (22-1-1954).

Ram Dass, Applicant v. Board of Revenue U. P. Allahabad and others, Opposite Party.

Misc. Writ No. 37 of 1954.

(a) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 6 and 26 — Validity — (Constitution of India, Art. 245).

Under clause (i) of S. 6 read with S. 26 the State government has power to prescribe the nature of suits and proceedings pending at the date of vesting which are to be stayed. Thereafter under S. 26 the State government is empowered to make rules to provide for the disposal of such suits and proceedings as have been stayed under clause (i) of S. 6. The delegation of this rule making power to the State government by the U. P. Legislature is valid and cannot be challenged. AIR 1952 SC 252, Rel. on. (Para 2)

(b) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 6 and 26 — Rules under, Rr. 4 and 6 — Validity.

Rules 4 and 5 of the rules framed under the U. P. Zamindari Abolition and Land Reforms Act are not in contravention of or beyond the scope of the power of making rules granted to the State Government under Ss. 6 and 26 of the Act. (Para 2)

(c) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 6 and 26 — Rules under, Rr. 4 and 6 — Applicability.

Rules 4 and 5 which are valid clearly govern suits under S. 180, U. P. Tenancy Act irrespective of whether the land in the suit was the Khudkasht of the intermediary or was of any other kind. Consequently, the Board of Revenue has jurisdiction to abate the suit under S. 180, U. P. Tenancy Act as well as second appeal pending before it having arisen out of that suit. (Para 3)

CASE REFERRED : Para

(A) (V39) AIR 1952 SC 252: 31 Pat 565 (SC) 2

Harish Chandra Sharma, for Applicant.

ORDER : The petitioner by this petition under Art. 226 of the Constitution prays for the issue of a writ of certiorari quashing the orders of the Board of Revenue dated 9-10-1953 and 16-10-1953 and for the issue of a writ of mandamus directing the Board of Revenue to decide Second Appeal No. 137 of 1948-49, which was instituted before it, on merits. A further direction or injunction was sought directing the opposite party, Ramji Lal restraining him from taking possession over the land in dispute in pursuance of the order of the Board of Revenue referred to above.

The grounds on which these writs and direction or injunction are sought have been mentioned as only being two in number. The first ground is that Rules 4 and 5 framed under the U. P. Zemindari Abolition and Land Reforms Act of 1950 are 'ultra vires', being in contravention of the rule making power of the State government under S. 26 of that Act, and consequently the order of the Board of Revenue abating the suit out of which S. A. No. 137 of 1948-49 arose is also 'ultra vires' and liable to be quashed. The second ground is that the land in dispute was admittedly the khudkasht of the intermediary on the date of vesting and even if Rule 5 framed under the U. P. Zemindari Abolition and Land Reforms Act be applied, the Board of Revenue had no jurisdiction to abate S. A. No. 137 of 1948-49.

(2) After hearing learned counsel for the petitioner I find that there is no substance in either of the two grounds taken by the petitioner. The relevant rule making power of the State government is laid down in S. 26, U. P. Zemindari Abolition and Land Reforms Act of 1950. It permits the State government to make rules, 'inter alia', so as to provide for the disposal of suits and proceedings stayed under Chapter II of the Act and to provide for matters which are to be, and may be, prescribed. Under S. 6, clause (i) suits and proceedings of the nature to be prescribed pending in any court at the date of vesting, and all proceedings upon any decree or order passed in any such suit or proceeding previous to the date of vesting have to be stayed.

Thus under cl. (i) of S. 6 read with S. 26 the State government has power to prescribe the nature of suits and proceedings pending at the date of vesting which are to be stayed. Thereafter under S. 26 the State government is empowered to make rules to provide for the disposal of such suits and proceedings as have been stayed under cl. (i) of S. 6. The delegation of this rule making power to the State government by the U. P. Legislature is valid and cannot now be challenged in this Court due to the decision of the Supreme Court in — 'State of Bihar v. Kameshwar Singh', AIR 1952 SC 252 (A), in which the Supreme Court declared that the U. P. Zemindari Abolition and Land Reforms Act of 1950 is valid in its entirety. That declaration of law by the Supreme Court is binding on all High Courts under Art. 141 of the Constitution. Consequently cl. (i) of S. 6 as well as S. 26 of the U. P. Zemindari Abolition and Land Reforms Act have to be held valid and all that can be said in connection with this petition is whether the rules which have been made by the Uttar Pradesh government are covered by the power granted to it by these provisions of the U. P. Zemindari Abolition and Land Reforms Act, 1950.

Rule 4 prescribes the nature of the suits and proceedings which are to be stayed under cl. (i) of S. 6. Obviously, therefore, the rule is within the specific power granted to the State Government to make rules in that behalf. Rule 5 lays down the procedure according to which the suit

that the legislature intended that they should be read as supplementary to each other."

In this case there were three charges for criminal misappropriation in respect of the three items; besides these three charges there were three other charges for falsification of accounts arising out of the same three transactions in respect of which the criminal misappropriation had been committed. It was held by their Lordships that in view of the provisions of Ss. 235 and 236 read together these charges which arose out of three transactions could be tried together.

(39) The next case is — 'AIR 1953 All 228 (B)'. It was decided in 1952 by a division Bench of this Court. It was held by Dayal and Agarwala JJ. that the true effect of S. 234 was not to create a prohibition that more than three offences could not be tried together.

But its true effect was to provide for an instance in which more than one offence, but not exceeding three committed in different transactions, could be tried together, that Ss. 234, 235, 236 and 239 were exceptions to the general prohibition contained in S. 233 and that the true construction to be placed upon the four preceding sections was that they laid down the circumstance in which joinder of trials could take place and when there were more than one exceptions to the prohibition all of them have to be read together because they carved out an area which was not covered by the prohibition, that so long as a particular joint trial was permitted by one section or the other taken either singly or jointly it could not be said to be contrary to the intention of the legislature though on the face of it, it may appear to go beyond one of the provisions of the enactment.

(40) In — '33 Bom 221 (S)', it was held by Scott, C. J. and Batchelor J. that Ss. 234, 235, 236 and 239, Cr. P. C. mentioned as exceptions to S. 233, were not mutually exclusive and if it had been intended that S. 235 (2) or S. 236 could not be made use of in co-operation with S. 234 this intention could have easily been expressed. In this case the accused was charged in respect of two articles published on 12-5-1908 and 9-6-1908 in the newspaper "Kesari". It was alleged that the accused had committed offences punishable under Ss. 124A and 153A, I. P. C. in respect of each of the two articles.

There can be no doubt that S. 234 or 235, considered individually, did not apply to the case nor the accused had been charged of both the offences, (124A and 153A, I. P. C.) committed on two different occasions in one trial. It was only when Ss. 234, 235 and 236 were supplementary to each other and could be read together in order to decide what offences and persons can be tried together that they could be tried together of these offences.

(41) In — 'AIR 1938 Sind 164 (K)', it was held by Davis and Havelivala, JJ. that the different clauses of S. 239, Cr. P. C. were mutually exclusive in the sense that they could not be added one to another so as to bring some of the persons charged under one section and some of another and so to put them upon their trial together at one and the same time. But they were not mutually exclusive in the sense that persons accused of an offence and accused of abetment or of attempt could only be tried at one trial because the case comes under clause (b). But if more than one person were to be tried and charged together their case must be brought within one of the clauses of S. 239 before they could be tried together.

In this case Chuhar Mal was charged jointly with others with the abetment of offences under S. 43(1)(a) and (1)(i), Abkari Act and S. 9(a) and (d), Opium Act. It was held that as the different offences of which the accused was charged did not fall within any of the clauses of S. 239 he could not be tried together of all these charges. There could be no doubt that if the different clauses of S. 239 and Ss. 234 and 235 were considered supplementary to each other and not independent and mutually exclusive the accused can be tried of all these offences at one and the same trial.

(42) The last case on the point is — 'AIR 1952 Bom 177 (C)'. It is a Full Bench decision. In this case the accused was charged under S. 409, I. P. C. for criminal breach of trust committed in respect of a sum of Rs. 2,500/- on 12-4-1949 and in the alternative was charged under S. 420, I. P. C. for having cheated in respect of that sum on the same day. He was also charged under S. 409, I. P. C. with intended criminal breach of trust in respect of a sum of Rs. 900/- on 20-4-1949 and in the alternative with having cheated in respect of the same sum on the same day.

The question that arose for consideration was whether these four charges could be tried together at one trial. It was held by the Full Bench that the joinder of the four charges did not fall within any of the three exceptions laid down in S. 233 and therefore was contrary to law. In order to decide whether the accused person could be tried of different offences committed by him at one trial the court has to consider whether his case fell within any of the exceptions contained in S. 234, 235 or 236.

It was observed by Rajadhyaksha, J. that to construe Ss. 234, 235, 236 and 239 as supplementing each other would necessarily result in enlarging the scope of each exception, that each section was self-contained and the limits of each had been carefully laid down according to the circumstances contemplated in these sections, and to combine these sections must necessarily involve the widening of the scope of each and would result in the destruction of the essential elements of these sections.

(43) I have already pointed out above that if the different clauses of S. 239 are considered supplementary to each other and not mutually exclusive and independent and if the different accused charged with different offences or some offences committed at different times or in separate transactions were tried together at one trial it would result in lot of confusion and would be prejudicial to the accused in properly defending themselves. The different clauses of S. 239 mention the categories of persons who can be tried together at one trial.

It could never be the intention of the legislature that the different categories of persons mentioned in the different clauses could all be tried together for the different offences committed by all of them either jointly or severally. If the different clauses of S. 239 are considered supplementary to each other and not independent and exclusive of each other, then persons falling in clause (e) could be tried with persons falling in clauses (f) and (g). In other words persons accused of theft, extortion or criminal misappropriation, receiving or retaining stolen property or assisting in the disposal or concealment of the same, or attempting and abetting the commission of any of these offences can be tried with persons accused of offences relating to counterfeit coin. I agree with the views expressed by the Full Bench of the Bombay High Court and by the Sind Court.

(44) My answer to the question is that the different clauses of S. 239, Cr. P. C. are mutually exclusive and not supplementary to each other and in order to decide the question whether different persons accused of different offences the court has to look to these clauses and if their case fell within any of these clauses considered individually then they would come under the exceptions and could be tried together. If they do not fall within any of the exceptions mentioned in the different clauses of S. 239 then they cannot be tried together.

JUDGMENT OF THE COURT:

(45) Our answer to the question is that the different clauses of S. 239 are mutually exclusive i.e., it is not possible to combine the provisions of two or more clauses in any one case or to justify a trial of several persons partly by applying the provisions of one clause and partly by applying the provisions of another clause or other clauses. A trial of several persons is valid only if the joinder of all the persons is permitted by any one of the clauses.

A/D.H.Z. Answer accordingly.

A.I.R. 1954 ALLAHABAD 515 (Vol. 41, C.N. 209)

V. BHARGAVA J. (22-1-1954).

Ram Dass, Applicant v. Board of Revenue U. P. Allahabad and others, Opposite Party.

Misc. Writ No. 37 of 1954.

(a) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 6 and 26 — Validity — (Constitution of India, Art. 245).

Under clause (i) of S. 6 read with S. 26 the State government has power to prescribe the nature of suits and proceedings pending at the date of vesting which are to be stayed. Thereafter under S. 26 the State government is empowered to make rules to provide for the disposal of such suits and proceedings as have been stayed under clause (i) of S. 6. The delegation of this rule making power to the State government by the U. P. Legislature is valid and cannot be challenged. AIR 1952 SC 252, Rel. on. (Para 2)

(b) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 6 and 26 — Rules under, Rr. 4 and 6 — Validity.

Rules 4 and 5 of the rules framed under the U. P. Zamindari Abolition and Land Reforms Act are not in contravention of or beyond the scope of the power of making rules granted to the State Government under Ss. 6 and 26 of the Act. (Para 2)

(c) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 6 and 26 — Rules under, Rr. 4 and 6 — Applicability.

Rules 4 and 5 which are valid clearly govern suits under S. 180, U. P. Tenancy Act irrespective of whether the land in the suit was the Khudkasht of the intermediary or was of any other kind. Consequently, the Board of Revenue has jurisdiction to abate the suit under S. 180, U. P. Tenancy Act as well as second appeal pending before it having arisen out of that suit. (Para 3)

CASE REFERRED: Para

(A) (V39) AIR 1952 SC 252: 31 Pat 565 (SC) 2

Harish Chandra Sharma, for Applicant.

ORDER: The petitioner by this petition under Art. 226 of the Constitution prays for the issue of a writ of certiorari quashing the orders of the Board of Revenue dated 9-10-1953 and 16-10-1953 and for the issue of a writ of mandamus directing the Board of Revenue to decide Second Appeal No. 137 of 1948-49, which was instituted before it, on merits. A further direction or injunction was sought directing the opposite party, Ramji Lal restraining him from taking possession over the land in dispute in pursuance of the order of the Board of Revenue referred to above.

The grounds on which these writs and direction or injunction are sought have been mentioned as only being two in number. The first ground is that Rules 4 and 5 framed under the U. P. Zemindari Abolition and Land Reforms Act of 1950 are 'ultra vires', being in contravention of the rule making power of the State government under S. 26 of that Act, and consequently the order of the Board of Revenue abating the suit out of which S. A. No. 137 of 1948-49 arose is also 'ultra vires' and liable to be quashed. The second ground is that the land in dispute was admittedly the khudkasht of the intermediary on the date of vesting and even if Rule 5 framed under the U. P. Zemindari Abolition and Land Reforms Act be applied, the Board of Revenue had no jurisdiction to abate S. A. No. 137 of 1948-49.

(2) After hearing learned counsel for the petitioner I find that there is no substance in either of the two grounds taken by the petitioner. The relevant rule making power of the State government is laid down in S. 26, U. P. Zemindari Abolition and Land Reforms Act of 1950. It permits the State government to make rules, 'inter alia', so as to provide for the disposal of suits and proceedings stayed under Chapter II of the Act and to provide for matters which are to be, and may be, prescribed. Under S. 6, clause (i) suits and proceedings of the nature to be prescribed pending in any court at the date of vesting, and all proceedings upon any decree or order passed in any such suit or proceeding previous to the date of vesting have to be stayed.

Thus under cl. (i) of S. 6 read with S. 26 the State government has power to prescribe the nature of suits and proceedings pending at the date of vesting which are to be stayed. Thereafter under S. 26 the State government is empowered to make rules to provide for the disposal of such suits and proceedings as have been stayed under cl. (i) of S. 6. The delegation of this rule making power to the State government by the U. P. Legislature is valid and cannot now be challenged in this Court due to the decision of the Supreme Court in — 'State of Bihar v. Kameshwar Singh', AIR 1952 SC 252 (A), in which the Supreme Court declared that the U. P. Zemindari Abolition and Land Reforms Act of 1950 is valid in its entirety. That declaration of law by the Supreme Court is binding on all High Courts under Art. 141 of the Constitution. Consequently cl. (i) of S. 6 as well as S. 26 of the U. P. Zemindari Abolition and Land Reforms Act have to be held valid and all that can be said in connection with this petition is whether the rules which have been made by the Uttar Pradesh government are covered by the power granted to it by these provisions of the U. P. Zemindari Abolition and Land Reforms Act, 1950.

Rule 4 prescribes the nature of the suits and proceedings which are to be stayed under cl. (i) of S. 6. Obviously, therefore, the rule is within the specific power granted to the State Government to make rules in that behalf. Rule 5 lays down the procedure according to which the suit

stayed under rule 4 are to be disposed of and requires that suits of certain types stayed under Rule 4 shall be abated. Abatement of a suit is clearly a method of disposal of the suit. Clearly again, therefore, the provisions of Rule 5 are within the rule-making power of the State of Uttar Pradesh granted to it by clause (b) of sub-sec. (2) of S. 26 of the U. P. Zemindari Abolition and Land Reforms Act.

Learned counsel has not been able to show that any part of these rules deals with matters which are not covered by cl. (i) of S. 6 or cl. (b) of sub-sec. (2) of S. 26 of the Zemindari Abolition and Land Reforms Act and there is clearly therefore no force in the contention that Rules 4 and 5 of the rules framed under the U. P. Zemindari Abolition and Land Reforms Act are in contravention of or beyond the scope of the power of making rules granted to the State Government under sections 6 and 26 of the U. P. Zemindari Abolition and Land Reforms Act. The first ground is, therefore, clearly untenable.

(3) The second ground taken in the petition on the face of it has no force. If Rules 4 and 5 are held to be valid they clearly govern suits under S. 180, U. P. Tenancy Act irrespective of whether the land in the suit was the khudkasht of the intermediary or was of any other kind. The suit which has been abated by the Board of Revenue was under S. 180, U. P. Tenancy Act and consequently the Board of Revenue had jurisdiction to abate the suit, as well as S. A. No. 137 of 1948-49 pending before it having arisen out of that suit.

(4) The petition has, therefore, no force and is rejected.

A/K.S.B. Petition rejected.

A.I.R. 1954 ALLAHABAD 516 (Vol. 41, C.N. 210)

V. BHARGAVA J. (6-1-1954).

Newspapers Ltd., Allahabad, Petitioner v. State Industrial Tribunal, U. P. Allahabad and others, Opposite Party.

Misc. Writ Nos. 556 and 651 of 1953.

(a) **U. P. Industrial Disputes Act (28 of 1947), S. 2 — "Workman" — "Dismissed employee — (Industrial Disputes Act (1947), S. 2(s)).**

A dismissed employee falls within the definition of a "workman" and a dispute raised by him in connection with his non-employment does fall within the purview of the term "industrial dispute". AIR 1952 All 992, Relied on. (Para 6)

(b) **Industrial Disputes Act (1947), S. 2(k) — Industrial Dispute — Single workman — (U. P. Industrial Disputes Act (28 of 1947), S. 2).**

An industrial dispute can come into existence even if the parties to the dispute be a single employer and a single workman provided, of course, other conditions are satisfied. AIR 1953 SC 58; AIR 1951 Mad 616, Relied on. (Para 16)

(c) **Constitution of India, Art. 226 — Reference of industrial dispute to Industrial Tribunal and Industrial Appellate Tribunal of India on its own motion and not on report of Conciliation Board — Invalidity of report of and of proceedings before Board are not material for consideration of writ application — (U. P. Industrial Disputes Act, (28 of 1947), Ss. 3, 4 and 8).**

Where the reference to the U. P. Industrial Tribunal was made by the State Government by Notification in exercise of the powers conferred by Ss. 3, 4 and 8, U. P. Industrial Disputes Act, 1947 and in pursuance of the provisions of cl. 10 of the Notification under S. 3, U. P. Industrial Disputes Act, 1947 and the notification referring a dispute to the Industrial Tribunal clearly mentioned that the State Government was satisfied that the industrial dispute existed, in applications for writs against orders of the U. P. Industrial Tribunal and the Labour Appellate Tribunal of India, while examining the proceedings in connection with the exercise of powers of the High Court under Art. 226 of the Constitution, the High Court cannot go into the question whether that satisfaction was right or wrong.

The State Government is competent to make a reference to the Industrial Tribunal of its own motion, and, when nothing was said in the notification referring the dispute to the Industrial Tribunal, that it was referred in pursuance of the report of the Conciliation Board, it must be held that the reference is made by the State Government of its own motion and the invalidity of the report of the Board or proceedings before the Board are not material in considering the writ application. (Para 17)

(d) **Constitution of India, Art. 226 — Question of fact — Proper representation of employee before Industrial Dispute Tribunal — (Industrial Disputes Act (1947), S. 36).**

Whether a person representing the employee in proceeding before Industrial Tribunal was proper person to represent him is a question of fact. Where the point was raised before the Industrial Tribunal and decided by it, it cannot be raised in writ application against the decision of the Tribunal. In any case, where the order of the Industrial Tribunal has merged in the order of the Labour Appellate Tribunal of India and there is no grievance at all that there was any irregularity in the procedure before the Labour Appellate Tribunal of India and it is that order which has now to be given effect to and that order is valid and without any defect, the contention that there was no proper representation, cannot be raised before the High Court hearing the writ application. (Para 18)

CASES REFERRED : Paras

(A) (V39) AIR 1952 All 992: 1952 All LJ 353 6
(B) (V36) AIR 1949 FC 111: ILR (1949) Bom 686 (FC) 6
(C) (V40) AIR 1953 SC 58: 1953 SCR 302 8
(D) (V38) AIR 1951 Mad 616: 1949-2 Mad LJ 789 11
(E) (1942) 1942-2 All ER 425: 1943 AC 166 14
(F) (1943) 1943-2 All ER 633 14
(G) (1909) 1909 AC 506: 78 LJ KB 1025 15
(H) ('51) 55 Cal WN 256 16

B. M. Lal Srivastava, for Petitioner; S. C., (for Nos. 1 and 2); and D. Sanyal, (for No. 3) for Respondents.

JUDGMENT: The petitioner and the opposite-parties in both these writ petitions are identical and both of them relate to the same subject-matter and have, therefore, been heard together.

Both the petitions were filed by the Newspapers Limited, Allahabad, alleging that opposite party no. 3, Tejammul Husain, who was employed in the petitioner's company as a Lino operator, was in the interest of maintaining discipline among the workers who had made complaints

against him, dismissed by the petitioner in accordance with rule 12(ii) of the standing orders of the workers of the petitioner's company. This order of dismissal was passed on 8-5-1952. Thereupon, a representation was made regarding the propriety of this order of dismissal to the Regional Conciliation Officer, Allahabad, by the U. P. Working Journalists' Union, Lucknow, through one R. K. Sharma who claimed to be its President though Tajammul Husain was not a member of the Union and the Union had nothing to do with the employees of the petitioner.

The Regional Conciliation Board took up the matter on this representation but no settlement was arrived at and consequently the Conciliation Officer submitted his report to the State Government. Thereupon the State Government issued a notification on 3-1-1953 referring the industrial dispute to the Industrial Tribunal, U. P., Allahabad, specifying the matters of dispute in that notification. The Industrial Tribunal, U. P., Allahabad, heard the parties and gave its decision on 13-2-1953.

During the hearing of the dispute by the Industrial Tribunal, Tajammul Husain was represented by R. K. Sharma on the basis of a written authority from Tajammul Husain and the objection of the petitioners that R. K. Sharma had no right to represent Tajammul Husain was overruled. The petitioners went up in appeal to the Labour Appellate Tribunal of India from the order of the U. P. Industrial Tribunal. The Labour Appellate Tribunal of India gave its decision on 24-7-1953.

Before this decision could be given by the Labour Appellate Tribunal and while the proceedings were pending before it, the petitioner moved the writ application no. 556 of 1953, challenging the validity of the proceedings in the U. P. Industrial Tribunal and asking for the issue of a writ of certiorari to remove the proceedings that were pending in the Labour Appellate Tribunal of India, and for quashing the order made by the U. P. Industrial Tribunal.

The second Writ Application No. 651 of 1953 was moved subsequently after the judgment of the Labour Appellate Tribunal of India had been given. The facts given in support of this petition were also the same but the prayer had to be altered inasmuch as a writ of certiorari was asked for to quash the decision given by the Labour Appellate Tribunal of India.

(2) The petitioner's contention in support of these petitions which need be considered are only four in number.

The first contention is that Tajammul Husain was not a workman at all at the time when the dispute was referred by the State Government to the Industrial Tribunal and, since Tajammul Husain was not a workman, there was no industrial dispute which could be referred, so that the reference was incompetent.

(3) The second contention is that there was no industrial dispute at all which could be referred, as a dispute between an employer and an individual workman is not an industrial dispute within the meaning of that word, as defined in the U. P. Industrial Disputes Act, 1947.

(4) The third contention is that the reference of the case to the Conciliation Board on a representation made by the U. P. Working Journalists' Union, Lucknow, as well as the reference by the State Government to the U. P. Industrial Tribunal were incompetent and not in accordance with the U. P. Industrial Tribunal Disputes Act, or the orders passed thereunder.

(5) The 4th contention is that the orders were liable to be set aside on the ground that Tajammul Husain had been wrongly represented by R. K. Sharma during the proceedings before the U. P. Industrial Tribunal.

(6) It does not appear to be necessary for me to consider the first contention in detail as that point is now settled by a decision of a Division Bench of this Court which is binding on me. It was held in — 'Ganeshdas Ramgopal v. Govt. of the State of Uttar Pradesh', AIR 1952 All 992 (A) that a dismissed employee falls within the definition of a "workman" and a dispute raised by him in connection with his non-employment does fall within the purview of the term "industrial dispute". This view was based on a decision of the Federal Court in — 'Western India Automobile Association v. Industrial Tribunal, Bombay', AIR 1949 FC 111 (B). In accordance with this decision this contention of the petitioners has to be rejected.

(7) The main argument on behalf of the petitioner has been on the second point raised in support of this petition. In the U. P. Industrial Disputes Act, 1947 (No. 28 of 1947) the expression "Industrial dispute" is not separately defined. It is laid down in the definition that this expression shall have the same meaning as assigned to it in the Industrial Disputes Act, 1947 (Central Act 14 of 1947). In that Act the definition is as follows:

> "Industrial Dispute" means "any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment of the terms of employment or with the conditions of labour, of any person."

(8) The submission of learned counsel is that this definition uses the words "employers and employees", "employers and workmen" and "workmen and workmen" in the plural and consequently a dispute can be an industrial dispute only if it involves more than one workman, and a dispute between an individual workman and an employer would consequently not be an industrial dispute. It however appears that, if the language of the definition alone is considered, it is wide enough to cover cases of dispute between an individual employer and an individual workman though the definition refers to employers and workmen in the plural, because according to S. 3, General Clauses Act, 1897 a word in plural includes one in singular and vice versa. The mere fact that the definition refers to 'employers' and 'employees does not, therefore, indicate that a dispute or a difference between one employer and an employee is not be deemed to be included within this definition.

There is no doubt as remarked by the Supreme Court in — 'D. N. Banerji, Administrator of Budge Budge Municipality v. P. R. Mukherjee', AIR 1953 SC 58 (C) that

> "the words 'industrial dispute" convey the meaning to the ordinary mind that the dispute must be such as would affect large groups of workmen and employers ranged on opposite sides on some general questions on which each group is bound together by a community of interests—such as wages, bonus, allowances, pensions, provident fund, number of working hours per week holidays and so on."

It was, however, held in the same case that

> "having regard to the modern conditions of society where capital and labour have organised

themselves into groups for the purpose of fighting their disputes and settling them on the basis of the theory that union is strength and collective bargaining has come to stay, a single employee's case might develop into an industrial dispute, when, as often happens, it is taken up by the trade union of which he is a member and there is a concerned demand by the employees for redress. Such trouble may arise in a single establishment or a factory. It may well arise also in such a manner as to cover the industry as a whole in a case where the grievance, if any, passes from the region of individual complaint into a general complaint on behalf of all the workers in the industry."

(9) In this connection it has to be noted that it is not merely the words "employees" and "workmen" which are used in the plural but even the word "employers" has been used in the definition in plural.

If it be possible to construe this definition as indicating that the use of the plural word "workmen" requires that there should be more than one workman involved in the industrial dispute, it would also have to be held that there could be no industrial dispute which involves one single employer. If two words are both used in plural in the same provision of law, it must necessarily be inferred that the legislature laid down that both the words must be interpreted in the same manner.

Consequently, there can be only two interpretations—either that it is possible for an industrial dispute to arise even if the dispute is between one individual employer and one individual workman or that there can be an industrial dispute only when not only the workmen but also the employers are more than one in number.

The interpretation, which would require that there must be more than one employer as a party for an industrial dispute to come into existence would, on the face of it, defeat the purpose of the Industrial Dispute Act altogether. Cases of industrial dispute in which more than one employer as well as more than one employee is involved are not very frequent. There are of course very frequent cases where the employer is only one and the employees are large in number and it is difficult to hold that this Act was not meant to govern the latter class of cases. The legislature could not have intended to restrict the application of this Act to the few cases where a large number of employers, on the one side, and a large number of employees or workmen, on the other side, happen to be parties to the dispute.

The narrow interpretation sought to be given on behalf of the petitioner to the word "workmen" so as not to include cases of dispute involving only one single workman, is, therefore, clearly one that would almost nullify the provisions of this Act and make it useless for the purpose for which it was enacted. This result follows because, once it is held that the word "workmen" cannot be interpreted to refer to a single workman, it will have to be necessarily held that the plural word "employers" cannot be held to refer to one single employer.

In this connection, reference may be made to cl. (c) of S. 18 of this Act. Section 18 lays down the persons on whom settlement and awards arrived at in the course of conciliation proceedings under the Act or an award which is declared by the appropriate Government to be binding under sub-section (2) of S. 15, shall be binding.

It defines four classes of persons on whom settlements or awards are binding. Clause (a) makes it binding on all parties to the industrial dispute; Clause (b) on all other parties summoned to appear in the proceedings as parties to the dispute except in cases where the Board or the Tribunal records the opinion that such parties were summoned without proper cause; Clause (c) lays down that where a party referred to in clause (a) or clause (b) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates, would also be bound by the settlement or award.

The use of the word "employer" in the section in this clause is a clear indication that the Act contemplated a single employer as a party to the industrial dispute the settlement of which or the award in which is made binding on persons under S. 18 of the Act. Clause(d) then refers to the settlement or award being binding, where a party is composed of workmen, on all persons who were employed in the establishment or part of the establishments, as the case may be, which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part.

(10) It appears to me that it is not necessary that in respect of every industrial dispute there must be persons of all the four classes mentioned in clauses (a) to (d) of S. 18 so as to be bound by the settlement or award. There can certainly be cases where there may be persons who fall within clause(a) alone and none who fall within the other three clauses. Occasions must frequently arise when no other parties are summoned to appear in the proceedings as parties to the dispute besides those who were originally parties to the industrial dispute and in such cases cl. (b) of S. 18 would not come into operation at all. The inclusion of the class of persons in clause(b) of S. 18 cannot be deemed to make it compulsory for the Conciliation Board or the Tribunal to summon parties, whether necessary or not, as additional parties to the dispute so as to have persons covered by this clause.

Similarly, there can be cases where a party referred to in clause (a) or (b) may not be composed of many workmen but may consist of a single workman. In such a case there would be no persons covered by clause (d) of S. 18 who could be bound by the settlement or the award. The mere non-existence of such a body of persons would not make this clause (d) redundant or bring it into conflict with other provisions. Obviously, clause (d) has been provided for cases where the dispute happens to be of a general nature which could be settled between the employer and all his workmen concerned with that dispute and to ensure that, if any such dispute is settled or adjudicated upon, it should not be necessary to have a fresh settlement or adjudication at the instance of other workmen, similarly situated.

This clause, therefore cannot be taken to give an indication that there can be no dispute between an individual workman and his employer. On the other hand, as I have held earlier, the language of clause(c) of S. 18 leads to the contrary view that an individual employer is contemplated as being the sole party to an industrial dispute and, if there can be one individual employer, there is no reason why there cannot be one individual workman in that capacity.

(11) Learned counsel for the petitioner places reliance on a decision of a Division Bench of the Madras High Court in the — 'Kandan Textile Ltd v. Industrial Tribunal (1) Madras', AIR 1951 Mad

616 (D), in which this point was considered by the Madras High Court. Rajamannar C. J. in that case remarked—

"I must confess that the language of the definition of "industrial dispute" is so wide that, giving the words their ordinary meaning, even a dispute between an employer and one of the workmen or between one workman and another workman which is connected with one or other of the matters mentioned therein would fall within the definition."

With this view I entirely agree. The learned Chief Justice goes on to deal with the contention that, in construing the definition, the objects of the Act and the scheme of the several provisions of the Act have to be taken into consideration. He then rejected the contention that the statement of objects and reasons attached to the bill which was enacted as Industrial Disputes Act can be resorted to in order to discover the intention of the legislature. He clearly held that it has been often pointed out that in construing the enactment such statement of objects and reasons would not be relevant. Not infrequently, the object and reasons of a legislation, as announced at the initial stage of a Bill, do not coincide with the enactment when finally passed.

Thereafter, the learned Chief Justice went on to consider whether assistance could be sought from the provisions of S. 10(2) of the Industrial Disputes Act which provides that—

"where the parties to an industrial dispute apply in the prescribed manner, whether jointly or separately, for a reference of the dispute to a Board, Court or Tribunal the appropriate Government, if satisfied that the persons applying represent the majority of each party, shall make the reference accordingly."

The learned Chief Justice was of the opinion that this provision did not necessarily lead to the conclusion that there could be no industrial dispute unless the majority of workmen is ranged as one of the parties and in this connection he drew attention to the fact that in S. 10(1) of the Act there is no such condition which requires to be fulfilled before the Government makes an order, referring a dispute to a Tribunal.

(12) Mack, J. who was the other learned Judge associated in that decision, however, was of the view that the use of the words "majority of each party" in sub-section (2) of S. 10, gave an indication that there could be no Industrial dispute unless the workmen summoned were more than one in number and they represented the majority of the workmen concerned in the dispute.

(13) With respect, I must say that I am unable to agree with this view. When interpreting the words used in the statute, the effect of the interpretation is to be considered not only with reference to one party but with reference to all the parties, as the words used are "majority of each party". In every industrial dispute one party must be either "an employer or employers" and the other "a workman or workmen".

If it is held that the use of the words "majority of each party" implies that there must be more than one workman, it will necessarily have to be held that there must also be more than one employer also so that we would again arrive at the result that this Act would not apply to industrial dispute unless both the employees and the workmen were more than one in number. In fact, as the word "majority" is also applied to both, it would require that the majority of the employers as well as the workmen would be necessary parties to the industrial dispute.

Such a result, in my opinion, as I have already mentioned earlier, would defeat the purpose of the Act, and consequently an interpretation, which gives rise to this result, should not be accepted.

(14) The learned Chief Justice also referred to some decisions of the courts in England where the word "industrial dispute" is defined in very much the same words as in the Industrial Disputes Act, 1947, in this country. It, however, appears that in none of these cases was it held in clear terms that there can be no industrial dispute between one individual workman and one individual employer.

In — 'National Association of Local Govt. Officers v. Bolton Corporation', 1942-2 All E R 425 (E), all that Lord Wright said was that the Industrial Disputes Act dealt with collective bargaining, trade practices and so forth. This sentence cannot be construed as laying down that the Industrial Disputes Act was inapplicable to individual disputes between an employer and an employee as long as it related to matters connected with the industry or the employment in the industry.

In the other case, — 'Ex parte Keable Press, Ltd.', 1943-2 All E R 633 (F), the point was not considered at all because in that case the Union had taken up the dispute of an individual workman and no question arose whether, if the dispute had been taken up by the Union it would have been an industrial dispute or not.

(15) On the other hand, Lord Atkinson in his speech in the case of — 'Conway v. Wade', 1909 AC 506 (G) said:

"In order that a dispute may be a trade dispute at all, a workman must be a party to it on each side, or a workman on one side and an employer on the other."

It may be that, in this context in which these words occur, Lord Atkinson did not intend to lay down specifically that a dispute between an individual workman and an individual employer would be a trade dispute but the language used is in line with the view taken by me above.

(16) I was also referred by learned counsel to a decision of a learned single Judge of the Calcutta High Court in the matter of — 'J. Chowdhry v. M. C. Banerjee', 55 Cal W N 256 (H), but I find that in that case the question was hardly discussed at all and the learned Judge merely relied on and followed the view of the Madras High Court in the case mentioned by me above, with which I find I am unable to agree.

I consequently hold that an industrial dispute can come into existence even if the parties to the dispute be a single employer and a single workman provided, of course, other conditions are satisfied. In this case, there was no argument that the dispute was of such a nature that it could not be held to be an industrial dispute. Clearly it was not a private dispute between two individuals but was a dispute relating to the employment or non-employment of the workmen in an industry run by the petitioner. This contention of the petitioner also, therefore, fails.

(17) The third point raised by learned counsel is that in this case the matter was taken up by the Conciliation Board on the basis of a representation by the U. P. Working Journalists' Union, Lucknow, which could not have been done, as a Conciliation Board could only take cognizance of an industrial dispute if the dispute was brought up before it in accordance with clause (4) of the

order constituting Conciliation Board and Industrial Courts, published in Notification No. 615(LL)/XVIII-7(LL)/51, dated 15-3-1951.

Conciliation Boards and industrial courts were constituted in this State by this notification which was issued by the State Government in exercise of its powers conferred by clauses (b), (c), (d) and (g) of S. 3 and S. 8, U. P. Industrial Disputes Act, 1947. There can be no doubt that the representation on behalf of Tajammul Husain sent by the U. P. Working Journalists' Union, Lucknow, was not the proper method of referring the dispute to the Board as laid down by clause 4 of this Order. The report of the Conciliation Officer on failure to arrive at a settlement of the dispute would also, therefore, not be a report under clause 6 of that Order.

The invalidity of the proceedings before the Conciliation Board or of the report of the Conciliation Officer are, however, not material at all for the decision of these writ cases. In these cases writs are sought against the orders of the U. P. Industrial Tribunal and the Labour Appellate Tribunal of India. The reference to the U. P. Industrial Tribunal was made by the State Government by Notification No. 8177(ST)/XVIII-(LA)-261(ST)/52, dated 3-1-1953, in exercise of the powers conferred by Ss. 3, 4 and 8 of the Industrial Disputes Act, 1947 and in pursuance of the provisions of cl. 10 of the Notification dated 15-3-1951, mentioned above. Clause 10 lays down that—

"the State Government if it is satisfied that an industrial dispute exists may either of its own motion, or after considering the report of the Conciliation Board made under sub-rule (3) of rule 6 or on an application made to it, by order in writing, refer any dispute to the Industrial Tribunal, or if the State Government considering the nature of the dispute or the convenience of the parties so decides, to any other persons specified in that behalf for adjudication."

The notification referring a dispute to the Industrial Tribunal clearly mentioned that the State Government was satisfied that the industrial dispute existed and while examining the proceedings in connection with the exercise of powers of this Court under Article 226 of the Constitution, this Court cannot go into the question whether that satisfaction was right or wrong.

It has not been contended that the satisfaction of the Government was arrived at without any material altogether or was a fraud on the statute or statutory orders. The contention of learned counsel that there was no competent report of the Conciliation Board made under sub-rule (3) of rule 6 of that Order must be accepted but the notification does not mention that the reference was being made in pursuance of any such report. The State Government was competent to make a reference to the Industrial Tribunal of its own motion and, while nothing is said in the notification, it must be held that the reference was made by the State Government of its own motion and consequently the powers exercised were properly invoked by the Government. The reference to the Industrial Tribunal was, therefore, competent and it had jurisdiction to decide the industrial dispute referred to it. Thereafter, naturally the Labour Appellate Tribunal of India also had jurisdiction to decide the appeal against the decision of the U. P. Industrial Tribunal.

(18) The last contention on behalf of the petitioner that the U. P. Industrial Tribunal wrongly permitted Tajammul Husain to be represented by R. K. Sharma in the proceedings before it, needs little consideration. Even if there was wrong representation before the Industrial Tribunal, the appellant had his remedy before the Labour Appellate Tribunal of India, and he could have sought vacation of the order of the Industrial Tribunal from that proper court on this ground too.

A printed copy of the decision of the Labour Appellate Tribunal of India was produced before me and it shows that the Appellate Tribunal had no occasion to deal with any such point. Very likely no such point was raised in the appeal before it.

The question whether R. K. Sharma was a competent person to represent Tajammul Husain was a question of fact. It was decided against the petitioners by the Industrial Tribunal, as is clear from their order. This point cannot, therefore, be considered now in connection with the prayer for the issue of a writ of certiorari.

In any case, the order of the U. P. Industrial Tribunal has now merged in the order of the Labour Appellate Tribunal of India and there is no grievence at all that there was any irregularity in the procedure before the Labour Appellate Tribunal of India. It is that order which has now to be given effect to and that is at least an order which is valid and without any defect. This contention also, therefore, fails.

(19) Both the writ petitions are, therefore, dismissed with costs to opposite party no. 2 which are fixed at Rs. 80/- in each case and to opposite-party no. 3 which shall be assessed in each case according to the rules of this Court.

A/R.G.D. Applications dismissed.

A.I.R. 1954 ALLAHABAD 520 (Vol. 41, C.N. 211)

V. BHARGAVA J. (18-2-1954).

Vibhuti Narain Singh, Applicant v. Improvement Trust, Benaras and another, Opposite Party.

Civil Misc. Writ No. 823 of 1953.

(a) Municipalities — U. P. Municipalities Act (2 of 1916), S. 180 — Powers of Improvement Trust — U. P. Town Improvement Act (8 of 1919), S. 29 (1) (b).

Section 180, U. P. Municipalities Act only governs the powers of the Improvement Trust in so far as it is not inconsistent with the provisions of the Town Improvement Act, 1919. Any provision in the Municipalities Act which would limit the power of the Improvement Trust under S. 29 (1) (b) of the Town Improvement Act would, therefore, be inconsistent and consequently inapplicable. The validity of the order passed by the Improvement Trust has to be judged with reference to the provisions of the Town Improvement Act. (Para 2)

(b) Municipalities — U. P. Town Improvement Act (8 of 1919), S. 29 (1) (b) — Order under, refusing to allow certain construction in contravention of a scheme — Validity — (Constitution of India Arts. 19 (1) (f) and 226).

The petitioner sought permission to construct a building along the side of a road in respect of which the Improvement Trust of Banaras had already made a Deferred Street Scheme prescribing alignment on each side of the street. In enforcing this Deferred Street Scheme, the Improvement Trust directed by a resolution that no construction should be permitted which did not leave 7½ ft. wide land on either side of the street for widening the

road on both sides. In spite of this scheme, the petitioner sought to make constructions so as to include 7½ ft. wide strip of land along the street also within his building. The Improvement Trust when sanctioning the plan directed that no constructions should be made over this 7½ ft. wide strip of land except a cantilevered balcony subject to its being open to sky and air. The petitioner applied under Art. 226 challenging the order.

Held that when the right of the petitioner to make the constructions was taken away altogether by S. 29(1)(b), U. P. Town Improvement Act except to the extent to which he might obtain written permission of the Improvement Trust, his exercise of that right would be limited to the extent of the permission granted. The conditions in the permission granted by the Improvement Trust were within the powers of the Improvement Trust granted to it under S. 29(1)(b) and the order passed was perfectly valid and did not in any way infringe the fundamental rights of the petitioner. Even if it be said that these limitations on his power to make constructions on land owned by him do infringe his fundamental right under Art. 19(1)(f) of the Constitution, the limitation was a reasonable limitation in the interest of the general public. (Paras 2, 3)

Rajeshwari Prasad and Ambika Prasad, for Applicant; J. Swarup, for Opposite Party.

ORDER : By this petition under Art. 226 of the Constitution the petitioner challenges the validity of an order of the Improvement Trust, Banaras, sanctioning a plan for constructions submitted by the petitioner subject to certain amendments. The petitioner seeks the issue of a writ of mandamus directing the Improvement Trust, Banaras, and the Municipal Board, Banaras, to stop them from taking coercive measures to enforce the amendment of the plan or interfering in the construction of the building by the applicant according to the plan submitted by him on 9-5-1952.

The petitioner has admitted in his own petition that his building is sought to be constructed along a road in respect of which the Improvement Trust of Banaras has already made a Deferred Street Scheme prescribing alignment on each side of the street. In enforcing this Deferred Street Scheme, the Improvement Trust directed by a resolution dated 22-8-1949 that no construction should be permitted which did not leave 7½ ft. wide land on either side of the street for widening the road on both sides. In spite of this scheme, the petitioner sought to make constructions so as to include 7½ ft. wide strip of land along the street also within his building. The Improvement Trust when sanctioning the plan directed that no constructions should be made over this 7½ ft. wide strip of land except a cantilevered balcony subject to its being open to sky and air.

(2) The petitioner's contention is that S. 180, U. P. Municipalities Act which governs the exercise of the power by the Town Improvement Trust to sanction constructions did not empower the Town Improvement Trust to impose such a condition. On the face of it this contention on behalf of the petitioner completely ignores the specific provision of the Town Improvement Act, 1919, under which the Deferred Street Scheme was made by the Improvement Trust. Section 29, sub-section (1), clause (b) of that Act lays down:

"No person shall erect, re-erect, add to or alter any building or wall so as to make the same project beyond the prescribed alignments of the street except with the written permission of the Trust."

This provision of law specifically takes away the power of the petitioner to make constructions over the 7½ ft. strip of land. In the Deferred Street Scheme an alignment of the building was prescribed on a land 7½ ft. removed from the boundary of the road. So far as S. 180, U. P. Municipalities Act is concerned, it only governs the powers of the Improvement Trust in so far as it is not inconsistent with the provisions of the Town Improvement Act, 1919. Any provision in the Municipalities Act which would limit the power of the Improvement Trust under S. 29(1) (b), Town Improvement Trust Act would, therefore, be inconsistent and consequently inapplicable. The validity of the orders passed by the Improvement Trust has to be judged with reference to the provisions of the Town Improvement Act.

Learned counsel for the petitioner is unable to show how the order passed in his case by the Improvement Trust is beyond the scope of the powers vested in it under S. 29(1) (b) of the Act, as reproduced above. When the right of the petitioner to make the constructions was taken away altogether by S. (29) (1) (b) except to the extent to which he might obtain written permission of the Improvement Trust, his exercise of that right would be limited to the extent of the permission granted. In this case the Improvement Trust chose it improper to permit the petitioner to put up cantilevered balcony on 7½ ft. strip of land without permitting any further constructions on the arcade. The permission being limited in this manner the petitioner could not make any construction beyond the extent specified in the order granting the permission. It cannot be said that the permission granted was in any way void.

The conditions in the permission granted by the Improvement Trust were within the powers of the Improvement Trust granted to it under S. 29 (1) (b) and I do not see how the order passed in any way infringes the fundamental rights of the petitioner. Even if it be said that these limitations on his power to make constructions on land owned by him do infringe his fundamental right under Art. 19 (1) (f) of the Constitution, the limitation is a reasonable limitation in the interest of the general public. It is obviously in the interest of the public that the land 7½ ft. abutting the road should be left open and should not be allowed to be covered except by a single arcade. Learned counsel failed to show me any connection between the order passed by the Improvement Trust and Art. 19 (1) (g) of the Constitution. There is no question of any right of trade, business or profession being affected by an order granting permission to make the construction in this limited manner.

(3) In these circumstances, the order passed by the Improvement Trust is valid and the petition fails and is dismissed with costs which I assess at Rs. 200/-.

A./K.S.B. Petition dismissed.

A.I.R. 1954 ALLAHABAD 521 (Vol. 41, C.N. 212)

V. BHARGAVA J. (11-2-1954)

Ashtbhuja Singh, Petitioner v. Board of Revenue Allahabad and others, Opposite Party.

Civil Misc. Writ No. 1068 of 1953.

(a) Civil P. C. (1908), S. 98(2), Proviso — 'May state the point of law'.

The word "may" used in the proviso cannot be read as equivalent to the word "shall". Under the proviso it is discretionary for the Members of the Bench hearing the appeal to state the point of law on which they differ. If they do not choose to state the point of law but proceed to give their judgments differing from each other, the decree of the lower court from which the appeal has been filed is to be confirmed. 9 All 625 (FB), Foll. (Para 3)

Anno: C. P. C., S. 98 N. 11.

(b) Constitution of India, Art. 227 — Decision in accordance with law — Interference — Member of Board of Revenue allowing second appeal and sending it for concurrence to another member who differed — Appeal again coming before the first member who dismissed it confirming the decree of lower appellate Court — Judgment is in accordance with law viz. S. 98(2), Proviso, Civil P. C. and cannot be interfered with under Art. 227 unless it is shown that the Board exercised a jurisdiction not vested in it or failed to exercise jurisdiction vested in it. (Para 4)

CASE REFERRED : Para

(A) ('87) 9 All 625: 7 All WN 154 (FB) 3

Gyan Prakash, for Petitioner.

ORDER : I have heard learned counsel for the petitioner on this petition under Art. 227 of the Constitution. By this petition the petitioner challenges the correctness of an order of the Board of Revenue dated 9-12-1953 by which a second appeal was dismissed by the Board. The petitioner should have approached this court under Art. 226 of the Constitution which is the appropriate provision for this purpose.

(2) On merits also this petition has no force. It appears that the second appeal was first heard by one Member of the Board of Revenue. Shri A. Rauf on 22-8-1953 passed his judgment holding that he would allow the appeal, set aside the order passed by the Additional Commissioner and restore that passed by the trial court. This judgment went for concurrence to another Member Shri T. N. Srivastava who differed from Shri A. Rauf and held that he would suggest that the decree of the Additional Commissioner should be maintained and the appeal be dismissed. Consequent on this difference of opinion between the two Members, Shri A. Rauf, when the appeal came up again before him, passed an order dismissing the appeal and confirming the order of the Additional Commissioner against which the appeal was directed.

(3) Learned counsel's only point is that since there was a difference between two Members of the Board of Revenue, a point of law should have been stated and referred to a third Member of the Board of Revenue under the proviso to sub-s. (2) of S. 98, C. P. C. which is applicable to a procedure before the Board of Revenue. It, however, appears that under the proviso it is discretionary for the Members of the Bench hearing the appeal to state the point of law on which they differ. If they do not choose to state the point of law but proceed to give their judgments differing from each other, the decree of the lower court from which the appeal has been filed is to be confirmed. This is exactly what happened in this case.

Learned counsel's contention was that it was compulsory for the Board of Revenue to state the point of law under the proviso and the word "may" used in the proviso should be read as equivalent to the word "shall". This contention cannot be accepted in view of a decision of a Full Bench of this Court in — 'Lal Singh v. Ghansham Singh', 9 All 625 (A). In that case S. 575, Civil P. C. of 1882 was interpreted. So far as the point of interpretation in the present case is concerned, the language of the proviso to sub-s. (2) of S. 98, Civil P. C., 1908 is the same as occurred in S. 575 of the Code of C. P. C. of 1882. There have been changes in the language of the proviso but they do not affect the point which is being considered in this case, viz., that the word "may" should be interpreted as making it compulsory, if the Judges differ, to state the point of law. That decision of the Full Bench of this Court is binding on me.

(4) Consequently, I have to hold that the judgment of the Board of Revenue confirming the decree of the court from which the appeal had been filed was correct and in accordance with the law. No other point has been raised which would show that the Board of Revenue exercised a jurisdiction not vested in it or failed to exercise a jurisdiction vested in it.

(5) The petition therefore has no force and is rejected.

A/K.S.B. Petition dismissed.

A.I.R. 1954 ALLAHABAD 522 (Vol. 41, C.N. 213)

V. BHARGAVA J. (18-2-1954)

Tej Bhan Madan, Petitioner v. Govt. of India, Opposite Party.

Misc. Writ No. 120 of 1954.

(a) Constitution of India, Art. 226 — Jurisdiction — Writ of mandamus.

Where the order sought to be challenged by a petition for a writ of mandamus is an order passed at New Delhi by the Deputy Secretary to the Government of India, the High Court of Allahabad has no jurisdiction to entertain the petition. Civil Misc. Writ Petn. No. 449 of 1952, D/- 9-10-1953 (All.), Rel. on. (Para 2)

(b) Constitution of India, Art. 226 — Writ of mandamus — Nature of direction that can be given.

Under Art. 226 the High Court has no power to give a direction to the opposite party by a writ of mandamus as to the manner in which the petitioner's petition presented to the opposite party should be decided by the opposite party. AIR 1951 All 257 (FB), Rel. on. (Para 3)

CASES REFERRED : Paras

(A) ('53) Civil Misc. Writ No. 449 of 1952, D/- 9-10-1953 (All) 2

(B) (V40) AIR 1953 SC 210: 1953 SCR 1144 2

(C) (V40) AIR 1953 All 477: 1953 All LJ 148 (FB) 2

(D) (V38) AIR 1951 All 257: ILR (1951) 1 All 269 (FB) 3

Baleshwari Prasad, for Applicant.

ORDER : I have heard learned counsel for the petitioner on this petition under Art. 226 of the Constitution.

(2) By this petition the petitioner seeks issue of a writ of mandamus to the Government of India through their Deputy Secretary, Ministry of Finance, Department of Economic Affairs, Shri B. K. Kaul, I. C. S., New Delhi, commanding the opposite party to accept the petition of the petitioner under Art. 14, Constitution of

India and thereby declare him eligible for enrolment as a member of the Institute of Chartered Accountants of India or at least admission to the final examination for the said enrolment. A preliminary point that arises is whether a writ of mandamus can be issued to the Government of India through the Deputy Secretary at New Delhi by this Court.

The petition and the affidavit filed in support of it show that the petition of the petitioner which has not been accepted by the opposite party and which the petitioner says was a petition under Art. 14 of the Constitution was presented to the opposite party at New Delhi and was rejected there. The writ of mandamus sought is that the opposite party should accept the prayer in that petition. The order of acceptance of the petition to be passed by the opposite party would also have to be passed at New Delhi. By this petition, therefore, directions are sought from this Court against the opposite party in respect of an act done at New Delhi which is not a place within the jurisdiction of this Court. It may be that, if the petitioner's petition under Art. 14 of the Constitution had been accepted by the opposite party, it might have given some rights to the petitioner which he might exercise within the jurisdiction of this Court. But this fact would not give jurisdiction to this Court to issue a writ of mandamus to the opposite party in respect of acts done entirely outside the jurisdiction of this Court.

This view of mine is supported by a decision of a division Bench of this Court in — Inderjeet Singh v. Chief Commercial Manager, E. I. Rly., Calcutta', Civil Misc. Writ No. 449 of 1952, D/-9-10-1953 (All.) (A) in which case the Supreme Court decision in — 'Election Commission, India v. Saka Venkata Rao', AIR 1953 SC 210 (B) as well as the Full Bench decision of this Court in — 'Maqbulunissa v. Union of India', AIR 1953 All 477 (C) were discussed and interpreted. The division Bench held in that case that since the order challenged by the petition for a writ of mandamus was an order passed at New Delhi this Court had no jurisdiction to issue the writ sought for. The circumstances in the case before me are identical and consequently this writ petition cannot be entertained.

(3) A further point may also be taken notice of. The prayer in this petition is for the issue of a writ of mandamus commanding the opposite party to accept the petition of the petitioner and to declare him eligible for enrolment as a member of the Institute of Chartered Accountants of India or at least for admission to the final examination for the said enrolment. It is clear from the wording of the prayer that the petitioner wants this Court to direct the opposite party as to the manner in which the petitioner's petition presented to the opposite party should be decided by the opposite party. Such a direction cannot be given by this Court by a writ of mandamus as was held by a Full Bench of this Court in — 'Moti Lal v. Govt. of State of Uttar Pradesh', AIR 1951 All 257 (D). This is another ground on which this petition must fail.

(4) The petition is accordingly rejected.

A/K.S.B. Petition dismissed.

A.I.R. 1954 ALLAHABAD 523 (Vol. 41, C.N. 214)

(FULL BENCH)

MALIK C. J., DESAI AND MUKERJI JJ. (28-9-1953)

State v. Padma Kant Malviya and another, Opposite Party.

Misc. Case No. 4 of 1950.

†**Criminal P. C. (1898), Ss. 5(2), 4(1)(o) — Contempt of Court is not "offence" — Contemner is not "accused" — Cross-examination of contemner, on affidavit filed by him — (Oaths Act (1873), S. 5) — (Constitution of India, Art. 20(3)) — (Contempt of Courts Act (1952), S. 1).**

Per Full Bench: Contempt of Court is not an offence within the meaning of S. 5 (2), Criminal P. C.

The alleged contemner is not an accused person within the meaning of S. 5, Indian Oaths Act, 1873.

An alleged contemner is not a person accused of an offence within the meaning of Art. 20(3) of the Constitution and, if he has voluntarily filed an affidavit, he can be cross-examined on it. AIR 1945 All 1; AIR 1945 Oudh 266, Commented upon. AIR 1944 Bom 127, Relied on and case law Ref. (Para 79)

Anno: Cr. P. C., S. 5 N. 6; Oaths Act, S. 5 N. 1.

CASES REFERRED: Paras

(A) (V8) AIR 1921 Cal 1: 48 Cal 388: 22 Cr LJ 31 (SB) 13
(B) ('83) 10 Cal 109: 10 Ind App 171 (PC) 13, 21, 33, 35, 37, 41, 63, 65
(C) (V10) AIR 1923 Mad 523(2): 46 Mad 605: 24 Cri LJ 599 14
(D) (V1) AIR 1914 Cal 69: 41 Cal 173: 14 Cri LJ 321 (SB) 17, 19, 24, 26
(E) ('11) 12 Ind Cas 293: 10 Mad LT 209 19
(F) (V9) AIR 1922 Bom 52: 46 Bom 592: 23 Cri LJ 177 19
(G) (V13) AIR 1926 All 623: 48 All 711 (SB) 19, 37
(H) (V39) AIR 1952 SC 149: 1952 SCR 425: 1952 Cri LJ 832 (SC) 22 25
(I) (V41) AIR 1954 SC 10: 1953 SCJ 521: 1954 Cri LJ 238 (SC) 25
(J) (1873) 19 Wallace 505 25
(K) (1873) 114 Madss 238 25
(L) (V32) AIR 1945 All 1: 46 Cri LJ 272 30, 37, 63
(M) (1765) Wilm 243: 97 ER 94 33, 37
(N) (1924) 69 Law Ed 162: 266 US 42 33, 36
(O) (1903) 194 US 324: 48 Law Ed 997 33, 40, 42
(P) (1923) 68 Law Ed 577: 264 US 95 33, 42
(Q) (1899) 158 US 564: 39 Law Ed 1092 35
(R) (1852-53) 8 Moo PC 47: 97 RR 26 35
(S) (V32) AIR 1945 Oudh 266: 47 Cri LJ 294 35, 37
(T) (V31) AIR 1944 Bom 127: 45 Cri LJ 647 37, 64
(U) (V29) AIR 1942 Lah 105: ILR (1942) Lah 411: 43 Cri LJ 599 (FB) 37
(V) (1831) 2 Russ & M 639: 39 ER 538 40
(W) (1874) 87 US 387: 22 Law Ed 354 40
(X) 54 CCA 622 41
(Y) (1890) 15 PD 59: 59 LJP 47 41
(Z) (1913) 58 Law Ed 1115: 233 US 604 41
(Z1) (1910) 55 Law Ed 797: 221 US 418 41, 42
(Z2) (1882) 1882-1 Ch D 642: 51 LJ Ch 940 46
(Z3) (1855) 2 K & J 28: 69 ER 680 47
(Z4) (1895) 40 Law Ed 819: 161 US 591 77
(Z5) (1925) 271 US 494: 70 Law Ed 1054 77

A. G., U. P. and Govt. Advocate, for the State; S. C. Khare, for Opposite Party.

MALIK C. J.:

I have read the judgments prepared by learned brothers Desai and Mukerji, JJ. and agreed to the answers proposed by them.

(2) So far as the second question is concerned, it presents no difficulty and it is not necessary for me to add anything to what has already been said. All that the Oaths Act provides is, that nothing contained in the Oaths Act shall authorise the administration of oath to an accused person in a criminal proceeding. Reliance is not placed by the learned Government Advocate on anything in the Oaths Act to entitle him to cross-examine the contemner.

(3) The third question is a little difficult. Article 20(3) of the Constitution provides that:

> "No person accused of any offence shall be compelled to be a witness against himself."

We are concerned with the words "accused of an offence". I shall not like in this case to consider the larger question whether the words "accused of" are restrictive and mean a person against whom proceeding in a criminal court for any offence committed by him has in fact been started.

To similar provision in the Constitution of the United States though slightly differently worded, the American Courts have given a much wider meaning. Confining myself, therefore, to the word 'offence', (sic) the word has not been defined in the Constitution but Art. 367 provides that unless the context otherwise requires, the General Clauses Act, 1897 shall, subject to any adaptations and modifications that may be made therein under Art. 372, apply for the interpretation of the Constitution. The word 'offence' has been defined in the General Clauses Act (No. 10 of 1897) as meaning "any act or omission made punishable by any law for the time being in force". I think the words "made punishable by any law for the time being in force" are important.

In Art. 13(3) of the Constitution "law" is defined as "including any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law." "Law as in force", on the other hand, have been defined as

> "including laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed....."

No doubt these two definitions are applicable only to Art. 13 of the Constitution and cannot, therefore, be treated as a sure guide.

In Art. 336 of the Constitution though law has not been defined, existing law has been defined which would only include statute law. That, however may also not be a sure guide. It is, however, important to note that nothing can be a crime or an offence unless the law makes it so.

(4) It is not necessary to give in detail how the Criminal Law has developed in this country.

Before the passing of the Penal Code and the modification of the law, Criminal Law applied in the presidency towns and within a certain area thereof was the Criminal Law of England, but in the rest of the country where the courts established by the British were functioning it was mostly the Mohamedan Law relating to crimes that was applied. The Penal Code was drafted in 1837 though for various reasons it could not be enacted till 1860. The general principles upon which the Code was based was described as follows (see letter of Lord Auckland dated 14-10-1837, and Parliamentary Papers 1837-38 (673), 41, 463):

> "Your Lordships in Council will perceive that the system of penal law which we propose is not a digest of any existing system, & that no existing system has furnished us even with a groundwork".

Then the prevailing state of Criminal Law in India was described and then it was said:

> "Under these circumstances we have not thought it desirable to take as the ground-work of the code any of the systems of law now in force in any part of India. We have, indeed to the best of our ability, compared the code with all those systems, and we have taken suggestions from all; but we have not adopted a single provision merely because it formed a part of any of those systems."

The Penal Code was enacted in 1860 and it purported to codify the Criminal Law of India as applicable to the country. Its Preamble is as follows:

> "Whereas it is expedient to provide a general Penal Code for British India; it is enacted as follows."

Section 2 is to the effect that:

> "Every person shall be liable to punishment under the Code and not otherwise for every act or omission contrary to the provisions thereof....."

And S. 5 is to the effect that:

> "Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 & 4, William IV, Chapter 85, or of any Act of Parliament passed after that Statute in anywise affecting the East India Company or the said territories, or the inhabitants thereof; or any of the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of Her Majesty .....or of any special or local law."

A special or local law was thus saved by S. 5.

(5) Coming to the definition of the word "offence" in the Penal Code, S. 40 of the Code provides that:

> "Except in the chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code."

Clause 2 mentions certain sections of Chapter 4 and Chapter 5A and lays down that in this section

> "the word "offence" denotes a thing punishable under the Code or any special law or local law as hereinafter defined";

and in certain sections mentioned in Cl. 3 the word "offence", it is laid down,

> "has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine."

Section 41 defines "special law" as

> "a law applicable to a particular subject";

and S. 42 defines "local law" as

> "a law applicable only to a particular part of the territories comprised in India."

(6) Again, in the Explanation to S. 203 it is provided that in Ss. 201, 202 and 203, Penal Code:

> "The word "offence" includes any act committed at any place out of India, which if committed in India, would be punishable under any of the following sections";

and then a number of sections are quoted.

(7) Chapter 4 of the Act gives the General exceptions and many acts which would otherwise be

offences are said to be not offences if done under certain circumstances or by certain individuals.

(8) The word "offence" throughout the Code has, therefore, been used in the sense of a law enacted by a competent Legislature.

(9) Soon after in the year 1861, the first Criminal Procedure Code was enacted (Act No. 25 of 1861) in which the word "offence" was not defined but S. 21 gives us clear indication as to what it meant. The section was to the following effect:

"The Criminal Courts of the several grades, according to the powers vested in them respectively by this Act, shall have jurisdiction in respect of offences punishable under the Indian Penal Code (Act 45 of 1860) or under any special or local law (except offences which are by any such law made punishable by some other authority therein specially mentioned), and in the investigation and trial of the offences hereby declared to be within their jurisdiction, shall be guided by the provisions of this Act."

(10) In the Code of 1898 (Act 5 of 1898), which is at present in force, the word "offence" has been defined in S. 4(o) as meaning

"any act or omission made punishable by any law for the time being in force";

and S. 21 of the Code of 1861 has been replaced by S. 5 of the new Code, which is as follows:

"(1) All offences under the Indian Penal Code, shall be investigated, inquired into, tried and otherwise dealt with according to provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

(11) Soon after the Penal Code became law the Letters Patent of various High Courts were drafted and the Letters Patent of this Court, Cl. 23 is to the following effect:

"And we do further ordain that all persons brought for trial before the said High Court of Judicature at Allahabad either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal reference or revision charged with any offence for which provision is made by Act No. 45 of 1860 called the "Indian Penal Code" or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents shall be liable to punishment under the said Act or Acts and not otherwise."

(12) This provision was made to make it clear that the Penal Code alone was to be applied to all cases provided for in that Code. Thus any other system that may have been followed before was to be deemed to be superseded by the Code which alone was to apply to cases provided for by it.

In this connection, I may mention that Maharaj Nund Coomar was tried and hanged for the offence of forgery under the Law of England applied to Presidency towns, but after 1860 any one guilty of such an offence could be convicted only under the appropriate sections of the Code.

(13) In — 'Satish Chandra v. Ram Doyal', AIR 1921 Cal 1 (SB) (A), Mookerjee A. C. J. at page 6 has observed as follows:

"It is in our opinion indisputable that all persons brought before the High Court for trial in the exercise of its original criminal jurisdiction or in the exercise of its jurisdiction as a Court of Criminal Appeal, Reference or Revision, if charged with an offence under the Penal Code, shall be liable to punishment under that Code and not otherwise. This does not militate against the view that the High Court has jurisdiction, like the Supreme Court, to punish for contempt of Court, which, as was pointed out in — 'Surendranath v. Chief Justice and Judges of High Court of Bengal', 10 Cal 109 (PC) at p. 131 (B) is not an offence under the Penal Code. 'It is an offence which by the Common Law of England is punishable by the High Court in a summary manner by fine or imprisonment or both; that part of the Common Law of England was introduced into the presidency towns when the late Supreme Courts were respectively established by the Charters of justice'."

Again, at page 5 he has said:

"The two sections taken together declare that offences defined by special and local laws continue to be punishable as before; in other words, all acts or omissions contrary to the provisions of the Code itself, or of the provisions of special and local laws, and the other laws enumerated in S. 5, 'and these alone and none others are punishable as offences'." (Italics here in ' ' are mine).

(14) In — 'Gopal Naidu v. Emperor', AIR 1923 Mad 523 (2) (C) it was held by a Full Bench that by the codification of the Criminal Law it was intended that a person should be punished under or for an offence under the Indian Penal Code or any special or local law and the rules of Common Law of England were excluded.

(15) Personal law of the Hindus, Mohammedans or others relating to crimes is no longer enforceable by the Indian Courts, nor is it permissible to create any new offences by any custom howsoever well established. Questions relating to succession inheritance, marriage or caste or any religious usage or institution, however, have to be decided according to personal law, if there are no legislative enactments to the contrary and, if on those points personal law is silent, the rule for guidance of the Courts is to be the rule of justice, equity and good conscience.

(16) That being the legal position that nothing can be treated as a crime unless made so under some statutory provision, the word "law" in the definition of the word "offence" in the General Clauses Act must mean statute law. In other words, the definition in the General Clauses Act, S. 3(37) that " 'offence' shall mean any act or omission made punishable by any law for the time being in force", means made punishable by the Penal Code or by a Statute passed by a competent legislature.

If I am right in my view that "offence" in Art. 20(3) of the Constitution must mean what is made an offence by statute, then the answer to the third question must be that a contemner is not a person accused of an offence within the meaning of Art. 20(3) of the Constitution unless it can be held that contempt has been made punishable by any law passed by a competent legislature.

(17) The only other point that remains to be considered is whether contempt of court has been made an offence under any statute. The history as regards jurisdiction of the High Courts in India to punish for contempt of the High Courts or courts subordinate to them is dealt with at some length by Jenkins C. J. in the case of — 'Governor of Bengal v. Moti Lal Ghosh', AIR 1914 Cal 69 (SB) (D). The jurisdiction of the High Courts, as court of record, to punish for contempt of the High Court was never doubted.

The lower courts had, however, no such power and the first piece of legislation giving them such power was Act 30 of 1841 for repressing obstructions to justice in certain Courts of the East India Company, and by S. 1 it was enacted that all persons using menacing questions or expressions otherwise obstructing justice in the presence of any Zillah or City Magistrate, Joint Magistrate or other officer under a Magistrate empowered to try a civil case or any superior or inferior court, civil or criminal, or the East India Company, shall be liable to be fined by the authority whose proceedings were obstructed to a fine not exceeding Rs. 200/- and in default of payment of fine to an imprisonment not exceeding one month, but the proviso to the section showed that these did not prevent an indictment in Her Majesty's Supreme Court for such an offence. This Act is not of much importance for our purposes as the High Courts, as Courts of Record, do not derive their jurisdiction to deal with cases of contempt of lower courts under this Act.

(18) In the Indian Penal Code there are certain sections in Chapter 10 dealing with contempt of the lawful authority of public servants and the sections which deal with contempt of court may be said to be Ss. 175, 178, 179, 180 and 228, but offences under these sections can be tried in accordance with the provisions of the Criminal P. C. and the procedure is prescribed in Ss. 480, 481 and 482 of that Code. The High Courts, as Courts of Record, do not derive their jurisdiction to punish for contempt of the lower courts or the High Courts from the Penal Code or the Criminal P. C., nor are the punishments by the High Courts under the sections of the Penal Code.

(19) The Contempt of Courts Act (Act 12 of 1926), also to my mind, cannot be said to be the law which makes contempt punishable.

Some difference of opinion had arisen on the point whether the High Courts had power to punish for contempt of the lower courts, specially the subordinate criminal courts. The Calcutta High Court in 'Moti Lal Ghosh's case, (D)', had taken the view that the High Court had no such jurisdiction. The Madras High Court in the case of 'K. Venkat Rao', 12 Ind Cas 293 (Mad) (E), held that the High Court had jurisdiction. In the Bombay High Court in — 'Emperor v. Balkrishna Govind Kulkarni', AIR 1922 Bom 52 (F) there was some difference of opinion between Sir Norman MacLeod, C. J. and Shah, J.

In the Allahabad High Court in — 'Hadi Husain v. Nasir Uddin Haider', AIR 1926 All 623 (SB) (G), it was held that the High Court had jurisdiction to take cognizance of cases of contempt of subordinate civil Courts but the question whether it had similar powers to take cognizance of contempt of inferior criminal courts was left undecided.

It was on that account that the Contempt of Courts Act of 1926 was passed for resolving these doubts and to define and limit the powers exercisable by High Courts and Chief Courts in punishing contempts of court, as the Preamble of the Act would show. The Act does not define what is contempt and all that it provides is that the High Court will have jurisdiction, power and authority in respect of contempt of subordinate courts, as it has power in respect of contempt of the High Court except in cases coming under S. 2(3) of the Act.

The maximum punishment that can be awarded is, however, laid down in the Act. Act 12 of 1937 merely amends the Contempt of Courts Act of 1926 and provides that the High Court's power of imposing a sentence is the same as that of contempt of subordinate courts.

(20) The only other provision to which reference may be made is the Constitution and Art. 215 provides that-

> "Every High Court shall be a court of record and shall have all the powers of such a Court including the power to punish for contempt of itself."

If, therefore, there could be any doubts on the point, these doubts must be deemed to have been resolved by this Article, which clearly indicates that the High Court possesses the power to punish for contempt of itself as it is a court of record. It cannot be said that this power is conferred by the Legislature. The power, which the High Court already possessed, is recognised by it.

(21) In '10 Cal, 109 (B)', their Lordships of the Judicial Committee laid down that by the common law every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court and the jurisdiction of the High Court to commit for contempt has not been affected by Criminal P. C., 1882.

Their Lordships further observed that the offences of contempt of Court and the powers of the High Courts to punish it are the same in such Courts as in the superior Courts in England. This is also evident from the fact that the Contempt of Courts Act, 1926, and the Constitution recognise the High Court's power to punish for contempt and do not purport to confer the said jurisdiction.

(22) In — 'Bathina Ramkrishna Reddy v State of Madras', AIR 1952 SC 149 (H), Mukherjea J. has said:

> "It may be pointed out in this connection that although the powers of the High Courts in India established under the Letters Patent to exercise jurisdiction as Superior Courts of Record in punishing contempt of their authority or processes have never been doubted, it was a controversial point prior to the passing of the Contempt of Courts Act, 1926, as to whether the High Court could, like the Court of King's Bench in England, punish contempt of courts subordinate to it in exercise of its inherent jurisdiction. The doubt has been removed by Act 12 of 1926 which expressly declares the right of the High Court to protect subordinate courts against contempt. ....."

So far as I can see, therefore, there is no statute law which makes contempt an offence and punishable as such.

(23) The question then arises that if nothing can be an offence unless the law, i.e., statute law, makes it so, how is it that contempt, specially the contempt that is classed as criminal contempt, is punishable by the High Court as Courts of Record.

(24) My learned brothers have pointed out that contempt has been divided into two broad heads of criminal contempt and civil contempt. In — 'Moti Lal Ghosh's case (D)', Mookerjee, J. thus distinguished the two:

> "The distinction between criminal and civil contempt is of a fundamental character, though it has been sometimes overlooked. A criminal contempt is conduct that is directed against the dignity and authority of the Court. A Civil contempt is failure to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a civil contempt the proceeding for its punishment is at the instance of the party interested and is civil in its character; in the case of a criminal contempt, the proceeding is for punishment of an act committed

against the majesty of the law, and as the primary purpose of the punishment is the vindication of the public authority, the proceedings conform as nearly as possible to proceedings in criminal cases."

The learned Judge pointed out that it was conceivable that the dividing line between the acts constituting criminal and those constituting civil contempts may become indistinct in some cases but in ordinary cases the line of demarcation was not difficult to determine. As an illustration of civil contempt reference may be made to Order 39, R. 2, sub-r. (3), Civil P. C. (Act 5 of 1908).

(25) To my mind, even criminal contempt cannot be said to be a crime made punishable by law and it, therefore, does not come under the definition of the term 'offence', in the General Clauses Act though by ancient practice it has been made punishable by Courts of Record. The jurisdiction of the Courts of Record to punish for contempt is based, whatever its old history in England might have been which it is not necessary here to give, on the realisation that it is essential for the proper discharge of their duties and of the courts subordinate to them.

The Courts exist for the determination and the enforcement of the rights of those who come before it for redress or for determining the guilt and punishing the wrong doer. Anything said or done which is likely to hamper or impede the course of justice or prejudice the case of any party before a Court of law is treated as contempt of Court, as it affects the due administration of justice for which alone the Courts exist. In cases of contempt, therefore, the effect on the administration of justice is the main factor on which stress is laid in awarding punishment.

In — 'AIR 1952 SC 149 (H)', Mukherjea, J. has said:

"It is well known that the aim of the contempt proceeding is 'to deter men from offering any indignities to a court of justice' and an essential feature of the proceeding is the exercise of a summary power by the court itself in regard to the delinquent."

To the same effect are the remarks of the Supreme Court in the case of — 'Brahma Prakash v. State of Uttar Pradesh', AIR 1954 SC 10 (I):

"It admits of no dispute that the summary jurisdiction exercised by superior Courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law as is administered in the Courts."

In 'Ex parte Robinson', (1873) 19 Wallace 505 (J), Field J. said:

"The power to punish for contempt is inherent in all Courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of Courts, and consequently to the due administration of justice."

In 'Cartwright's case', (1873) 114 Madss 238 (K), Gray, C. J. observed:

"the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other superior Courts, as essential to the execution and to the maintenance of their authority....."

In this connection it may be pointed out that for similar reasons the legislature has jurisdiction to punish as contempt a breach of the privilege of the legislature. Articles 105 and 194 of the Constitution define the powers, privileges and immunities of Parliament and the State legislatures in Part A States and its members and Cl. 3 of the two Articles provide that in other respects the powers, privileges and immunities of the members & of the legislatures shall be unless otherwise defined by law, the same as that of the House of Commons.

It is not necessary to go into the history how the power to punish as contempt for breach of the privilege came to be exercised, but it is now well recognised in England that:

"Such powers are essential to the authority of every legislature. The functions, privileges and disciplinary powers of a legislative body are thus closely connected. The privileges are the necessary complement of the functions, and the disciplinary powers of the privileges." (See May's Parliamentary Practice, 15th Edn. 41).

At page 89 of the same book it pointed out that

"It is necessary to emphasize the fact that the power possessed by each of the Houses is a general power of committing for contempt analogous to that possessed by the superior courts, and is not restricted to cases in which the privileges enjoyed by the House, in its collective capacity or by its Members as such, have been violated, lest a contrary inference should be drawn from the fact that in recent years nearly all the offences that have been punished by either House have been adjudged to be breaches of privilege."

It is not necessary to go into this matter further not to deal with the question what are the breaches of the privileges of Parliament or of its members. These powers possessed by the legislatures in India are for the proper carrying out of its functions as is the power possessed by the courts for the proper carrying out of their work.

(26) Though, therefore, the provisions of S. 5(2), Criminal P. C., or S. 5, Oaths Act, or Art. 20 (3) of the Constitution may not apply to the case of contempt punishable by the High Court, as a Court of Record, in all cases of criminal contempt the summary procedure adopted by the Court, as far as possible, be such that it should not militate against the rules of natural justice. In such cases, to my mind, the burden must be put entirely on the prosecution to prove its case, as was done by Jenkins, C. J., in 'Moti Lal Ghosh's case, (D)' and if it has not been proved by the prosecution that contempt was committed by the contemner, he should get the benefit of such a finding. It is open to the contemner to leave it to the prosecution to prove its case, but where a contemner enters into a defence and files an affidavit, or a document on which he wants to rely, or goes into the witness-box, he cannot object to his being subjected to cross-examination.

(27) On a careful consideration I am of the opinion, in agreement with my learned brothers, that a contemner being tried by the High Court under its inherent jurisdiction, as a Court of Record, is not a person accused of an offence within the meaning of Art. 20(3) of the Constitution.

(28) The only other question that remains to be answered is the first question which is as follows:

"(1)(a) Whether contempt of court is an offence within the meaning of S. 5(2), Criminal P. C.?

(b) If it is, whether the procedure prescribed by that Code for the investigation, enquiry and trial of an offence must be followed?"

In view of what I have already said while dealing with the third question it must follow that contempt of court is not an offence within the

meaning of S. 5(2), Criminal P. C. I have already quoted S. 5(2) which deals with offences created by special or local law, which, I have already said, must mean enacted law. The second part of the question, therefore, does not arise.

DESAI J.:

(29) The following questions have been referred to us by a Division Bench before which proceedings for contempt of court are pending against the opposite parties:

"(1)(a) Whether contempt of court is an offence within the meaning of S. 5(2), Criminal P. C.;

(b) If it is, whether the procedure prescribed by that Code for the investigation, inquiry and trial of an offence must be followed:

(2) Whether the alleged contemner is an accused person within the meaning of S. 5, Oaths Act, 1873;

(3) Whether the alleged contemner is a person "accused of an offence" within the meaning of Art. 20(3) of the Constitution, and can he, if he voluntarily makes an affidavit, be cross-examined upon it."

(30) The proceedings were started on an application made on 7-10-49 by the City Magistrate, Allahabad, through the Additional District Magistrate under Ss. 2 & 3, Contempt of Courts Act, 1926. A case under S. 145, Criminal P. C. was pending in his court between Harjiwan Das Nagar and opposite party No. 1. During its pendency the opposite parties are said to have published a pamphlet, which is alleged to interfere with the fair trial of the case. When the publication of the pamphlet was brought to the notice of the City Magistrate by Harjiwan Das Nagar, he applied for contempt proceedings against the opposite parties. When this Court issued a notice to them, opposite party No. 1 appeared on 1-5-50 and filed an affidavit stating that he had nothing to do with the publication or printing or circulation of the pamphlet, that he never sent a copy of it to the City Magistrate or his staff and that, in any case he was tendering unqualified apology to the court if it held that he was guilty of contempt.

The other opposite party also filed an affidavit on the same day. The Government Advocate informed the court that he desired to cross-examine opposite party No. 1 on the affidavit sworn by him and the case was adjourned to 16-5-50. On 16-5-50 the opposite party challenged the right of the Government Advocate to cross-examine him. He relied upon a decision of this court in — 'Emperor v. Benjamin Guy Horniman', AIR 1945 All 1 (L). The learned Judges hearing the matter doubted the correctness of that decision and referred the questions to us.

(31) Section 5(2), Criminal P. C. runs as follows:

"All offences under any other law shall be investigated, enquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences".

(32) "Offence" is defined in S. 4(o) of the Code to mean "any act or omission made punishable by any law for the time being in force". It was argued on behalf of the opposite party that contempt of court is an act made punishable by the Contempt of Courts Act, 12 of 1926, that consequently it is an offence within the meaning of the Code and that it must be investigated, enquired into and tried according to the Code.

Section 342 of the Code lays down that no oath shall be administered to the accused. The word "accused" is not defined in the Code, but if contempt of court is an offence within the meaning of the Code, there would be no difficulty in holding that the contemner is an accused within the meaning of S. 342. The word "accused" evidently means a person accused of an offence as defined in the Code.

On behalf of the learned Government Advocate, it was contended that contempt is not an act made punishable by the Contempt of Courts Act, that it is made punishable under the inherent and the supervisory powers of the court and that the word "law" in the definition of "offence" does not include the inherent and the supervisory powers. The Contempt of Courts Act of 1926 was an Act to define and limit the powers of certain courts in punishing contempts of courts. It was enacted to resolve the doubts that had arisen as to the powers of a High Court to punish contempts of subordinate courts. Section 2 of it provided that High Court would have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to them as they had and exercised in respect of contempts of themselves and that no High Court could take cognizance of contempt of a subordinate court where it was an offence punishable under the Penal Code.

Section 3 provided that contempt of court might be punished with simple imprisonment for a term extending up to six months or with fine or with both. The intention of the legislature was that the limit of punishment laid down in S. 3 was for contempts of High Courts and subordinate courts both and this was made clearer by an amendment of the Act in 1937.

On the passing of the Constitution, new High Courts were established. Article 214 lays down that there must be a High Court for each State. Article 215 lays down that every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. The Supreme Court was established under Art. 124 and Art. 129 made it a court of record and conferred upon it all the powers of such a court including the power to punish for contempt of itself.

With the establishment of new High Courts the Contempt of Courts Act of 1926 became obsolete and in 1952 another Contempt of Courts Act, Act No. 32 of 1952, was enacted. That is the Act now in force. Section 3 of it provides that a High Court can punish contempts of subordinate courts

"in accordance with the same procedure and practice..... as it has and exercises in respect of contempts of itself".

Section 4 provides that contempt of a High Court or of a subordinate court can be punished with imprisonment extending up to six months and fine extending up to two thousand rupees.

(33) In the well-known case, — 'R. v. Almon', (1765) Wilm 243 (M), Wilmot, J. said:

"The power which the Courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands

upon the same immemorial usage, as supports the whole Fabric of the Common Law; it is as much the 'lex terrae', and within the exception of Magna Charta, as the issuing of any other legal process whatsoever".

Cooley, in his "Constitutional Limitations", 8th edition, Vol. 1, p. 668, footnote 2, writes:

"The power to punish contempts summarily is incident to courts of record, and the courts have generally held that cases of contempt are not triable by jury. The object of the power would be defeated in many cases if they were."

Sutherland, J. said in — 'Michaelson v. United States', (1924) 69 Law Ed 162 (N):

"That the power to punish for contempts is inherent in all courts * * * may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power."

According to 'Corpus Juris', Corpus Juris Secundum, Vol. 17, paragraph 43:

"the power that courts possess for contempt does not depend upon constitutional, nor, at least as to courts established by constitutional provisions, upon legislative grants but it, on the broad ground of public policy, is, and was at Common Law, inherent, it being necessary for self-protection and for the execution of judicial functions. It is an essential auxiliary to the due administration of law."

In — 'Bessette v. W. B. Conkey Co.', (1903) 194 US 324 at p. 326: 48 Law Ed 997 at p. 1001 (O), Brewer, J. said:

"The power to punish contempt is inherent in all courts."

He quoted on page 1005 of the Lawyer's Edition from previous authorities stating that

"it has always been one of the attributes — one of the powers necessarily incident to a Court of Justice that it should have this power of vindicating its dignity of enforcing its orders of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power"

and that

"the power of a court to make an order carries with it the equal power to punish for disobedience of that order".

In — '10 Cal 109 (B)', Sir B. Peacock stated at p. 131 that contempt of court by defaming the Judge is an offence which by the Common Law of England is punishable by the High Court in a summary manner by fine or imprisonment or both and that the High Courts in India being superior courts of record, have the same power by virtue of the Common Law of England.

The High Courts in India have powers of superintendence over subordinate courts and these powers include the power to punish for contempts of subordinate courts. Thus a High Court derives the power to punish for contempts of courts from its own existence or creation; it is not a power conferred upon it by any law. The Act of 1926 merely recognised the existence in every High Court of the power to punish for contempts of subordinate courts.

The Clayton Act prescribed a special procedure and punishment for trial of contempts, consisting of wilful disobediance of a lawful writ, process, order, rule, decree or command of any district Court of the United States or of any court of the District of Columbia, if the acts of contempt were also liable to be punished as criminal offences.

Mr. Justice McReynolds said as regards the Act in — 'Myers v. U. S.', (1923) 68 Law Ed 577 at p. 579 (P):

"To disobey a judicial order is not declared criminal by the Clayton Act. It recognizes that such disobedience may be contempt, and having prescribed limitations, leaves the court to deal with the offender".

(34) Exactly the same is the position of our 1926 Act.

(35) "The legislature cannot define what shall be considered contempt of court"; see Cooley, Vol. 1, p. 181. In the case of 'Bessette', at p. 1005 (O), Mr. Justice Brewer re-affirmed the view taken by the Supreme Court in 're Debs', (1899) 158 US 564 (Q), that the

"inquiry as to the question of disobedience has been from time immemorial, the special function of the court", that it is not technical rule and that "to submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency".

Every court of record in England "is the sole and exclusive Judge of what amounts to a contempt of Court"; — 'Rainy v. The Justices of Sierra Leone', (1852-53) 8 Moo PC 47 at p. 54 (R).

That is why the Judicial Committee denied to itself the power to interfere with an order of a court of record imposing a fine for contempt. That decision was referred to as an authority by the Judicial Committee in the case of 'Surendra Nath Banerjee, (B)', and was followed by the Chief Court of Avadh in — 'P. L. Jaitley v. Sir Iqbal Ahmad', AIR 1945 Oudh 266 (S). It is thus clear that it is not law that has made contempts of courts punishable, or conferred upon a High Court the power to punish for contempts.

(36) What the Constitution (Art. 215) and the Contempt of Courts Acts of 1926 and 1952 have done is simply to recognise that contempts are punishable, and punishable by High Courts under their inherent and supervisory powers, and to regulate these powers.

It was expressly stated in the preamble of the Act of 1926 that it was enacted to define and limit the powers exercisable by High Courts in punishing contempts. In the face of this statement in the preamble it cannot be argued that the Act was enacted to create the powers or that contempt is made punishable under a law since 1926. The Act of 1926 not only did not define contempt of court but also did not contain any provision making it punishable. "Contempt" was not defined in the Act, not because it was difficult, or not necessary, to define it but because the legislature had no power to define it, a court of record having the exclusive power to define and determine what amounts to contempt. Though the words used in S. 2 were "shall have and exercise", it did not confer powers upon a High Court but simply recognised their existence.

Some High Courts were exercising those powers, but others thought that they did not have them and S. 2 confirmed that they had them. Section 3 by itself did not make contempt punishable; it assumed that it was punishable and only fixed limits to the punishment that could be imposed. The word used was "may" and not "shall". Had the legislature made contempt punishable for the first time by enacting that section, it would have used the word "shall", as it has used in punitive sections of the Penal Code.

Its object behind its enactment was expressly to limit the powers exercisable by a High Court in punishing contempts of courts. If the real nature of the power to punish for contempts is understood, there should be no difficulty in understanding that the Acts did not by themselves make contempts punishable. As the power is inherent and incidental and as it is within the exclusive jurisdiction of courts of record to decide what amounts to contempt of court, there was nothing to be done by the legislature except to recognise it and regulate its exercise.

The position in India is not different from that in America which is described in 'Corpus Juris Secundum, Vol. 17, p. 58' in the following words:

"Except where the Constitution otherwise provides, the legislature may not destroy or abridge, or limit, as by definition, the inherent power of courts to punish for contempt. Although there is authority to the contrary, the legislature may, however, regulate the use of the power, and in some jurisdictions, ...the punishment that may be imposed.

.. ..

Statutes purporting to grant a court power to punish acts which it has the inherent power to punish are simply declaratory of the Common Law, and such statutes, as well as those defining contempts, or regulating contempt proceedings, do not limit the inherent power to punish".

In 'Michaelson's case, (N)', Sutherland, J. said at P. 167, with regard to the power to punish for contempts:

"The attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted."

(37) With great respect to the learned Judges deciding the case of 'B. G. Horniman, (L)', I do not agree with their conclusion (though it is approved by Chitaley in his commentary on Criminal P. C. and Tek Chand and Ram Chandra in their books on Contempts of Court), that contempt is an act made punishable under a law for the time being in force within the meaning of S. 4(o) of the Code nor with the learned Judges who decided — 'P. L. Jaitley v. Sir Iqbal Ahmad', (S) and respectfully agree with the learned Judges of the Bombay High Court who decided in 're B. G. Horniman', AIR 1944 Bom 127 (T).

The Allahabad case was an off-shoot of the Bombay case against B. G. Horniman. A Bench of this Court, purporting to act under Criminal P. C., issued a warrant of arrest against B. G. Horniman who was residing in Bombay, for contempt of this Court. B. G. Horniman was arrested by the police of Bombay in execution of the warrant and was released on bail by the Chief Presidency Magistrate. He challenged the order of the Chief Presidency Magistrate on the ground that the alleged contempt was not an offence within the meaning of the Code and that no warrant of arrest could be issued against him by this Court to the police of Bombay. The challenge was upheld by the High Court of Bombay.

Beaumont, C. J. relying upon the case of — 'Surendra Nath Banerjee (B)', held that contempt of Court is not an offence which is dealt with by any law within the meaning of S. 5(2) of the Code. The learned Chief Justice, with the concurrence of Sen, J., discharged the bail bonds executed by B. G. Horniman. When the matter of the discharge of the bail bonds was put up before a Bench of this Court, it disagreed with the decision of the learned Chief Justice of Bombay, said that contempt of the High Court is an act punishable under a law for the time being in force and that since the passing of the Contempt of Courts Act, 1926, the decision in — 'Surendra Nath Banerjee's case (B)', was no longer in force

The learned Judges did not explain what happened to the inherent powers which this Court had at the time of the passing of the Act in 1926 and why in spite of their existence, statutory provision was made for the exercise of those powers. They remarked on page 4 that the offence of contempt of the High Court "can be enquired into according to the provisions of that Code as set out in S. 5(2)". The word used in S. 5(2) of the Code is "shall" and how that word was changed into "can" is not explained.

If contempt of court were an offence within the meaning of the Code, it was bound to be investigated, enquired into and tried according to the Code, there being no enactment in force regulating the manner and place of investigating, enquiring into or trying the offence. Common law is not an enactment. The Act of 1926 did not regulate the manner or place of investigating, enquiring into or trying contempts of courts. It laid down that a High Court should adopt the same procedure and practice for punishing the contempt of subordinate courts as it adopts for punishing its own contempts but did not in any manner specify or regulate the procedure and practice. Not a single authority was cited before us laying down that the procedure for the punishment of contempts of courts is governed by the Code.

On the other hand, besides the authorities already mentioned there is — 'In re K. L. Gauba' AIR 1942 Lah 105 (U), in which Full Bench of the Lahore High Court held that the Code is not applicable to summary proceedings for punishing contempts. A Full Bench of this Court held in 'AIR 1926 All 623 (G)', that this Court has jurisdiction to deal with a libellous attack upon it in a summary manner. Sulaiman, J. said in that case that inherent power of preventing 'brevi manu' attempts to interfere with the administration of Justice in the subordinate courts must exist in every High Court because, among other facts, the ordinary remedy under the penal laws of the land, meant for offences against officers, in their individual capacity, would, if resorted to, be cumbrous and cause considerable delay and that dealing out swift justice in a summary proceeding is the only way of protecting them effectively. As stated in Oswald's Contempt of Courts, 3rd edn., p. 8,

"the usual criminal process to punish contempts was found to be cumbrous and slow, and therefore the Courts at an uncertain date assumed jurisdiction themselves to punish the offence summarily, 'brevi manu', so that cases might be fairly heard, and the administration of justice not interfered with."

Wilmot, J. said in the case of 'Almon, (M)', that contempt of court "calls out for a more rapid & immediate redress than any other obstruction whatsoever". It is said in 'Corpus Juris', Corpus Juris Secundum, Vol. 17, p. 72' that the procedure in contempt proceedings is governed by Common Law rules & is not restricted to the procedure prescribed by the criminal law. The learned Judges themselves did not say that they were bound to follow the procedure laid down in the Code. If the proceedings for contempts of courts are not governed by the Code, it necessarily follows that S. 5(2) of the Code is not applicable and that contempt of court

is not an offence within the meaning of the Code.

Collister, J. remarked on page 4 that contempt was not defined in the Act just as insult is not defined in S. 228, Penal Code. But while S. 228 expressly makes the act of offering any insult punishable, when it was not punishable previously, there was nothing in the Contempt of Courts Act to make the act of contemning courts punishable for the first time.

I have already said that contempt was not defined in the Act because the Act did not purport to make contempt punishable and it was conceded to be 'ultra vires' the legislature to define contempt. In the case of 'P. L. Jaitley, (S),' the learned Judges held that contempt proceedings are of a criminal nature and that contempt is an "offence". They did not refer to the definition of "offence" in the Code and seem to have described contempt as "offence" in a general way.

Their Lordships of the Judicial Committee also had described contempt as an offence in a general way in the case of 'Surendra Nath Banerjee, (B)'. The learned Judges did not express any opinion on the decision in the Bombay case of 'B. G. Horniman, (T)'.

(38) My answer to question 1(a) is "No". The other part of the question does not arise. If the first part were answered in the affirmative, the second part also would have to be answered in the affirmative.

(39) Article 20(3) of the Constitution lays down that no person accused of an offence shall be compelled to be a witness against himself. This provision is based on the fifth amendment to the American Constitution stating that no person shall be compelled in any criminal case to be a witness against himself. The word "offence" is interpreted in the General Clauses Act in exactly the same language as is used in S. 4(o) of the Code. The General Clauses Act applies in the interpretation of the Constitution, vide Art. 367. As contempt of court is found to be not an offence within the meaning of the Code, it cannot be an offence within the meaning of Art. 20(3) of the Constitution also.

(40) Contempt has been divided into civil contempt and criminal contempt. It cannot be disputed that the contempt that we are considering is criminal contempt; the object of the proceedings is not to enforce compliance with any order made by a court but to punish for interference with the administration of justice by a court.

In — 'Wellesley v. The Duke of Beaufort', (1831) 2 Russ & M. 639 (V), the Lord Chancellor said:

"Now convictions, and the sentences that follow upon them, are of two sorts; either formally, upon trial, by indictment or information and verdict, with the consequent judgment, or summarily, but as legally, as formally, by a commitment for contempt, where there is no other punishment provided, and no other mode of trying the offence".

Thus the Lord Chancellor treated contempt as an offence, holding a person guilty of contempt as convicting him and punishment for contempt as a sentence. The Supreme Court of United States denies to itself the jurisdiction to entertain an appeal from an order of commitment for contempt on the ground that the order is one in a criminal matter; in — 'City of New Orleans v. The N. Y. M. Property Co.', (1874) 87 US 387 (W) it is stated that contempt of court is a specific offence and that imposition of fine for contempt of court is a judgment in a criminal case.

Brewer, J. observed in the case 'Bessette' at p. 1001 (O):

"A contempt proceeding is sui generia. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty is punished."

(41) He quoted with approval the following from the opinion of Sanborn J. in 're Nevitt' 54 C. C. A. 622 (X):

"Proceedings for contempts are of two classes, — those prosecuted to preserve the power, and vindicate the dignity, of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce."

The contempt that was being considered by Brewer, J., consisted of violation of a perpetual injunction decreed by a court. It was treated as coming more fully within the punitive class than within the remedial class. It was regarded like misconduct in a court room or disobedience of a subpoena.

According to Corpus Juris (11), p. 8:

"Although a contempt of court is in a sense sui generis, it is commonly regarded as in the nature of a crime although not necessarily as a criminal offence. However, criminal contempts ....are offences against organised society and public justice.....and the proceedings to punish it (them?) are punitive".

When their Lordships of the Judicial Committee remarked in the case of 'Surendra Nath Banerjee, (B)', that a contempt of a High Court by a libel is an "offence" which by the Common Law of England is punishable by the High Court in a summary manner, they meant that it is a criminal wrong.

The Contempt dealt with in — 'O'shea v. O'shea', (1890) 15 PD 59 (Y) consisted of publishing in a newspaper an article commenting on the conduct of the petitioner in a pending action against his wife for dissolution of marriage. The contempt proceedings were held to be a "criminal cause or matter". Cotton, L. J. pointed out that there are many contempts that are not of a criminal nature, for instance, when a man does not obey an order of a court made in some civil proceeding, to do or to abstain from doing something. Lindlay, L. J. had no doubt that:

"The proceeding is a summary conviction for a criminal offence" (page 64).

In — 'Gompers v. United States', (1913) 58 Law Ed 1115 (Z) Holmes, J. remarked at page 1120 that if contempts "are not criminal, we are in error as to the most fundamental characteristics of crimes". Though contempt may be a crime, it is not an offence, as that word is understood in our Constitution. The provision in Art. 20(3) is differently worded from that in the Fifth Amendment. Therefore, the dictum in — 'Gompers v. Buck's Stone and Range Co.', (1910) 55 Law Ed 797 at p. 807 (Z1) that a contemner may not be compelled to be a witness against himself cannot be applied in India.

(42) Contempts are divided into civil and criminal contempts, but it does not follow that they are to be dealt with differently in every respect and that the proceedings in one are governed by Civil P. C. and those in the other, by Criminal P. C. The division of contempts into two classes is for particular purposes only.

For example, there is a right of appeal or review from an order passed in a civil contempt while an order passed in a criminal contempt is held to be final. This was made clear in the case of 'Bessette, (O)'. The Crown has the power to grant pardon or not according as the contempt is criminal or civil; vide Oswald's Contempt, p. 4. The rule of benefit of doubt prevails in a criminal contempt, but not in a civil contempt.

In some cases it is laid down that the sworn answer of the accused fully denying the alleged contempt is conclusive in a criminal contempt but not in a civil contempt, vide 'Corpus Juris (11)', at p. 108. While there exists a difference between civil and criminal contempts as regards these matters, no authority exists laying down that there is a difference as regards the procedure also. All contempts punishable under the inherent and the supervisory powers, civil or criminal, are governed by the same procedure.

In — 'Gompers v. Buck's Stone and Range Co., (Z1)', Lamar, J. referred to "many elements of similarity in procedure and punishment" between the two classes. McReynolds, J. made it clear in the case of 'Myers, (P)', at p. 580 that the proceedings to punish contempts are not "criminal prosecutions" within common understanding. The fact that the contempt in the instant case was criminal contempt does not attract the provision in Art. 20(3) any more than it attracts the provision of S. 5(2) of the Code. A contemner is not "accused of an offence" and cannot claim immunity from being sworn as a witness.

(43) The privilege against self-crimination is merely an option of refusal, not a prohibition of enquiry. When an ordinary witness is on the stand and a criminating fact is desired to be proved through him, the question may be asked, and it is for him then to say whether he would exercise the option given him by the law. It cannot be known beforehand whether he would refuse. To prevent the question would be to convert the option into a prohibition. A witness cannot declare himself to be incompetent to testify as a witness, but must be sworn and can claim his privilege only when he has been asked a question, the answer to which would tend to incriminate him.

But the case of an accused who offers to give evidence in defence is different. The privilege permits him to refuse answering any question whatever in the cause, on the general principle that it tends to criminate. See Wigmore on Evidence, Vol. 8, 3rd Edn. pp. 388, 391 and 392. Any fact which is relevant to an enquiry whose sole or essential object is to charge a specific crime upon the accused is an incriminating fact.

Therefore, an accused in a criminal case is exempted by the privilege from all answers whatsoever; Wigmore, p. 356. When Phipson in his treatise on Evidence said on p. 216 that the prohibition is against self-incrimination and not against entry in the witness box, he evidently referred to the case of an ordinary witness and not to that of an accused entering the witness box on behalf of himself or a co-accused. It is said by Willoughby on the Constitution of the United States, Vol. 2, p. 1165, that if an answer would tend merely to disgrace but not to incriminate the witness, the privilege does not apply, and that if, however, the answer is one which can have no bearing upon the case except to impair the credibility of the witness, he may refuse to answer.

Therefore, if the opposite party were "accused of an offence", he could refuse to be sworn altogether (provided he had not waived the privilege).

(44) The privilege against self-crimination can be waived.

"It is well established that a witness having voluntarily taken the stand, may be compelled to disclose the whole facts regarding the matters concerning which he has testified:" (Willoughby on page 1166).

"It has never been doubted that the privilege like all privileges, is in itself waivable". (Wigmore, Vol. 8, p. 435).

An ordinary witness waives the privilege by exercising his option of answering.

"The case of an accused in a criminal trial, who voluntarily takes the stand, is different. Here his privilege has protected him from being asked even a single question for the reason that no relevant fact could be inquired about that would not tend to criminate him. On this very hypothesis then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all." (ibid pp. 440-41).

Wigmore further observes on p. 441 that:

"The spirit and the purpose of the privilege cannot be violated by any questioning after the accused has once voluntarily taken the stand".

There is no unanimity about the effect of the waiver, but the greatest support according to Wigmore (pp. 445-449) is for the view that the waiver extends to all matters relevant to the issue meaning thereby to exclude collateral matters, i.e., facts merely affecting credibility.

If the opposite party were entitled to the privilege conferred by Art. 20(3) he had to exercise the privilege at the very outset and should not have sworn the affidavit at all. By swearing the affidavit on oath, he waived the privilege. Swearing the affidavit was tantamount to entering the witness box. He was sworn once and that was enough to make him forfeit his privilege.

(45) When the opposite party swore the affidavit and filed it in court and the court accepted it, he became liable to be cross-examined on the affidavit. The other party had a right to cross-examine him on the affidavit. He could not insist upon the affidavit being treated as evidence without being subjected to cross-examination. The opposite party's counsel said that the affidavit may not be read in the case at all. I think it is too late for him to withdraw the affidavit.

(46) In 're Quartz Hill etc., Company, Ex parte Young', (1882) 1 Ch D 642 (Z2), Brett, L. J. said:

"I think it most important that no person who has taken a step with a view to gaining an advantage should be at liberty to withdraw it if he finds that it will not answer. Lord Hatherley accordingly held that where a party had proposed himself as a witness and filed an affidavit, he could not, when threatened with cross-examination, withdraw the affidavit and escape cross-examination. I cannot imagine anything more calculated to bring the course of justice into contempt than to allow a person to file evidence which if there is no cross-examination makes in his favour, but which he knows will break down on cross-examination, and then to withdraw it if he finds that cross-examination is threatened."

He said that it was a principle applicable to proceedings before every tribunal.

(47) In — 'Clarke v. Law', (1855) 2 K & J 28 (Z3), Sir W. Page Wood V. C. said:

"When a party gives notice that he intends to use at the hearing an affidavit made by him, he is both a party and witness. If he had filed a new affidavit, he could not say that he would not use it. He had propounded himself as a witness, and cannot be allowed, if not cross-examined, to use his affidavit, but if threatened with cross-examination to withdraw it; having tendered himself as a witness, he is bound to submit to cross-examination."

Here the opposite party had clearly used the affidavit made by him. Therefore he could not say that he was withdrawing it and should not be examined.

My answer to the third question is as follows:

"No. He can be cross-examined on the affidavit voluntarily made by him."

(48) Section 5, Oaths Act requires oath to be administered to all witnesses i.e., all persons who may lawfully be examined or give evidence before any court. There is an express provision saying that this does not mean that oath should be administered to an accused in a criminal proceeding.

I think the word "accused" and "criminal proceeding" must be understood in the same sense in which those words are used in Criminal P. C. A contemner, even though the contempt committed by him is of criminal nature, is not an accused in the narrow sense in which the word is used in Criminal P. C. The proceedings against him may be criminal proceedings for certain purposes but not for the purpose of deciding whether an oath should be administered to him or not. I have already shown that contempt proceedings are special proceedings not governed by any rule. I have also referred to the passage in 'Corpus Juris (11)' at p. 108 suggesting that a contemner can file an affidavit on oath. The opposite party has already sworn an affidavit.

If S. 5, Oaths Act, prevented an oath being administered to him, he has not explained how he swore the affidavit. He is sought to be cross-examined on the affidavit itself and if the Oaths Act did not stand in the way of his swearing the affidavit it cannot stand in the way of his being administered oath again in the witness-box. My answer to the second question is "No".

MUKERJI J.:

(49) This reference to a Full Bench arises out of certain contempt proceedings which were initiated against the opposite parties on a petition made to this Court by a court subordinate namely, the court of the City Magistrate, Allahabad.

(50) It is not necessary for the purposes of this reference to go into the facts of the matter in any detail. The Bench which made the reference formulated three questions and has sought the answers to those questions from us. The questions formulated were these:

"(1)(a) Whether contempt of court is an offence within the meaning of S. 5(2), Criminal P. C., (b). If it is, whether the procedure prescribed by that Code for the investigation, inquiry and trial of an offence must be followed;

(2) Whether the alleged contemner is an accused person within the meaning of S. 5, Oaths Act, 1873;

(3) Whether the alleged contemner is a person accused of an offence within the meaning of Art. 20(3) of the Constitution, and can he, if he voluntarily makes an affidavit, be cross-examined on it."

The opposite parties, it appears, filed an affidavit in these proceedings in support of their case. The Government Advocate wisned to cross-examine the opposite parties in respect of that affidavit a right which he possessed under the general law. On behalf of the opposite parties objection was taken to their being put on their oath and thereafter subjected to cross-examination.

The question, therefore, that arose was whether the opposite parties were justified in law in taking the stand that they did in regard to the right which was asserted, of cross-examination, by counsel on behalf of the State. The true answer to the question depends on the answers which are to be returned to the questions which were formulated by the Bench hearing the petition and which questions I have already quoted in full above.

(51) The proceedings which have given rise to this reference to the Full Bench were proceedings in contempt. The contempt jurisdiction or the jurisdiction of the High Court to punish contemners has an ancient history. This court exercised this jurisdiction upto 1950 by virtue of its being a Court of record; there was no statute or any other written law which conferred this jurisdiction on this Court directly.

In 1950, when we had our Constitution, this Court, along with all other High Courts in the country, had this right recognised by Art. 215 of the Constitution. The words of this Article are these:

"Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

(52) Even if this right had not been specifically, recognised by the Constitution, the rignt of the High Courts, which were Courts of record, would not have been impaired inasmuch as the existing jurisdictions of the High Courts, unless altered or curtailed by appropriate law, were to continue, even on the coming into force of the Constitution.

It may here be pointed out that the jurisdiction under which High Courts act for punishing contemners is a very special and a very important jurisdiction of these Courts. By a long course of precedents the procedure followed in the exercise of this jurisdiction had become so thoroughly settled that it enjoyed the same legal status as other procedural law of the land contained in statutes.

(53) No statute law from the earliest times to the present day has ever defined or even attempted to define "contempt". It was always for the courts, when faced with any particular case, to determine whether or not the facts alleged amounted to contempt. Precedents became the only guide for determining and knowing the meaning of contempt. The action of Legislatures in not attempting to define contempt or hedge in the jurisdiction of High Courts to punish for contempt by cumbrous rules of procedure was undoubtedly based on great wisdom. It has always been a matter of fundamental importance that the streams of justice should flow unimpaired and uncontaminated by any influences, big or small, and that the majesty of the law and the purity of its administration should be protected and guarded ruthlessly and zealously was of the highest importance for the security and welfare of any properly constituted State. Conferring powers on the highest courts of the land to punish people who acted in derogation and in obstruction of their dispensing justice, the noblest attitude of the State, was, therefore, based on the supremest wisdom of man.

(54) A contemner was looked upon by the law not as an accused in the sense in which a breaker of the law is looked upon, but he was looked upon as an offender who stood more or less in a class by himself.

In England, from where courts in India borrowed the entire law of contempt, contempt was divided into two classes. One class was given the denomination of criminal contempt while another class of contempt was designated civil contempt. This is also indicative of the fact that contempt was not treated as an offence within the meaning of the criminal law.

(55) The first question which has been referred to us is concerned with an answer as to whether contempt of court is an offence within the meaning of S. 5(2), Criminal P. C. Section 5(2) of the Code provides for the trial of offences against other laws. If contempt can truly be said to fall within the definition of the word "offence" in the Code then it would be difficult to say that the trial of a contemner for contempt would not have to be carried out in accordance with the procedure laid down by Criminal P. C., but if "contempt" does not come within the definition of the word "offence" as provided for by S. 4(1)(o), Criminal P. C. then obviously S. 5(2) of the Code would not, in terms, apply. "Offence" has been defined by S. 4(1)(o) of the Code in these words:

> " 'offence' means any act or omission made punishable by any law for the time being in force: it also includes any act in respect of which a complaint may be made under S. 20 of the Cattle-trespass Act, 1871:"

(56) That contempt is an act is undoubted. Further that the act is punishable is also undoubted, but what is not so undoubted is the fact that it is made punishable by "any law for the time being in force". As has been pointed out earlier, there is no statute law which makes the offence of contempt or defines it and makes it thereby, punishable.

The question then is whether the word "law" in the definition refers to statute law only or does it include all that other law which though not contained in statutes yet has the same force and binding effect as law contained in statutes. The Criminal P. C. does not define "law". The General Clauses Act has not defined "law" as such but has defined "Indian Law". It cannot be contended with any force that we are not in effect concerned with "Indian law" when we are attempting to find the true meaning of the word "law" as used in S. 4(1)(o), Criminal P. C.

The definition of "Indian law" in the General Clauses Act is in these words:

> " 'Indian law' shall mean any Act, Ordinance, Regulation, rule, order, bye-law or other instrument which before the commencement of the Constitution had the force of law in any Province of India or part thereof, or thereafter has the force of law in any Part A State or Part C State or part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act:"

(57) From the aforesaid definition it is manifest that "Indian law" which must be the true meaning or the true connotation of the word "law" in S. 4(1)(o), Criminal P. C., means written law. It is appropriate to notice at this stage that there is a class of contempts which have been catalogued as "offence" in the Penal Code, namely the offences which have been provided for by Ss. 175, 178, 179, 180 and 228, Penal Code.

Section 480, Criminal P. C. makes provision for the trial of certain cases of contempt and these cases, it would be noticed by a reading of the section, are cases of those contempts which fall within the ambit of Ss. 175, 178, 179, 180 and 228, Penal Code. Sections 481 and 482 are analogous and complementary provisions to S. 480, Criminal P. C. The fact that the Penal Code makes certain types of contempts offences and that Criminal P. C. prescribed a procedure for the trial of these offences, a procedure which is different from the procedure which has to be followed for the trial of other offences covered by Penal Code, is clearly indicative of the fact that the framers of the Codes wished to make statute law in regard to only certain types of contempts and they did not consider it desirable to cover the entire field.

(58) It may be appropriate also to notice at this stage that there is a type of contempt which is provided for by Civil P. C., namely, by O. 39, R. 2(3), where provision has been made for punishing a person disobeying an injunction granted by a court.

(59) In 1914 a bill was introduced in the Indian Legislative Council, as it then was, with the object of increasing the categories or classes of contempts of courts which could be punished as offences under the Penal Code, but this proposed legislation did not materialize. Instead, however, the Legislature passed an Act, Act 12 of 1926, called the Contempt of Courts Act.

The reason for this enactment was that there was a conflict in India in regard to the power of the High Courts to punish for contempts of courts subordinate to them. The Madras and the Bombay High Courts held the view that they possessed the power to protect their subordinate courts against contemners and that they had the right to punish such contemners while the Calcutta High Court took the contrary view. Doubt was also expressed in certain quarters as to whether or not the courts of judicial commissioners had the power to punish for such contempts.

The Contempt of Courts Act 1926 resolved these doubts and made certain provisions. This Act, however, did not attempt a definition of "contempt". By S. 2 of the Act the power of the superior courts to punish for contempts was recognised. The same section by sub-s. (2) stated that

> "a Chief Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of itself as a High Court referred to in sub-s. (1)."

By S. 3 a limit on the power to punish for contempt was placed.

The provisions of this Act, which consists only of three sections, indicate that it neither made contempt an offence nor provided for any punishment, in terms, for such an offence.

(60) Section 1(2), Criminal P. C. lays down the extent of the Code. This section is in these words:

> "It extends to the whole of British India; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force or shall apply to....."

(61) From the above it will be clear that "special law", "any special jurisdiction", and "any special form of procedure prescribed" were excepted from the purview of Criminal P. C.

(62) If law in S. 5(2), Criminal P. C. means only statute law, as I think it does, then the procedure prescribed in the Code cannot be made applicable to contempt proceedings not falling under Ss. 175, 178, 179, 180 and 228, Penal Code.

If, on the other hand, the meaning of law is wide enough to include laws, other than statute law, then under the provisions of S. 1(2) the reference to the form of procedure prescribed by "any other law" cannot also be confined to statute law and would embrace the procedure which has been followed by the courts dealing with certain classes of contempts, a procedure which is now well established by practice, and some of which are laid down in the rules of the Court.

(63) The jurisdiction under which this Court acts when it punishes a contemner is a "special jurisdiction" which has been conferred on it or is inherent in it as a Court of record, and the procedure which the Court has followed and follows is a "special procedure" within the meaning of S. 1(2), Criminal P. C.

In my view, therefore, contempt of court is neither an offence within the meaning of S. 5(2), Criminal P. C., nor is the procedure prescribed by the Code in regard to investigation, inquiry and trial of an offence applicable to proceedings initiated against a contemner by the High Court.

I may here also refer to a decision of the Privy Council in — '10 Cal 109 (B)', wherein their Lordships of the Judicial Committee of the Privy Council stated that the Penal Code did not provide against a contempt of court committed by the publication of a libel out of court, when the court is not sitting, and neither in Chapter 21 nor elsewhere it provided for the punishment of a contempt of court by the publication of a libel reflecting upon a Judge in his judicial capacity, or in reference to his conduct in the discharge of his public duties.

They further said that because the publisher of the libel could be punished for defamation under the Code, it did not follow that he could not be punished summarily by the High Court for a contempt of court. Their Lordships further pointed out in this case that the provisions of S. 5, Criminal P. C., 1882, relating to the procedure under which "all offences under the Indian Penal Code" and "all offences under any other law" are punished, do not include a contempt of the High Court committed by the publication of a libel out of court, when the court is not sitting, although such contempt may include defamation.

Their Lordships pointed out that such a contempt was more than mere defamation, and was of a "different character".

Their Lordships, however, refrained from considering the true meaning of the words "any special jurisdiction or power conferred by any other law now in force" as used in S. 1(2), Criminal P. C.

This case, in my judgment, supports the view that I have expressed that the offence that a contemner commits is not in 'pari materia' with offence to which Criminal P. C. applies. The authority of this decision is not shaken by anything that has been enacted by the Contempt of Courts Act of 1926. A contrary view was expressed by Collister and Allsop, JJ. in — 'AIR 1945 All 1 (L)'. In this case Collister, J. held that a contempt of the High Court is an offence which can be enquired into in accordance with the provisions of Criminal P. C.

Allsop, J. however, in a separate judgment said thus;

> "It is doubtless true that the Contempt of Courts Act when it recognized our jurisdiction also recognized our procedure and practice, but once we hold, as I think we should, that a contempt is an offence within the meaning of the Code of Criminal Procedure we can exclude from operation only those portions of the Code which are positively repugnant to existing procedure and, as at present advised, I see no reason for thinking that it was ever illegal for this Court to seek the assistance of the appropriate officers of the Crown for the purpose of attaching the person of the offender and that the provisions of the Code for the issue of warrants of arrest are not inapplicable."

(64) From the aforequoted words of Allsop, J. it is clear to me that he was attempting to reconcile two conflicting positions, namely, the position where it is held that contempt is not an offence within the meaning of Criminal P. C. and the position where it is so held. The learned Judge felt the necessity for doing so because in his view the provisions contained in Criminal P. C. for the trial of offences did not in their entirety apply to proceedings taken by the High Courts for the trial and punishments of "contempts".

Collister, J. however, took the view that contempt of the High Court was an act made punishable under a law for the time being in force within the meaning of S. 4(o), Criminal P. C. He expressed the opinion that the offence could be enquired into according to the provisions of that Code as set out in S. 5(2). With great respect to the learned Judge I am unable to agree with the view taken by him. The view expressed by Allsop, J., in my opinion, and I express it with respect, is not strictly logical for I can see no reason why if contempt be an "offence" within the meaning of Criminal P. C. then the procedure prescribed by the Code for the trial of "offences" should not be strictly followed and the procedure which High Court followed for the trial of such "offences" should be adhered to.

The Bench was dealing with a situation which had arisen on account of a divergence of opinion between this Court and the Bombay High Court in regard to this Court's power to arrest and bring a contemner, who was residing beyond the territorial limits of this Court, before it. The Bombay view is to be found in — 'AIR 1944 Bom 127 (T)'. In this case Beaumont, C. J. held that:

> "The power to punish for contempt of Court is a power inherent in superior courts of record, which in this country are the High Courts. Each court has inherent power to punish contempt of itself."

(65) The learned Chief Justice further held that the nature of proceedings in contempt were such as not to bring them within definition of an offence within the meaning of Criminal P. C. Reliance was placed by Beaumont, C. J. on the decision of the Privy Council in — '10 Cal 109 (B)'. Beaumont, C. J. also pointed out the distinction that there was between those classes of contempt which fell directly either within the ambit of Civil P. C. or within the ambit of the Penal Code.

The conflict that arose on account of the divergent views expressed by the Allahabad High Court and the Bombay High Court in regard to the power of the court to arrest a contemner from outside the jurisdiction of the Court has now been set at rest by an amendment of the Contempt of Courts Act. The amendment to the Act has not, however, touched the procedure which the High Courts have consistently followed during the long course of their

existence in dealing with cases of contempt. This, to my mind, is also an indication of the fact that the Legislature did not consider it desirable to alter that procedure.

(66-67) I am, therefore, of the opinion that both the parts of question I referred to the Full Bench should be answered in the negative.

(68) The second question, namely, whether the contemner is an accused person within the meaning of S. 5, Oaths Act, 1873, need not, in my view, detain us long. The words of S. 5, Oaths Act with which we are concerned are these:

"Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person....."

(69) It has already been indicated earlier that a contemner is not in the same position as an accused person. An accused person within the meaning of S. 5, Oaths Act must be one who is accused of having committed an offence as defined in the General Clauses Act. It has also been noticed earlier that an offence which a contemner commits does not fall within that definition.

The words of S. 5 do not create a prohibition against administering an oath either to an accused person or to a contemner. All it says is that the Oaths Act was not to be treated as an authority for administering to an accused person an oath. We know that under the Prevention of Corruption Act, (Act 2 of 1947), an accused person can take the oath and be a witness in his own favour so that there is no inherent prohibition or disability in an accused person taking the oath. The prohibition to administer oath to the accused is provided for by S. 342(4), Criminal P. C.

Section 342 provides for the examination of an accused person and sub-s. (4) of that section says that while an accused is being examined by the court he shall not be put on his oath. It is, therefore, clear that in those cases to which S. 342, Criminal P. C. applies oath cannot be administered to an accused, but where that section does not apply, there is, in law, no prohibition to administer an oath to an accused person. I have already expressed the view that a contemner is not an "accused" within the meaning of Oaths Act and I have also expressed the view that contempt is not an offence within the meaning of Criminal P. C. Therefore, I must hold that S. 5, Oaths Act, 1873 has no application to an alleged contemner.

(70) I would, therefore, answer the second question also in the negative.

(71) The last question that has been referred to the Full Bench is, whether an alleged contemner is "a person accused" within the meaning of Art. 20(3) of the Constitution and whether he can, if he voluntarily makes an affidavit, be cross-examined on it. Article 20(3) is in these words:

"No person accused of any offence shall be compelled to be a witness against himself".

(72) This provision of our Constitution is analogous to the provision contained in the 5th amendment of the American Constitution wherein they provide a similar prohibition in these words:

"Nor shall any person be compelled, in any criminal case, to be a witness against himself".

(73) The guarantee which was thus furnished by the 5th amendment was a guarantee apart from the "due process". The American lawyers have given this guarantee a short name — the name under which this guarantee is popularly referred to is "the Guarantee against self-incrimination". The prohibition which is contained in our Constitution is a prohibiton against compelling a man to be a witness against himself; so appears to be the import of the American guarantee.

(74) Counsel for the applicants attempted to read in the words of Art. 20(3) of the Constitution a guarantee to the accused to decide whether or not he would submit himself to be cross-examined in regard to an affidavit which he had filed in this case. There is, in the words of Art. 20(3), no prohibition against a person, who is accused of an offence, being cross-examined in case he has chosen to enter the witness-box and take the oath. The right to cross-examine a person arises under the Evidence Act. The testimony that a man gives can only be taken into account if that testimony has been tested by cross-examination, at any rate, if there was an opportunity to the other side to test the truth or otherwise of the statement by cross-examination.

(75) The word "offence" in Art. 20 of the Constitution must, in my judgment, mean the violation of a law in force. That it is so is indicated by the use of these very words in Art. 20(1) of the Constitution. The expression "law in force" has not been defined in the Constitution for all purposes of the Constitution though it has been so defined for the purpose of Art. 13 of the Constitution in Art. 13(3)(b). If it were permissible to take the meaning of the words "laws in force" as given in Art. 13(3)(b) into account in order to find out the meaning of similar words used in Art. 20 then it would appear that these words have quite a wide connotation and may include the law of contempt as well, but that does not appear to have been the intention of the framers of the Constitution as will appear from what follows later.

The word "offence" in Art. 20 has to bear the same meaning with the framers of the Constitution intended for it. We have seen that the General Clauses Act has been made applicable for the interpretation of words used in the Constitution by Art. 367. "Offence" has been defined in the General Clauses Act, and that word in the Constitution must, therefore, bear the same meaning as has been given to it in the definition contained in the General Clauses Act. I have already noticed that the definition of the word "offence" in the General Clauses Act does not apply to a contemner. It must, therefore, follow that a contemner cannot be a person "accused of an offence" within the meaning of Art. 20(3) of the Constitution.

(76) The next question is, whether a contemner, when he voluntarily makes an affidavit, can or cannot be subjected to cross-examination thereon? This question stands on a slightly different footing from the question already considered.

(77) The guarantee which has been given in Art. 20(3) is a guarantee against "self-incrimination" and not a guarantee against being cross-examined in regard to the truth or falsity of any statement made by a person in an affidavit. The applicant who put in the affidavit cannot, in my judgment, refuse to be cross-examined by taking shelter behind Art. 20(3). He can, however, refuse to answer a question which, if answered, would incriminate him. Reference was made to the case of — 'Brown v. Walker', (1895) 40 Law Ed. 819(Z4). It is not necessary for me to notice this decision in any detail.

In America this guarantee has been interpreted by the courts and applied to particular situations and a good synopsis of these decisions can be found in Weaver's Constitutional Law 1946 Edn. p. 457 as also in Willis' Constitutional Law 1936 Edn. pp. 517-520. Willoughby refers to it in his Constitu-

tion of the United States in Vol. 2, p. 1165 onwards. It has been stated by Willoughby at p. 1166 that

"this constitutional privilege against self-incrimination is available to any one who may be incriminated by the testimony or other evidence that is asked for. It is not limited to a defendant at bar or to party defendants. Furthermore the constitutional privilege applies as well to testimony or other evidence called for in civil proceedings as in criminal actions. It applies alike to civil and criminal proceedings, whenever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant."

This statement of the law Willoughby appears to have got from the decision in — Brown v. Walker (Z4)', referred to above. According to the American view, however, this guarantee is a "personal privilege" and it may be waived so that if the accused voluntarily takes the witness stand in his own behalf he subjects himself to the same rule regarding cross-examination as any other witness. This is clear from the decision in — 'Raffel v. United States', (1925) 271 U. S. 494 (Z5).

(78) I would, therefore, answer the third question also in the negative.

BY THE COURT

(79) Our answer to the questions referred to us for opinion is as follows:

"(1) (a) Contempt of court is not an offence within the meaning of section 5(2) of the Code of Criminal Procedure;

(b) In view of our answer to the previous question this question does not arise.

(2) The alleged contemner is not an accused person within the meaning of section 5 of the Indian Oaths Act, 1873.

(3) An alleged contemner is not a person accused of an offence within the meaning of Article 20(3) of the Constitution & if he has voluntarily filed an affidavit, he can be cross-examined on it."

A/R.G.D. Answers accordingly.

A.I.R. 1954 ALL. 537 (Vol. 41, C.N. 215)

HARISH CHANDRA J.

Chhotey and another, Appellants v. Ram Singh and others; Opposite Party.

Criminal Ref. No. 25 of 1952, D/- 11-11-1953.

Criminal P. C. (1898), Ss. 435 and 526 — Application for transfer — Order calling for record — Operation as stay.

Whenever an order has been passed summoning the record in a case in which an application is made for the transfer of that case, it cannot be deemed to be an order staying the proceedings; for the superior court when it thinks that the proceedings should be stayed passes a specific order to that effect and when it thinks that the proceedings should not be stayed, it does not pass such an order. Where, however, the proceeding in the Court of a Magistrate has come to an end and all that remains to be done is to deliver the final order, whether the order passed by the Dist. Magistrate summoning the record also implies an order directing the stay of proceedings or not, undoubtedly it implies that the case should not be finished before the transfer application had been decided by him, as the final order passed by the Magistrate renders the proceedings before the District Magistrate wholly infructuous. Such an order is therefore, without jurisdiction: AIR 1937 Pat 131 and AIR 1925 Bom 247 (1), Ref. (Paras 3, 4)

Anno: Cr. P. C., S. 435 N. 21 (See also S. 439 N. 48).

1949 Mitra: S. 433 P. 1368 N. "Duty..... causes" (6 Pts. extra in N. 21 to S. 435 in A.I.R. Com. — 1 Pt. extra in Mitra).

Cr. P. C., S. 526 N. 19.

1949 Mitra: S. 526 P. 1619 N. 1387 "Sub-section (8).....change in law" and all the sub-notes (3 Pts. extra in A.I.R. Com.).

D. Sanyal, for Appellant: N. C. Shastri, for Opposite Party.

CASES REFERRED: Paras

(A) (V12) AIR 1925 Bom 247 (1): 26 Cri LJ 996 2
(B) (V24) AIR 1937 Pat 131: 38 Cri LJ 484 3

ORDER: This is a reference by the Additional District Magistrate of Meerut arising out of a case under section 145 of the Code of Criminal Procedure. The case was proceeding in the court of a Sub-divisional Magistrate. While the case was proceeding, an application was made to the Additional District Magistrate for the transfer of the case from that court to the court of some other Magistrate. This application was made on the 29th May, 1951, and the Additional District Magistrate passed an order summoning the record of the case from the court of the Sub-divisional Magistrate. This was duly communicated to the Sub-divisional Magistrate on the 31st May, 1951 when he passed an order directing that the record be submitted to the Additional District Magistrate. But the record was not actually sent to that court on that date and on the following day the learned Sub-divisional Magistrate decided the case.

(2) The view of the learned Additional District Magistrate is that after the order summoning the record had been communicated to the learned Sub-divisional Magistrate on a transfer application that had been made before him, the Sub-divisional Magistrate had no jurisdiction to proceed with the case. A case of the Bombay High Court — 'In re Maruti Vithu AIR 1925 Bom 247 (1) (A)' has been relied on by the learned Additional District Magistrate. This case supports the view taken by the Additional District Magistrate. Their Lordships observe as follows:

"When the order was made calling for the record and proceedings with a view to withdrawing the case and transferring to another Magistrate, the case was no longer on the file of the Magistrate and his jurisdiction was suspended."

With all respect, I do not agree that whenever an order is passed sending for the record of a case it should be assumed that the Magistrate in whose court the case is proceeding is no longer seized of the case.

(3) In another case decided by the Patna High Court — 'Ishar Singh v. Dusadh', AIR 1937 Pat 131 (B) it was pointed out that an order sending for the record in a case for the transfer of the case by a superior court implied that the proceedings in the lower court were to be stayed and that if the lower court continued the proceedings, they were without jurisdiction. In my view it would be difficult to assume that whenever an order has been passed summoning the record in a case in which an application is made for the transfer of that case, it should be deemed to be an order

staying the proceedings, for the superior court when it thinks that the proceedings should be stayed, passes a specific order to that effect and when it thinks that the proceedings should not be stayed, it does not pass such an order. In the present case, however, the proceeding in the court of the Sub-divisional Magistrate had come to an end and all that remained to be done was to deliver the final order. Whether the order passed by the Additional District Magistrate summoning the record also implied an order directing the stay of proceedings or not, undoubtedly it implied that the case should not be finished before the transfer application had been decided by the Additional District Magistrate. For by deciding the case finally, the Sub-divisional Magistrate rendered the proceedings that were going on in the court of the Additional District Magistrate wholly infructuous. In the circumstances my view is that this order of the learned Additional District Magistrate summoning the record contained an implicit direction that the final orders in the case should not be passed pending disposal of the transfer application.

(4) In this view of the matter, the order passed by the Sub-divisional Magistrate on the 1st of June, 1951, was without jurisdiction and I, accordingly, set it aside. The case will now proceed in the court of some Magistrate other than Shri A. Pandey by whom it had been previously decided, to whom it may be made over by the learned Additional District Magistrate of Meerut.

(5) Let the record be returned.

B/D.R.R. Order accordingly.

A.I.R. 1954 ALL. 538 (Vol. 41, C.N. 216)

(FULL BENCH) MALIK C. J., SAPRU AND V. BHARGAVA JJ. (10-2-1954)

Basti Sugar Mills Co. Ltd., Applicant v. State of Uttar Pradesh and others, Opposite Parties.

Civil Misc. Writ Nos. 280, 282, 284, 285, 308, 309, 314 of 1950 and 14 of 1951.

†(a) **U.P. Industrial Disputes Act** (28 of 1947), **S. 3 — Validity — (Constitution of India, Art. 245).**

Per Full Bench: Section 3 of the U. P. Industrial Disputes Act, 1947 was not beyond the competence of the legislature and cannot be declared 'ultra vires' on the ground that it delegates legislative or rule-making power of an unspecified character to the Executive Government. (Paras 6-7, 15)

The powers given by S. 3 may be and are indeed of a most wide character, but that fact alone cannot affect its validity. The remedy against delegated legislation is not judicial but political control with which Courts have no concern. AIR 1951 SC 332 and AIR 1952 All 866 (FB), Applied. (Para 6-7)

(b) Constitution of India, Pre. and Arts. 73 and 245 — Delegation of legislative power — Difference between Indian and American Constitution.

Per Sapru J.: The contention that our Constitution, being a written one, must be assumed to have an American background and is based upon an acceptance of that theory of "separation of powers" which determined the main lines on which the Constitution of the United States of America came to be drawn up cannot be accepted. The broad fact which stands out is that the Executive provided by our Constitution is a removable Executive, i.e. an Executive of the Parliamentary type such as obtains in Britain. Article 75(3) and (5) shows that the approach of our Founding Fathers of the Constitution was basically different from that of those responsible for the framing of the American Constitution. AIR 1951 SC 332, Rel. on. (Para 5)

(c) Constitution of India, Art. 245 — Delegation of legislative power — Extent.

Per Sapru J.: No doubt a law can be challenged on the ground of the incompetency of the particular legislature, whether federal or state, to enact it or on the ground of its inconsistency with the fundamental rights guaranteed by the Constitution, but — provided the legislature concerned does not abdicate its power of legislation by wiping itself out and retains its control so as to be able to withdraw legislative power conferred on the subordinate authority whenever it considers it proper to do so, it is not for Courts to decide how much authority should be delegated or for how long such delegation should continue. AIR 1951 SC 332, Rel. on. (Para 6-7)

(d) U. P. Industrial Disputes Act (28 of 1947), S. 3 — Order under, passed on basis of report submitted under S. 14 by a court of inquiry — Validity — (Constitution of India, Art. 226).

The State Government, in order to proceed under S. 3 of the U. P. Industrial Disputes Act, 1947, has to form an opinion that it is necessary or expedient to make an order under that section for securing the public safety or convenience or the maintenance of the public order or supplies and services essential to the life of the community, or for maintaining employment. If the State Government comes to that opinion, it is thereafter empowered to pass general or special orders, making provisions for the matters mentioned in clauses (a) to (g) of that section. The provisions of S. 3 and the remaining provisions of the U. P. Industrial Disputes Act, 1947, nowhere prescribe the materials on which this opinion of the State Government is to be formed, nor do they prescribe any procedure for arriving at that opinion. Clearly, therefore, the State Government is entitled to form its opinion on any or all material and information available to it. (Para 13)

Since S. 3 merely requires the opinion of the State Government as a preliminary to the exercise of powers under that section, the High Court is not competent to see whether the opinion arrived at by the State Government is or is not correct. There being no bar in any law to taking into account the report of a court of enquiry appointed under the Industrial Disputes Act, 1947, an order passed under S. 3, U.P. Industrial Disputes Act, 1947, on the basis of such report, cannot be challenged on the ground that the reference to the court of enquiry of the industrial dispute itself was not valid and was not in accordance with the provisions of the Industrial Disputes Act, 1947. (Para 13)

Held that the order contained in U. P. Govt. Notification No. 1425 (ST) (II)/XVIII-13 (ST)-50 D/- 5-7-1950 could not be challenged on ground that the Government was not competent to refer the dispute to a court of inquiry and make the recommen-

dation made by it binding on the parties as those matters were irrelevant to the validity of the order. (Para 13)

(e) **U. P. Industrial Disputes Act** (28 of 1947), **S. 3 — Validity — (Constitution of India, Art. 254(2)).**

Per V. Bhargava J.: The U. P. Industrial Disputes Act, 1947 was reserved by the Governor of Uttar Pradesh for the assent of the Governor General whose assent was obtained on 21-12-1947, and thereafter the Act was published in the U. P. Government Gazette, dated 10-1-1948. Since this Act of the State Legislature had received the assent of the Governor General, if there be any repugnancy between its provisions and the provisions of the Central enactment contained in the Industrial Disputes Act (Act No. 14 of 1947), the U. P. Industrial Disputes Act, 1947 would prevail in Uttar Pradesh over the repugnant provisions of the Industrial Disputes Act, 1947. It must therefore be held that the U. P. Industrial Disputes Act, 1947 is valid and binding in the State of Uttar Pradesh. (Para 14)

†(f) **U. P. Industrial Disputes Act** (28 of 1947), **S. 3 — If offends Arts. 19(1) (f) and 31 of the Constitution — (Constitution of India, Arts. 19 (1) (f) and 31).**

Per Full Bench: The provisions of S. 3, U. P. Industrial Disputes Act, 1947, are not invalid on the ground that they offend the fundamental rights guaranteed under Arts. 19(1) (f) and 31 of the Constitution. (Paras 1, 8, 16)

Section 3 does not purport to interfere, in any manner, with the right of a citizen to acquire, hold or dispose of property. It only deals with orders that might be made in relation to strikes, lock-outs, terms and conditions of employment, appointment of Industrial Courts, settlement of industrial disputes, and closure, non-closure and exercise of control over any public utility service or any subsidiary undertaking and similar matters. It cannot, therefore, be said that this section empowers the Executive Government to interfere with the right of a citizen to acquire, hold or dispose of property. (Para 16)

An order passed under S. 3 of the Act for payment of bonus or retainer allowance in connection with the regulation of employment in a factory can, in no way, be said to interfere with the right of the proprietors of the factory to acquire, hold or dispose of property. (Para 16)

Article 31, however, permits deprivation of property of a person by authority of law, and as the law, under which the order purports to have been made by the State Government, is a valid law, so that, if the orders fall within the purview of S. 3 they cannot be challenged on the ground that they infringe the fundamental right guaranteed by Art. 31 of the Constitution. No question arises of applying clause (2) of Art. 31 of the Constitution as no property is being taken possession of or acquired for public purposes. Even if cl. (2) of Art. 31 be held applicable, the U. P. Industrial Disputes Act would not be affected by cl. (2) of Art. 31, as provided in sub-cl. (a) of cl. (5) of Art. 31 of the Constitution. (Para 16)

(g) **Words and Phrases — Bonus — Meaning of — (Industrial Disputes — Bonus).**

Per V. Bhargava J.: In modern times, bonus is clearly regarded as deferred wages payable to employees which may be claimed by them as of right under the terms of employment. In the conditions, under which modern industries function, bonus has now come to be recognised as a right of employees which they can claim from their employers under certain circumstances. AIR 1951 Mad 856; AIR 1951 Mad 974 and AIR 1947 Bom 42, Rel. on. (Para 17)

Per Sapru J.: The granting of bonus is not an act of charity but is to be regarded in some measure as a right of the workers to share in the profits of the Company. (Para 8)

(h) **U. P. Industrial Disputes Act** (28 of 1947), **S. 3(b) — Order directing payment of bonus and retainer allowance if can be passed.**

Per V. Bhargava J.: Since bonus can be a term or condition of employment an order can be made under cl. (b) of S. 3 relating to payment of bonus. As regards the order relating to payment of retainer allowance there can be no doubt at all that such an order is specifically made for the purpose of regulating the terms and conditions of employment. Such an order can be passed under S. 3(b) of the U. P. Industrial Disputes Act. (Para 18)

(i) **U. P. Industrial Disputes Act** (28 of 1947), **S. 3(b) — Order under, directing payment of past bonus — Notification No. 1425 (ST) (II)/XVIII — 13 (ST) 50 dated 5-7-1950 — Validity.**

Per Malik C. J. and V. Bhargava J. (Sapru J. dubitante): The order of the U. P. Government contained in Notification No. 1425 (ST) (II)/XVIII-13 (ST)-50 dated 5-7-50 and passed under S. 3(b), U. P. Industrial Disputes Act, 1947, in so far as it directs the sugar factories to which the notification applies, to pay bonus in respect of the past years 1947-48 and 1948-49 is ultra vires and invalid as the U. P. Government had no authority to pass an order determining the conditions of service of the workmen with retrospective effect and in any case such bonus could be payable only to the workmen who were in service in those years. The order relating to payment of retaining allowance is valid and effective. (Paras 3, 9, 20, 21, 23 and 25)

Clause (b) of S. 3, U. P. Industrial Disputes Act cannot be given any retrospective effect. The language of this provision is such as to give a clear impression of the intention of the legislature that orders under it must be purely prospective so as to govern future terms and conditions of service. The use of the words, 'requiring to observe for such period', is a clear indication that the order should lay down the course of conduct to be followed by the employers, workmen or both in future during the period which is to be specified in the order. There cannot be any question of making an order, requiring employers or workmen to observe, for the specified period, terms and conditions of employment which relate to the past employment before the passing of the order. So far as past disputes with regard to terms and conditions of employment are concerned, the power, that was granted to the State Government to regulate them, is laid down in clauses (c) and (d) of S. 3 of the Act whereby an industrial dispute relating to

such past terms and conditions of service can be referred for conciliation or adjudication and for such purposes, the State Government can appoint Industrial Courts. Consequently, under S. 3(b), U. P. Industrial Disputes Act, the State Government's power was restricted to passing orders regulating terms and conditions of employment to be observed during a specified period after the date of the order and no order could be passed by the State Government so as to alter terms and conditions of service which had already been observed in the past.

(Para 21)

CASES REFERRED : Paras

(A) (V38) AIR 1951 SC 332: 1951 SCR 747 (SC) 5, 6-7, 15
(B) (V39) AIR 1952 All 866: 1952 ALJ 412: 1952 Cri LJ 1676 (FB) 5, 15
(C) (1928) 277 US 189: 72 Law Ed 845 5
(D) (V38) AIR 1951 Mad 856: ILR (1949) Mad 926 18
(E) (V38) AIR 1951 Mad 974: 1951-2 Mad LJ 382 18
(F) (V34) AIR 1947 Bom 42: ILR (1946) Bom 915 18
(G) 82 American LR (Annotated) 1239 21
(H) 77 NH 573 21

G. S. Pathak, R. S. Pathak and V. D. Bhargava, for Applicant; Standing Counsel, for Opposite Parties.

MALIK C. J.:

I have carefully considered the judgments prepared by my brothers Sapru and Bhargava. On the points on which they are in agreement I have nothing to add. On one point, however, they have differed. Bhargava, J. has held that the order passed by the U. P. Government under S. 3(b), U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) about payment of bonus for the years 1947-48 and 1948-49 was invalid as the U. P. Government had no authority to pass an order determining the conditions of service of the workmen with retrospective effect and, in any case, such bonus could be payable only to the workmen who were in service in those years. My brother, Sapru, has, however, taken a different view.

(2) As has been pointed out by my brother Bhargava, the Industrial Disputes Act, 1947 (Act No. 14 of 1947) deals with settlement of industrial disputes by Conciliation Officers or Boards of Conciliation or by Industrial Tribunals, Courts of Inquiry have also been provided for inquiring into any matter appearing to be connected with or relevant to an industrial dispute. An industrial dispute can no doubt arise not only with regard to the terms of employment in "praesenti' or in 'futuro' but also in respect of the terms and conditions of service in the past and in the case of an industrial dispute decided under the Industrial Disputes Act of 1947 (No. 14 of 1947) it may be possible for the requisite authorities to pass an order affecting the terms and conditions of service not only in the present or in future but also in the past.

(3) The order in the case before us has, however, been passed by the U. P. Government under the U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947). Section 3 of that Act is as follows:

"3 'Power to prevent strikes, lock-outs, etc.'

If in the opinion of the Provincial Government, it is necessary or expedient so to do for securing the public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community, or for maintaining employment, it may, by general or special order, make provision—

(a) for prohibiting, subject to the provisions of the order, strikes or lock-outs generally, or a strike or lock-out in connection with any industrial dispute;

(b) for requiring employers, workmen or both to observe for such period, as may be specified in the order, such terms and conditions of employment as may be determined in accordance with the order;

(c) for appointing industrial courts;

(d) for referring any industrial dispute for conciliation or adjudication in the manner provided in the order;

(e) for requiring any public utility service, or any subsidiary undertaking not to close or remain closed and to work or continue to work on such conditions as may be specified in the order;

(f) for exercising control over any public utility service, or any subsidiary undertaking by authorising any person (hereinafter referred to as an authorised controller) to exercise, with respect to such service, undertaking or part thereof such functions of control as may be specified in the order; and, on the making of such order the service undertaking or part, as the case may be, shall so long, as the order continues, be carried on in accordance with any directions given by the authorised controller in accordance with the provisions of the order; and every person having any functions of management of such service, undertaking or part thereof shall comply with such directions;

(g) for any incidental or supplementary matters, which appear to the Provincial Government necessary or expedient for the purposes of the order;

Provided that no order made under clause (b)—

(I) shall require an employer to observe terms and conditions of employment less favourable to the workmen than those which were applicable to them at any time within three months preceding the date of the order;

(II) shall, if an industrial dispute is referred for adjudication under clause (d) be enforced after the decision of the adjudicating authority is announced by, or with the consent of, the Provincial Government."

We are concerned with cl. (b) which empowers the Provincial Government to make provisions for requiring employers, workmen or both to observe for such period as may be specified in the order such terms and conditions of employment as may be determined in accordance with the order, if, in the opinion of the Provincial Government, it is necessary or expedient so to do for securing the public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community, or for maintaining employment. The first proviso to cl. (b) lays down that no order shall require an employer to observe terms and conditions of employment less favourable to the workmen than those which were applicable to them at any time within three months preceding the date of the order.

The whole of this section is intended to empower the Government to pass general or special orders when the passing of such orders becomes necessary for securing the public safety or convenience or the maintenance of public order or supplies. It may be urged that if the workmen claim some-

thing for the past years, without which they are not prepared to continue to work in future, and the Government is of the opinion that it is expedient to pass the order for securing the public safety, convenience or the maintenance of public order or supplies and services essential to the life of the community, or for maintaining employment, there is no reason why the Government should have no right to pass an order with respect to a period which has already expired and that it should have authority only to control the relationship in the present and the future. The question, however, has to be decided on the language of the section rather than on such general considerations and the language of the section appears to me to indicate that the power given to the Government relates to the present and the future.

Where the dispute is as regards any past period, it is open to the Government to have the matter decided either by a Board of Conciliation or by Industrial Tribunals under the Central Act or under clauses (c) and (d) of S. 3 of the U. P. Act. The orders contemplated under S. 3(b) of the U. P. Industrial Disputes Act appear to me to relate to the terms and conditions of service in the present and in the future necessitated by fluctuating economic conditions. To my mind, the error lay in the State Government proceeding under S. 3(b) instead of referring the matter for decision under the appropriate sections of the Central or the State Act. I, therefore, agree with the order proposed by my brother, Bhargava.

SAPRU J.:

(4) The facts which have given rise to these petitions have been narrated fully by my brother V. Bhargava and no useful purpose will be served by going over the same ground. I wish to add a few remarks in regard to certain matters which were argued before us in order to make my own position clear.

(5) The first point on which I would like to say a few words is regarding the contention of Sri Pathak that S. 3, U. P. Industrial Disputes Act, 1947, (Act 28 of 1947), is invalid as it is couched in such wide and sweeping language as to vest the Executive Government with legislative powers which cannot be canalised within definable limits and can be used by it arbitrarily, unreasonably and capriciously. The question of delegated legislation has been the subject-matter of a detailed consideration by their Lordships of the Supreme Court in 'In re The Delhi Laws Act, 1912, etc.,: 'AIR 1951 SC 332 (A)'. The implications of that decision were considered by a Full Bench decision of this Court in — 'Bhushan Lal v. State', AIR 1952 All 866 (B) in connection with the question of the validity of section 3, 4 and 6 of the Essential Supplies (Temporary Powers) Act, 1946, (Act 24 of 1946). The implications of this Full Bench have been explained by my brother V. Bhargava in his judgment and I do not propose to expatiate on them at any length.

Suffice it to say that I am quite unable to accept Sri Pathak's contention that our Constitution, being a written one, must be assumed to have an American background and is based upon an acceptance of that theory of 'separation of powers' which determined the main lines on which the Constitution of the United States of America came to be drawn up. The broad fact which stands out is that the Executive provided by our Constitution is a removable Executive, i.e., an Executive of the Parliamentary type such as obtains in Britain. Article 75(3) of the Constitution specifically lays down that. "The Council of Ministers shall be Collectively responsible to the House of the people."

Article 75(5) provides that,

"A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister."

I have quoted these articles to show that the approach of our Founding Fathers of the Constitution was basically different from that of those responsible for the framing of the American Constitution. This has been well pointed out, if I may say so with very great respect, by Patanjali Sastri, J., afterwards C. J., in — 'AIR 1951 SC 332 at p. 364 (A)', and I beg leave to quote him;

"Thus, the English approach to the problem of delegation of legislative power is characterised by a refusal to regard legislation by a duly constituted legislature as exercise of a delegated power, and it emphatically repudiates the application of the maxim 'delegatus non potest delegare'. It recognises the sovereignty of legislative bodies within the limits of the constitutions by which they are created and concedes plenary powers of delegation to them within such limits. It regards delegation as a revocable entrustment of the power to legislate to an appointed agent whose act derives its validity and legal force from the delegating statute and not as a relinquishment by the delegating body of its own capacity to legislate.

On the other hand, the American courts have approached the problem along wholly different lines, which are no less the outcome of their own environment and tradition. The American political scene in the eighteenth century was dominated by the ideas of Montesque and Locke that concentration of legislative, executive and judicial powers in the hands of a single organ of the State spelt tyranny, and many constitutions had explicitly provided that each of the great departments of State, the legislature, the executive and the judiciary, shall not exercise the powers of the others.

Though the Federal Constitution contained no such explicit provision, it was construed, against the background of the separatist ideology, as embodying the principle of separation of powers, and a juristic basis for the consequent non-delegability of its power by one of the departments to the others was found in the old familiar maxim of the private law of agency 'delegatus non potest delegare' which soon established itself as a traditional dogma of American constitutional law. But the swift progress of the nation in the industrial and economic fields and the resulting complexities of administration forced the realisation on the American Judges of the unavoidable necessity for large-scale delegation of legislative powers to administrative bodies, & it was soon recognised that to deny this would be "to stop the wheels of government". The result has been that American decisions on this branch of the law consist largely of attempts to disguise delegation 'by veiling words' or 'by softening it by a 'quasi' (per Holmes J. in — 'Springer v. Government of the Phillipine Islands', (1928) 277 US 189 (C)".

(6-7) No doubt a law can be challenged on the ground of the incompetency of the particular legislature, whether federal or state, to enact it or on the ground of its inconsistency with the fundamental rights guaranteed by the Constitution. but provided the legislature concerned does not abdicate its power of legislation by wiping itself out and retains its control so as to be able to withdraw the legislative power conferred on the subordinate authority whenever it considers it proper to do so,

it is not for Courts to decide how much authority should be delegated or for how long such delegation should continue. (See the observations of Das J. in — 'AIR 1951 SC 332 at p. 422 (A)', referred to above). The powers given by S. 3 may be and are indeed of a most wide character, but that fact alone cannot affect its validity. The remedy against delegated legislation is not judicial but political control with which Courts have no concern. I am, therefore, clear in my mind that S. 3, U. P. Industrial Disputes Act, 1947, (Act 28 of 1947) was not beyond the competence of the legislature and cannot be declared 'ultra vires' on the ground that it delegates legislative or rule-making power of an unspecified character to the Executive Government.

(8) I am also unable to accept Sri Pathak's contention that the provisions of S. 3, U. P. Industrial Disputes Act, 1947, (Act 28 of 1947) are invalid on the ground that they offend the fundamental rights guaranteed under Art. 19(1) (f) and 31 of the Constitution. I do not see how Art. 31(1) comes in at all for all that Article lays down is that, "No person shall be deprived of his property save by authority of law." The order cannot be said to be depriving them of their property. What it does is in effect to increase the wage-bill of the factories concerned by requiring them to pay an extra bonus to their workmen and this it does by a law which would be covered by cl. (5) of Art. 19 of the Constitution. In particular, as regards Art. 19(5), I do not see how by issuing its notification dated 5-7-1950, directing payment of bonus by the sugar factories to their workmen and providing for payment by them of retaining allowances to workmen periodically employed, the State Government can be said to have interfered with the rights of the petitioners to acquire, hold or dispose of property.

The objective of S. 3 is to secure the public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community, or for maintaining employment. With that end in view, the Executive Government has been authorised in a period of fluctuating economic condition to pass various orders specified in cls. (a) to (g) of that section. It is clear that at the time the notification was issued, the Governor of Uttar Pradesh had come to the conclusion that it was necessary to pass such orders as were contained in that notification for the purposes enumerated in S. 3. It was for the State Government on the basis of the material which it had before it to form its opinion. The Governor had before him, before issuing the notification, the report of the Court of Inquiry published under S. 17, Industrial Disputes Act, its recommendations and the general situation in which it was appointed. The contention that by directing payment of a bonus to the workers for the years in controversy the order deprives the factory owners of their property rights has no force as it cannot be said to constitute an infringement of the rights guaranteed by Art. 31(1) or (2) of the Constitution. For not only Art. 31(1) but also Art. 31(5) would protect the order.

The paramount object of the order appears to have been to ensure the maintenance of supplies and services essential to the life of the community and the maintenance of employment. Both the orders relating to the payment of the retainer allowances and the bonus for the years 1947-48 and 1948-49 are intended to regulate the terms and conditions of employment and I fail to see how such an order could not be passed under S. 3(b), U. P. Industrial Disputes Act. There is thus nothing which would justify us in holding that, in acting as it did, the State Government either acted capriciously or without bringing to bear upon its task an intelligent mind. I agree with the view of my brother V. Bhargava that the granting of bonus is not an act of charity but is to be regarded in some measure as a right of the workers to share in the profits of the company.

(9) The question that has now in this background to be considered and on which I have the misfortune to entertain some doubts in regard to what my brother V. Bhargava has said is as to whether the portion of the order contained in the notification dated 5-7-1950, relating to the payment of bonus for past years, viz., 1947-48 and 1948-49, can be held to be within the scope of the Industrial Disputes Act. Sri Pathak's contention is that it is the employees who worked during those years who could, if at all, claim that payment and that therefore it could not form part of the terms and conditions of service 'to be observed' during the period specified in the order. Stress has been laid by him on the words 'to be observed' as having reference only to the future.

In my opinion, no question of the prospectivity or retrospectivity of the section arises and I do not, therefore, propose to go into the law relating to the retrospectivity of Statutes, as it has undoubtedly been correctly stated by my brother V. Bhargava. As I see it, the position is quite simple. A dispute had arisen between the employers and the employees as regards the bonus to which the latter were entitled and the payment of which they appear to have regarded as a preliminary and essential condition for the continuance of work by them in future. That issue was referred to a Court of Inquiry and, after taking its recommendations into consideration, the State Government came to the conclusion that for the purpose of maintaining employment it was essential, in the interest of industrial peace, that the bonus claimed for the years 1947-48 & 1948-49 should be paid to the workers claiming them. Thus it was a term which the order required the employers to observe within the meaning of S. 3(b).

It may have had the effect of increasing, as all bonuses do, the wage bill of the employers, but with that we are not concerned. Whether the personnel forming the employees of the factories in July 1950 was the same as that in 1947-48 and 1948-49 appears again to be immaterial as the employees were bargaining in their collective capacity. The employees might well have taken in the industrial dispute the line that the payment of bonus in respect of the years 1947-48 and 1948-49 to the workmen employed in those years was regarded by those who were employed in future as a preliminary and essential condition for not only the settlement of the industrial dispute in progress but also for carrying on their future work in sugar factories. By coming to the conclusion that the demand should be conceded, the State Government was not passing an order which would have retrospective effect but was passing an order which was to ensure that the workmen thereafter to be employed in 1950 will work in a contented manner in the factories in question.

With the question whether the State Government had the material before it to enable it to come to the conclusion that the terms and conditions relating to the payment of the past bonus for future work was just and reasonable we are not concerned at all. The point is that it was a term or condition which the workers regarded as an essential preliminary for the industrial peace upon which employment depended and the State Government thought that there was reason behind

their demand. I am not free from doubt as to the correctness of the view that the order as regards the payment of past bonus was invalid. I am, however, not prepared to dissent from the order proposed.

V. BHARGAVA J.

(10) This petition for issue of a writ under Art. 226 of the Constitution has been moved by the Basti Sugar Mills Company, Ltd., through its Manager and General Attorney Shri Deshraj Narang, Basti, challenging certain orders made by the Government of Uttar Pradesh. Misc. Writ Cases Nos. 282, 284, 285, 308, 309 and 314 of 1950 and No. 14 of 1951 also challenge exactly the same orders of the Government of Uttar Pradesh which have been challenged in Misc. Writ Case No. 280 of 1950 though the petitioner in each of these cases is different from the petitioner in Misc. Writ Case No. 280 of 1950. Since, however, the points raised in all these cases are identical and they are based on identical facts, all these cases were heard together and this judgment will apply to all of them.

(11) Some time before December, 1949, the employees of various sugar factories, who have moved these writ petitions, started making various demands and, on 16-12-1949, a notice was served on their behalf on the various sugar factories in U. P. by the Indian National Sugar Mills Workers' federation, Lucknow. The demands were six in number but it is not necessary to enumerate all of them as the petitioners in those cases seek redress in respect of only two demands. One demand related to the payment of bonus for the year 1948-49 and to restoration of a deduction which had been made in the previous year's bonus. The second relevant demand related to payment of retaining allowance to employees of the sugar factories whose services were periodically dispensed with during the off season and who were only employed by the Sugar factories during the crushing season while the sugar was being manufactured. The notice of demand threatened a strike with effect from 16-1-1950, if the demands were not met by the sugar factories. This brought about an industrial dispute between the employers and the employees of the sugar factories and the Uttar Pradesh Government, in exercise of the powers conferred by Ss. 6 & 10, Industrial Disputes Act (Act 14 of 1947), issued the Labour Department Notification No. 167 (ST)/XVIII, dated January 11, 1950, appointing a Court of Enquiry and referring the dispute to it.

Under the notification, the Court of Enquiry was to consist of the Hon'ble Mr. Justice Bind Basni Prasad, Judge High Court of Judicature at Allahabad, as chairman and Sarvashri Hari Har Nath Shastri, General Secretary, Indian National Trade Union Congress and D. R. Narang, chairman, Indian Sugar Syndicate, Limited, as its members. The Court of Enquiry was directed to enquire into various matters including

(1) the bonus payable by sugar factories in Uttar Pradesh to their workmen for the crushing season 1948-49 and whether or not, from the amount so payable, any amount was liable to be deducted because of excess payment of bonus if any paid during 1947-48 and

(2) the retaining allowances for the off season to be paid, if any.

It was further directed by that notification that the Court of Enquiry was to enquire into the matters referred to it immediately and, as provided in S. 14, Industrial Disputes Act (Act No. 14 of 1947), submit its report not later than two months from the commencement of the enquiry. As a consequence of the appointment of the Court of Enquiry and the reference of the Industrial dispute to it, a further direction was made, prohibiting the workmen employed in any of the vacuum pan sugar factories from going or remaining on strike and prohibiting the factories from enforcing a lockout or continuing to lockout any of its workmen during the period of those two months. A direction was also made, prohibiting the sugar factories from discharging, dismissing or otherwise removing from service their workmen. This notification was amended by Notification No. 192 (ST)/XVIII, dated 12-1-1950, so as to substitute, for the first point referred to the Court of Enquiry, the following point:

> "The bonus payable by the sugar factories in the United Provinces to their workmen for the crushing season 1948-49 and readjustments necessary, if any, in the amount of bonus paid in respect of 1947-48."

A further notification No. 217. (ST)/XVIII, dated 13-1-1950 was issued changing the constitution of the Court of Enquiry and laying down that the Court of Enquiry was to consist of the Hon'ble Mr. Justice Bind Basni Prasad, Judge, High Court of Judicature at Allahabad, only. There was a further amendment by a notification, dated 5-4-1950 which however, need not be mentioned in detail. Mr. Justice Bind Basni Prasad started the enquiry in pursuance of those notifications and submitted his report to the Government of Uttar Pradesh on 15-4-1950.

On receipt of this report, the Government of Uttar Pradesh, under S. 17, Industrial Disputes Act (Act No. 14 of 1947), published the report in the U. P. Gazette on 8-5-1950. Thereafter, on 5-7-1950, the U. P. Government, in exercise of its powers under S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947), issued Notification No. 1425 (ST) (II)/XVIII-13 (ST)-50, and by this notification, directed the various sugar factories to make payments of bonus for the year 1948-49 as well as payment of certain amounts as bonus for the year 1947-48. The notification further directed that the skilled seasonal workmen and the clerical staff were to be allowed retaining allowance with effect from the off season in 1950 at the rate of 50 per cent. of their consolidated wages, and paragraph 3 of the Government Notification No. 750(ST)/XVIII, dated 29-1-1948, was ordered to be deemed to have been amended so as also to include certain classes of skilled workmen.

Payment of bonus to the workmen in accordance with the provisions of that notification was directed to be effected by the vacuum pan sugar factories within a period of six weeks from the date of that order. The Indian Sugar Mills Association, as Association of the Sugar Factories in India and registered under the Trade Union Act, moved a petition for issue of a writ under Art. 226 of the Constitution (numbered as Miscellaneous Case No. 221 of 1950) on 11-8-1950, claiming to represent all the sugar factories which have moved the present petitions and challenging the validity of the orders passed by the Government of Uttar Pradesh in its Notification No. 1425 (ST) (II)/XVIII-13 (ST)-50, dated 5-7-1950.

That writ petition was dismissed on 14-9-1950, by this Court, holding that the petitioner Association had no such legal interest in the matters affected by the orders of the Government as would entitle it to apply for issue of a writ, order or direction that it claimed. Thereupon these writ petitions were moved by the individual sugar factories which were affected by that notification of 5-7-1950, again challenging its validity. The

grounds taken for challenging the orders of the Government, contained in the notification, dated 5-7-1950, were as below:

(1) That the order No. 167(ST)/XVIII, dated 11-1-1950, and its amendments, dated January 12 and 13 and April 5, 1950, were 'ultra vires' the U. P. Government inasmuch as an industrial dispute could not be referred to a court of Enquiry, nor could a Court of Enquiry be constituted for that purpose.

(2) That, under the provisions of the Industrial Disputes Act (Act No. 14 of 1947) or the U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947), the Government of Uttar Pradesh had no jurisdiction to make the report of the Court of Enquiry binding on sugar factories.

(3) That, in any event, the order that the Government could pass under S. 3(b), U. P. Industrial Disputes Act could only be prospective, whereas giving effect to the report of the Court of Enquiry and making it binding was retrospective and 'ultra vires' the U. P. Government.

(4) That, in any event, S. 3, U. P. Industrial Disputes Act was 'ultra vires' inasmuch as the power to decide an industrial dispute could not be conferred on the Executive.

(5) That it was not open to the legislature to delegate its own functions to the Executive

(6) That, in any event, the delegation was without any limitation and, therefore, bad in law.

(7) That the exercise of the power by the State had been arbitrary, unreasonable and unconstitutional.

(8) That the powers conferred on the State Government by S. 3(b), U. P. Industrial Disputes Act were capable of being applied unreasonably, arbitrarily and capriciously and to cases to which constitutionally they could not be applied.

(9) That, under the Constitution, it was not possible for the State to allow bonus and retainer's salary.

(10) That the petitioner could not be deprived of its property which was in the nature of profits, Reserve Fund and Dividend Equalisation Fund.

(11) That section 3 of the U. P. Industrial Disputes Act offended against the equality clause inasmuch as it made it possible for the Government to arbitrarily settle an industrial dispute by an executive order will another dispute of the same nature might be referred at the sweet will of the Government to the Industrial Tribunal which passes a judicial decision with a right of appeal to the Appellate Industrial Tribunal.

(12) That section 3 of the U. P. Industrial Disputes Act offends against the Constitutional Fundamental rights.

(13) That the provisions of the U. P. Industrial Disputes Act offend against Art. 19(1)(f) of the Constitution.

(14) That S. 3, U. P. Industrial Disputes Act is repugnant to the Industrial Disputes Act, 1947 and is, therefore, void.

(12) The prayer in the writ petitions is that this Court may be pleased to quash the Government Notification No. 1425(ST)/XVIII-13(ST)-50, dated 5-7-1950, and to issue a writ, order or direction in the nature of 'mandamus', or such other writ or order as the Court may consider proper,

(i) directing opposite party No. 1, the State of Uttar Pradesh, to withdraw the notification aforesaid.

(ii) directing opposite-party No. 1 to act according to the provisions of S. 10 of the Industrial Disputes Act, and

(iii) restraining opposite-parties, the State of Uttar Pradesh, the Secretary, Labour Department, Lucknow, the Labour Commissioner, Kanpur Basti Sugar Mills Mazdoor Union, Walterganj, Sugar Mills Mazdoor Union and the Indian National Sugar Mills Workers' Federation, Lucknow, from enforcing the aforesaid notification.

There was a further prayer for the issue of an interim stay order, staying the operation of the aforesaid notification till the decision of these petitions. The interim stay order was passed by this Court on 19-9-1950, directing that the operation of the notification aforesaid would remain stayed till the decision of the writ petitions. Consequently the orders of the Government of Uttar Pradesh in the notification of 5-7-1950, which are challenged by these writ petitions, have not yet been given effect to. The sugar factories have not yet paid bonus for the years 1947-48 and 1948-49 or the retaining allowance in accordance with those orders.

(13) The first two points raised by the petitioners can conveniently be dealt with together. In the grounds taken by the petitioners, the appointment of the Court of Enquiry, the validity of its report and the passing of orders by the Government of Uttar Pradesh on the basis of that report have been challenged, principally, on the ground that, under the Industrial Disputes Act (Act No. 14 of 1947), an industrial dispute itself could not be referred to a Court of Enquiry but only to Board of Conciliation or to an Industrial Tribunal, so that the reference to the Court of Enquiry was itself incompetent. The further ground taken is that no order could be passed by the State Government, making the recommendations of the Court of Enquiry binding on the parties to the dispute. Section 5 of the Act empowers the appropriate Govt. to constitute a Board of Conciliation for promoting the settlement of an industrial dispute. Section 6, similarly, empowers the constitution of a Court of Enquiry for enquiring into any matter appearing to be connected with or relevant to an industrial dispute. Section 7 empowers the appropriate Government to constitute one or more Industrial Tribunal for the adjudication of industrial disputes in accordance with the provisions of the Act. Section 10 lays down that:

> "If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing,
>
> (a) refer the dispute to a Board for promoting a settlement thereof; or
>
> (b) refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry; or
>
> (c) refer the dispute to a Tribunal or adjudication."

Under S. 13 of the Act, the duty of a Conciliation Board is laid down to be to endeavour to bring about a settlement of an industrial dispute and if a settlement of the dispute or of any of the matters in dispute is arrived at in the course of the conciliation proceedings, the Board is required to send a report thereof to the appropriate Government together with a memorandum of settlement signed by the parties to the dispute. Section 14 deals with a Court of Enquiry and lays down that

> "a Court shall inquire into the matters referred to it and report thereon to the appropriate Government ordinarily within a period of six months from the commencement of its inquiry."

Under S. 15, where an industrial dispute has been referred to a Tribunal for adjudication, the Tribunal has to hold its proceedings expeditiously

and, on the conclusion thereof, to submit its award to the appropriate Government. The report of a Board or Court and the award of a Tribunal together with any minutes of dissent recorded therewith are required to be published by the appropriate Government within a period of one month from the date of its receipt under S. 17 of the Act. Section 18 of the Act lays down that a settlement arrived at by a Board or an award of an Industrial Tribunal, which is declared by the appropriate Government to be binding under sub-sec. (2) of S. 15, shall be binding on all parties to the industrial dispute and certain other parties mentioned in that section. There is no provision in the Industrial Disputes Act, 1947, laying down that, on its publication, a report of a Court of Enquiry can be made binding on the parties to the dispute.

These provisions of the Industrial Disputes Act, 1947, support the contention of the petitioners that the reference of the industrial dispute itself to the Court of Enquiry by the Government of Uttar Pradesh by its notification, dated 11-1-1950 as subsequently amended, was not in accordance with law. The function of a Court of Enquiry under the Industrial Disputes Act (Act No. 14 of 1947) is merely to report on any matter appearing to be connected with or relevant to the industrial dispute after holding an enquiry. For the actual settlement of a dispute, reference has to be made either to a Board of Conciliation for promoting a settlement or to an Industrial Tribunal for adjudication.

It may, however, be noticed that, in the notification of 11-1-1950, when constituting a Court of Enquiry, the Government only directed the Court of Enquiry to enquire into the matters mentioned in that notification; the Court of Enquiry was not directed to promote a settlement or to give an award on the dispute. The report of the Court of Enquiry was thereafter submitted to the Government of Uttar Pradesh and it has again to be noticed that, by Notification No. 1425 (ST) (ii)/XVIII-13(ST)-50, dated 5-7-1950, which is challenged by these writ petitions, the State Government did not purport to enforce the recommendations of the Court of Enquiry under any provision of the Industrial Disputes Act (Act No. 14 of 1947). In that notification, the State Government did not act under the Industrial Disputes Act, 1947, at all but proceeded to exercise the powers conferred on it by S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947). Section 3 of the U. P. Industrial Disputes Act (U. P. Act 28 of 1947) is to the following effect:

"3. If, in the opinion of the State Government, it is necessary or expedient so to do for securing the public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community or for maintaining employment, it may, by general or special order, make provision

(a) for prohibiting, subject to the provisions of the order, strikes or lock-outs generally, or a strike or lock-out in connection with any industrial dispute;

(b) for requiring employers, workmen or both to observe for such period, as may be specified in the order, such terms and conditions of employment as may be determined in accordance with the order;

(c) for appointing industrial courts;

(cc) for appointing committees representative both of the employer and workmen for securing amity and good relations between the employer and workmen and for settling industrial disputes by conciliation; for consultation and advice on matters relating to production, organization, welfare and efficiency.

(d) for referring any industrial disputes for conciliation or adjudication in the manner provided in the order;

(e) for requiring any public utility service, or any subsidiary undertaking not to close or remain closed and to work or continue to work on such conditions as may be specified in the order;

(f) for exercising control over any public utility service, or any subsidiary undertaking by authorising any person (hereinafter referred to as an authorised controller) to exercise, with respect to such service, undertaking or part thereof such functions of control as may be specified in the order; and, on the making of such order the service, undertaking or part, as the case may be, shall so long as the order continues, be carried on in accordance with any directions given by the authorised controller in accordance with the provisions of the order; and every person having any functions of management of such service, undertaking or part thereof shall comply with such directions;

(g) for any incidental or supplementary matters, which appear to the State Government necessary or expedient for the purposes of the order:

Provided that no order made under clause (b)—

(i) shall require an employer to observe terms and conditions of employment less favourable to the workmen than those which were applicable to them at any time within three months preceding the date of the order;

(ii) shall, if an industrial dispute is referred for adjudication under cl. (d), be enforced after the decision of the adjudicating authority is announced by, or with the consent of, the State Government."

The State Government, in order to proceed under this provision of the U. P. Industrial Disputes Act, 1947, has to form an opinion that it is necessary or expedient to make an order under that section for securing the public safety or convenience or the maintenance of the public order or supplies and services essential to the life of the community, or for maintaining employment. If the State Government comes to that opinion, it is thereafter empowered to pass general or special orders, making provisions for the matters mentioned in clauses (a) to (g) of that section. Notification No. 1425(ST)(ii)/XVIII-50, dated 5-7-1950, shows that, when this notification was issued, the Governor of Uttar Pradesh was of the opinion that it was necessary to pass orders contained in that notification for securing the public safety or convenience and the maintenance of the public order and supplies and services essential to the life of the community and for maintaining employment. The notification was, consequently, issued after the Government had formed the opinion which it was necessary for it to form as a preliminary for the exercise of its powers under S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947).

The provisions of S. 3 and the remaining provisions of the U. P. Industrial Disputes Act, 1947, nowhere prescribed the materials on which this opinion of the State Government is to be formed, nor do they prescribe any procedure for arriving at that opinion. Clearly, therefore, the State Government is entitled to form its opinion on any or all material and information available to it. In this case, it appears from the notification, dated 5-7-1950, that the report of the Court of Enquiry,

published under S. 17, Industrial Disputes Act, 1947, was considered by the State Government, the recommendations made in it were taken into account, the situation, in which the Court of Enquiry had been appointed and had made its report, was before the Government and it was on these materials that the State Government came to the opinion that it was necessary to pass the orders mentioned in that notification for the purpose of securing the public safety or convenience, and the maintenance of public order, and supplies and services essential to the life of the community, and for maintaining employment.

It cannot, therefore, be said that the State Government acted capriciously or without exercising its mind. Since S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) merely requires the opinion of the State Government as a preliminary to the exercise of powers under that section, this Court is not competent to see whether the opinion arrived at by the State Government is or is not correct. There being no bar in any law to taking into account the report of a Court of Enquiry appointed under the Industrial Disputes Act, 1947, an order passed under S. 3, U. P. Industrial Disputes Act, 1947, on the basis of such report, cannot be challenged on the ground that the reference to the Court of Enquiry of the industrial dispute itself was not valid and was not in accordance with the provisions of the Industrial Disputes Act, 1947.

It appears, therefore, that, in these cases, the validity of the report of the Court of Enquiry and the competence of the Government to refer the industrial dispute to it for enquiry are matters not relevant to the validity of the order passed by the State Government under S. 3 of the U. P. Industrial Disputes Act, 1947. The orders, contained in the notification of 5-7-1950, cannot, therefore, be challenged on these grounds.

(14) The fourteenth ground that S. 3, U. P. Industrial Disputes Act, 1947, is repugnant to the Industrial Disputes Act, 1947, and is, therefore, void was not seriously pressed before us by Shri Pathak, learned counsel for the petitioners. The U. P. Industrial Disputes Act (U. P. Act 28 of 1947) was reserved by the Governor of Uttar Pradesh for the assent of the Governor General whose assent was obtained on 21-12-1947, and thereafter the Act was published in the U. P. Government Gazette, dated 10-1-1948. Since this Act of the State Legislature had received the assent of the Governor General, if there be any repugnancy between its provisions and the provisions of the Central enactment contained in the Industrial Disputes Act (Act No. 14 of 1947), the U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) would prevail in Uttar Pradesh over the repugnant provisions of the Industrial Disputes Act (Act No. 14 of 1947).

It may also be mentioned that learned counsel for the petitioners was not able to point out whether the repugnancy between the two enactments existed. On these grounds, it must be held that the U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) is valid and binding in the State of Uttar Pradesh.

(15) Shri Pathak, learned counsel for the petitioners, challenging the validity of S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947), principally contended that this section contained delegation of such legislative powers by the Legislature to the Executive as was unconstitutional and 'ultra vires' the Legislature. In support of this argument, learned counsel relied, mainly, on certain decisions of the Supreme Court of America and, for this purpose, read out before us portions from the American Administrative Law by Schwartz, the American Constitutional Decisions by Fairman and Introduction to Administrative Law by Hart. He also read out before us certain cases decided by the Supreme Court of America and some decisions of their Lordships of the Privy Council.

It does not appear to be necessary for us to deal with these arguments in detail in view of a recent decision of our own Supreme Court which was interpreted and followed by another Full Bench of this Court. Shri Pathak's main contentions were that the U. P. Legislature, which enacted the U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947), could not delegate its legislative powers to the Executive as it had purported to do under S. 3 of the Act, that the delegation of the legislative powers was without any limitation and was not canalized within specified limits and that the powers conferred by S. 3, of the Act were capable of being applied by the Executive Government unreasonably, arbitrarily and capriciously.

The question how far the Indian Legislatures are competent to delegate their legislative powers to the Executive Government was considered by the Supreme Court of India — 'AIR 1951 SC 332 (A)'. In the light of this decision of their Lordships of the Supreme Court, a Full Bench of this Court, in — 'AIR 1952 All 866 (B)', had occasion to consider the validity of Ss. 3, 4 and 6 of the Essential Supplies (Temporary Powers) Act (Act No. 24 of 1946). The observations of the seven learned Judges of the Supreme Court in — 'AIR 1951 SC 332 (A)', were summarised and considered by the Full Bench which also discussed the various American cases which have been relied upon by Shri Pathak before us.

After considering all the relevant case law, the Full Bench held that it would appear that the majority of the learned Judges of the Supreme Court had held that a Legislature cannot act beyond the limits laid down in the instruments which gave it birth and that it cannot create another independent or parallel legislative power. In order to perform its functions effectively, the Legislature must, however, be able to delegate to another body or person the discretion to bring into effect an Act of the Legislature complete in itself but conditional upon the exercise of that discretion and to delegate to the subordinate bodies the power to make rules and regulations for the purpose of filling in matters of detail so as to make the legislative enactment effective. A third restriction concerning the power of delegation was held to be that the Legislature cannot abdicate its functions. Further abdication did not consist merely in creating an independent or parallel Legislature but there would be abdication, for instance, if the Legislature were to arm the delegate with the power to repeal existing laws. What precisely would amount to abdication had not been conclusively laid down by the majority of the learned Judges of the Supreme Court.

On this view, it was held that S. 3, Essential Supplies (Temporary Powers) Act, 1946, was 'intra vires' the Indian Legislature. Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, is very similar to S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947). Under sub-sec. (1) of S. 3 of the Essential Supplies (Temporary Powers) Act, the Central Government is empowered, in so far as it appears to it necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution & availability at fair prices, to provide, by

notified order, for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein. Sub-section (2) of that section enumerates what kind of provisions can be made by the Central Government under sub-sec. (1) but the list given in this sub-section is not exhaustive so that the sub-section lays down that this enumeration is without prejudice to the generality of the powers conferred by sub-section (1).

Section 3 of the U. P. Industrial Disputes Act, 1947, does not confer any general power to pass orders but, specifically, limits that power to making provision for specified purposes which are enumerated in clauses (a) to (g) of that section. The power granted to the Executive Government by S. 3 of the U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) is thus very similar to the power conferred on the Central Government by S. 3 of the Essential Supplies (Temporary Powers) Act, 1946. If at all, the delegation of the power in S. 3, U. P. Industrial Disputes Act, 1947, is narrower and more precisely defined than the delegation of legislative power to the Central Government by S. 3, Essential Supplies (Temporary Powers) Act (Act No. 24 of 1946). Section 3 of the Essential Supplies (Temporary Powers) Act, 1946 having been held to be valid, S. 3, U. P. Industrial Disputes Act, 1947 must also be held to be valid.

The view taken by the Full Bench of the Court in — 'AIR 1952 All 866 (B)', has binding effect in the present case and we may further say with respect that we see no reason to differ from the view taken in that case. I, consequently, hold that S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) is valid and is not 'ultra vires' the Legislature on the ground of unauthorised delegation of legislative power.

(16) Shri Pathak's next submission was that the provisions of S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) offend against the fundamental rights guaranteed in Art. 19(1)(f) and 31 of the Constitution. I have not been impressed by this argument at all. Article 19 of the Constitution is a provision designed to safeguard certain freedoms which, according to the Constitution makers, ought to be guaranteed to all individuals as human beings. With reference to property, this Article guarantees to all citizens the right to acquire, hold and dispose of property subject to any law imposing reasonable restrictions either in the interest of general public or for the protection of any scheduled tribe. Section 3 of the U. P. Industrial Disputes Act, 1947, does not purport to interfere, in any manner, with the right of a citizen to acquire, hold or dispose of property. It only deals with orders that might be made in relation to strikes, lock-outs, terms and conditions of employment, appointment of Industrial Courts, settlement of industrial disputes, and closure, non-closure and exercise of control over any public utility service or any subsidiary undertaking and similar matters. It cannot, therefore, be said that this section empowers the Executive Government to interfere with the right of a citizen to acquire, hold or dispose of property.

Shri Pathak urged that the order passed by the State Government in its notification, dated 5-7-1950, directs payment of bonus by the sugar factories to their workmen and provides for payment by them of retaining allowance to workmen periodically employed and such an order is an interference with the right of the petitioners to acquire, hold or dispose of property. We are unable to accept this contention. An order for payment of bonus or retainer allowance in connection with the regulation of employment in a factory can, in no way, be said to interfere with the right of the proprietors of the factory to acquire, hold or dispose of property. Shri Pathak in the alternative urged that the order had the effect of depriving the petitioners of their property as it directed payment of money belonging to the petitioners to their employees and thus deprived them of that money.

Article 31, however, permits deprivation of property of a person by authority of law and, as we have held above, the law, under which the order purports to have been made by the State Government, is a valid law, so that, if the orders fall within the purview of S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947), they cannot be challenged on the ground that they infringe the fundamental right guaranteed by Art. 31 of the Constitution. No question arises of applying cl. (2) of Art. 31 of the Constitution as no property is being taken possession of or acquired for public purposes. It may further be noticed that, even if cl. (2) of Art. 31 has been applicable, the U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) would not be affected by cl. (2) of Art. 31, as provided in sub-cl. (a) of cl. (5) of Art. 31 of the Constitution.

(17) I, consequently, proceed to consider the next argument of Shri Pathak that the orders of the Government of Uttar Pradesh, contained in the notification of 5-7-1950, are not valid on the ground that they are not within the scope of the power granted to the State Government by S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947). The notification itself mentions that the orders were passed in exercise of the powers conferred on the State Government by cl. (b) of S. 3, U. P. Industrial Disputes Act, 1947. Clause (b) permits provision to be made by a general or special order for requiring employers, workmen or both to observe, for such period as may be specified in the order, such terms and conditions of employment as may be determined in accordance with the order.

The first contention on behalf of the petitioners was that an order, requiring payment of bonus, was not an order regulating terms and conditions of employment and, consequently, no such order could be passed under cl. (b) of S. 3 of the Act. It does not appear to be necessary to enter into the history of the relations between the industrialists and their workmen in order to determine the nature of "bonus". There can be no doubt, however, that, in modern times, bonus is clearly regarded as deferred wages payable to employees which may be claimed by them as of right under the terms of employment. In the conditions, under which modern industries function, bonus has now come to be recognised as a right of employees which they can claim from their employers under certain circumstances.

(18) In — 'Baktavatsalu Nayudu v. Chrome Leather Co., Ltd.', AIR 1951 Mad 856 (D), a Division Bench of the Madras High Court held:

> "The granting of bonuses, gratuities, pensions, and the like to employees is not out of charity. They are given in order to make labour more contented and form part of the remuneration of the workers for their services. Bonuses, for example, may, in one sense, be regarded as a recognition of the right of the workers to share in some measure in the profits of the company and encourages workmen to work harder, in the knowledge that by doing so they will secure more gain to themselves."

In — 'Sree Meenakshi Mills, Ltd., Madura v. State of Madras', AIR 1951 Mad 974 (E), another

Division Bench of the Madras High Court remarked:

"As pointed out in several decisions of this Court, bonus is not in the nature of an 'ex gratia' payment and it must be treated as comprised in the terms of employment."

In — 'Indian Hume Pipe Co., Ltd. v. E. M. Nanavaty', AIR 1947 Bom 42 (F), a Division Bench of the Bombay High Court had to consider the question whether a dispute relating to payment of bonus was an industrial dispute within the meaning of the Trade Disputes Act (Act No. 7 of 1929). Stone, C. J., dealing with this question, held:

"But even accepting that the primary meaning of the word 'bonus' is 'gift' or 'gratuity', it is not asked in this case as a matter of patronage or bounty. It is demanded, and strike action is threatened if such demand is not complied with. So that as soon as the demand is declined, all the elements of a trade dispute arise. I respectfully agree with the conclusion arrived at by the learned Judge in the Court below that the dispute between the appellant company and their workmen relating to their demand for payment of bonus for the year 1944 is a trade dispute within the meaning of the Trade Disputes Act....."

Kania, J., in the same case, held:

"In my opinion, it is clearly a dispute between the parties as regards the terms of employment and is covered by section 3 of the Trade Disputes Act."

He went on to say:

"It will, of course, be a matter for the decision of the adjudicator as to whether the claim is in respect of an 'ex gratia' payment or is a term of employment of the workmen."

The views, expressed in these cases, are clearly in line with my view expressed above that bonus can be a term or condition of employment and, consequently, an order can be made under cl. (b) of S. 3 of the U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) relating to payment of bonus. As regards the order relating to payment of retainer allowance, there can be no doubt at all that such an order is specifically made for the purpose of regulating the terms and conditions of employment and Shri Pathak also did not attempt to argue that such an order could not be passed under S. 3(b) of the U. P. Industrial Disputes Act.

(19) I have finally to consider the submission of Shri Pathak that, in any case, the order contained in the notification of 5-7-1950, relating to payment of bonus for the years 1947-48 and 1948-49 cannot be held to be within the scope of Cl. (b) of S. 3 of the U. P. Industrial Disputes Act as that order requires payment of bonus in respect of past years which, if at all, could be claimed by the employees who worked during those years and cannot, therefore, form part of the terms or conditions of service to be observed during the period specified in the order. In short, Shri Pathak's contention is that an order, under Cl. (b) of S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947), can only be a prospective order by which directions may be given to employers, workmen or both to observe the specified terms and conditions of employment in future during the future period that may be specified in the order. This provision of law would not justify any order with regard to terms & conditions of employment in respect of a period which has already elapsed.

(20) Considering the language used in Cl. (b) of S. 3 of the Act, the contention of Shri Pathak must, in our opinion, be accepted.

(21) Maxwell, in his book on the Interpretation of Statutes on the basis of the decided cases in England, says that

"the statutes are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only..... ....

A statute is not to be construed to have a greater retrospective operation than its language renders necessary.... ....

It is chiefly where the enactment would prejudicially affect vested rights, or the legality of past transactions, or impair contracts, that the rule in question prevails..... .... Where vested rights are affected 'prima facie' it is not a question of procedure.... ...."

Crawford, in his book on the Construction of Statute, has summarised the view of the American Courts on this question in the following words:

"Retroactive legislation is looked upon with disfavour, as a general rule, and properly so because of its tendency to be unjust and oppressive. That disfavour is so great that some of our state constitutions contain provisions which expressly prohibit the enactment of retrospective legislation. Nevertheless, even in the absence of constitutional provisions of this character, statutes, with but few exceptions, should, if possible, be construed so that they will have only prospective operation. Indeed, there is a presumption that the legislature intended its enactment to have this effect — to be effective only 'in futuro'.... Consequently, in the absence of any indication in the statute that the legislature intended for it to operate retroactively, it must not be given retrospective effect. If perchance any reasonable doubt exists, it should be resolved in favour of prospective operation..... ...."

He further goes on to say that

"The rule that statutes should not be given a construction which will give them retroactive effect, is, as already indicated, especially applicable to statutes where such a construction will either destroy or impair vested rights."

When dealing with the statutes creating any penalties and liabilities, Crawford has summarised the American view in these words:

"In accord with the general principles already discussed, statutes which create new liabilities in connection with past transactions should be given a retroactive operation. This rule has been applied to enactments imposing penalties on delinquent tax-payers, statutes creating new principles concerning the liability of employers, and those giving an action for wrongful death..... ...."

Particular reference may be made to the case reported in — 'Georgianna Cote, Admrx., etc., of Zephirin Cote, Deceased v. Bachelder-Wor-cester

Co.', 82 American L. R. (Annotated), 1239 (G), wherein it was held:

"It follows that the plaintiff's rights are limited by the provisions of the law in force at the time of the accident. In order to bring the present case within the provisions of chapter 131 of the Laws of 1931, it would be necessary to give retroactive effect to that statute. This result, if constitutionally permissible, would involve a violation of the principles which were stated and examined at length in — 'Murphy v. Railroad', 77 N. H. 573, 944, 967 (H)."

In the annotation on this case at page 1244, reference is made to some other decisions of American Courts and the general principle deduced has been enunciated in the following words:

"The right of the employee to compensation arises from the contractual relation between him and his employer existing at that time, and the statute then in force forms a part of the contract of employment and determines the substantive rights and obligations of the parties. No subsequent amendment in relation to the compensation recoverable can operate retrospectively to affect in any way the rights and obligations prior thereto fixed."

Examined in the light of these principles, it is clear that Cl. (b) of S. 3, U. P. Industrial Disputes Act cannot be given any retrospective effect. There are no words at all in this section which may indicate that the legislature expressly intended that this provision of law should operate retrospectively so as to govern terms and conditions of employment agreed to between the employers & employees and already acted upon before orders are passed by the State Government in exercise of the powers conferred by Cl. (b) of S. 3 of the Act. There are, in fact, no words at all in this provision to indicate that the legislature could even have impliedly intended to lay down that orders passed under Cl. (b) of S. 3 might be given retrospective effect so as to alter terms and conditions of employment agreed upon and carried out prior to the passing of the orders. In our view, the language of this provisions is such as to give a clear impression of the intention of the legislature that orders under it must be purely prospective so as to govern future terms and conditions of service.

The section lays down that the State Government may, by general or special order, make provision for requiring employers, workmen or both to observe for such period, as may be specified in the order, such terms and conditions of employment as may be determined in accordance with the order. The use of the words, 'requiring to observe for such period', is a clear indication that the order should lay down the course of conduct to be followed by the employers, workmen or both in future during the period which is to be specified in the order. There cannot be any question of making an order, requiring employers or workmen to observe, for the specified period, terms and conditions of employment which relate to the past employment before the passing of the order.

Obviously there can be no question of requiring any one to observe, in a future period, terms and conditions of employment which have already remained effective and have already been carried out by those persons. It also appears that, so far as past disputes with regard to terms and conditions of employment are concerned, the power, that was granted to the State Government to regulate them, is laid down in clauses (c) and (d) of S. 3 of the Act whereby an industrial dispute relating to such past terms and conditions of service can be referred for conciliation or adjudication and, for such purposes, the State Government can appoint Industrial Courts. In this connection, notice may also be taken of proviso (1) to S. 3 which reads as follows:

"Provided that no order made under clause (b)—

(i) shall require an employer to observe terms and conditions of employment less favourable to the workmen than those which were applicable to them at any time within three months preceding the date of the order."

It appears that, if it be held that the State Government is competent to pass an order under cl. (b) of S. 3, U. P. Industrial Disputes Act (U. P. Act 28 of 1947) so as to have retrospective effect in altering terms and conditions of employment which have already been observed in the past, the State Government would be in a position to completely nullify the proviso mentioned above. The State Government may, by an order under cl. (b) of S. 3, first alter the terms and conditions of service which have already been observed during the three months preceding the date of the order so as to make these terms and conditions less favourable to the workmen than those which were applicable to them during that period before that order and may, thereafter, require the employers, workmen or both to observe those very conditions in future during the period specified in the order under cl. (b) of S. 3 of the Act.

It is, therefore, clear that, giving retrospective effect to an order passed under cl. (b) of S. 3 would be clearly against the intention of the legislature as it would permit the State Government to get round the limitation of its power specifically imposed by the legislature in the proviso. I, consequently, hold that, under S. 3(b) of the U. P. Industrial Disputes Act (U. P. Act 28 of 1947), the State Government's power was restricted to passing orders regulating terms and conditions of employment to be observed during a specified period after the date of the order and that no order could be passed by the State Government so as to alter terms and conditions of service which had already been observed in the past. In the case before us, the order, contained in the notification of 5-7-1950, directs payment of bonus in respect of the years 1947-48 and 1948-49 which years had already run out before the order was passed. The order passed in respect of payment of bonus was, therefore, clearly a retrospective order which was not within the competence of the State Government in exercise of its powers under S. 3(b) of the U. P. Industrial Disputes Act.

In this connection, we may also take notice of one other circumstance. The order, contained in the notification of 5-7-1950, contemplates payment of bonus for the years 1947-48 and 1948-49 to employees of the sugar factories who were in service on 5-7-1950, or, at the most, those who may continue in service, or, enter service after 5-7-1950, within the period specified in the order. It is a reasonable presumption that the actual personnel, forming the employees of the factories in July, 1950, or, during the period specified in the order, could not be identical with the personnel that was in employment during the years 1947-48 and 1948-49. Payment of bonus in respect of those years could be a term or condition of service for only those employees who were in service during those years and any order, directing payment of bonus to a set of persons who might be different from the actual employees whose terms and conditions of service are said to be regulated with respect to bonus, would not be an order relating to terms and conditions of employment of the employees during those years.

I, consequently, hold that the order, contained in the notification of 5-7-1950, directing the petitioner-companies to pay bonus or arrears of bonus in respect of the years 1947-48 and 1948-49, was beyond the powers of the State Government and, consequently, void and cannot be given effect to. In passing this order, the State Government has acted beyond its statutory powers and in my opinion, this order must, therefore, be quashed.

(22) So far as the retainer allowance is concerned, no objection can be taken on the ground that the order, relating to it, is retrospective in nature. The order was passed during the off season in 1950 and relates to payment of the retainer allowance for that off season. It also adds certain classes of skilled seasonal workmen and the clerical staff as employees entitled to the retainer allowance. Such an order is clearly a prospective order relating to the terms and conditions of employment and is, therefore, valid and must be upheld.

(23) As a result, I would partly allow this petition, direct that a writ in the nature of 'mandamus' shall issue, directing the State Government not to enforce its order contained in Notification No. 1425 (ST)(ii)/XVIII-13 (ST)-50, D/- 5-7-1950, ordering the sugar factories, to which the notification applies, to pay bonus in respect of the years 1947-48 and 1948-49 and quash that order. The order relating to payment of retaining allowance is held to be valid and effective. In the circumstances of this case, I would direct parties to bear their own costs.

(24) This order shall also govern Misc. (Writ) Cases Nos. 282, 284, 285, 308, 309 and 314 of 1950 and No. 14 of 1951.

BY THE COURT :

(25) These writ petitions under Art. 226 of the Constitution are partly allowed. A writ in the nature of 'mandamus' shall issue directing the State Government not to enforce its order contained in Notification No. 1425 (ST)(ii)/XVIII-13 (ST)-50, dated 5-7-1950, ordering the sugar factories to which the notification applies, to pay bonus in respect of the years 1947-48 and 1948-49 and we quash that portion of the order. The order relating to payment of retaining allowance is held to be valid and effective.

(26) In the circumstances we direct the parties to bear their own costs.

A/K.S.B. Petitions partly allowed.

A.I.R. 1954 ALLAHABAD 550 (Vol. 41, C.N. 217)

MOOTHAM AND CHATURVEDI JJ. (5-3-1954).

British India Corporation Ltd., Kanpur, Applicant v. Govt. of Uttar Pradesh and others, Opposite Party.

Civil Misc. Writ No. 7934 of 1951.

(a) U. P. Industrial Disputes Act (28 of 1947), S. 3 — Validity — Delegation of legislative power — What amounts to — (Constitution of India, Art. 245).

There can be no doubt that the U. P. Industrial Disputes Act is legislation on the subject of industrial and labour disputes, a matter within the competence of the State Legislature, and S. 3 of the Act cannot therefore, be successfully challenged on the ground of legislative incompetence.

Even on the alternative view that in order to be valid the legislation must lay down a policy for the guidance of the delegates of the power of subordinate legislation, such a policy is laid down in the opening words of S. 3 namely "securing the public safety or convenience or the maintenance of public order or supplies and services essential for the life of the community, or for maintaining employment." The power conferred by the Uttar Pradesh Legislature on the State Government by S. 3, U. P. Industrial Disputes Act, 1947, to constitute industrial courts cannot therefore be impugned on the ground that it amounts to the delegation of an essential legislative function. AIR 1954 All 538 (FB); AIR 1952 All 866 (FB) and AIR 1951 SC 332, Foll. (Paras 5, 8)

(b) U. P. Industrial Disputes Act (28 of 1947), S. 3(d) — Existence of industrial dispute — Determination — Jurisdiction of Court.

If the dispute is an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters. AIR 1953 SC 53, Rel. on. (Para 9)

(c) U. P. Industrial Disputes Act (28 of 1947), S. 3 — Order for payment of bonus — Contravention of Art. 19(1)(f) — (Constitution of India, Art. 19 (1) (f)).

An order for the payment of a bonus made under S. 3 of the U. P. Industrial Disputes Act cannot in any way be held to interfere with the right of the employer to acquire, hold or dispose of property, within the meaning of Art. 19(1)(f) of the Constitution. AIR 1954 All 538 (FB), Foll. (Para 10)

Anno: Const. of India, Art. 19, N. 69.

CASES REFERRED : Paras

(A) ('78) 5 Ind App 178: 4 Cal 172 (PC) 6
(B) (V32) AIR 1945 PC 48: 72 Ind App 57: 46 Cri LJ 589 (PC) 6
(C) (V38) AIR 1951 SC 69: 1951 SCR 51 6
(D) (V36) AIR 1949 FC 175: 1949 FCR 595: 50 Cri LJ 897 (FC) 6
(E) (V38) AIR 1951 SC 332: 1951 SCR 747 6, 8
(F) (V41) AIR 1954 All 538: (Writ Petn. No. 280 of 1950 D/- 10-2-1954 All) (FB) 7, 8, 10
(G) (V39) AIR 1952 All 866: 1952 All LJ 412: 1952 Cri LJ 1676 (FB) 8
(H) ('53) Writ Petn. No. 731 of 1953 (All) 9
(I) (V40) AIR 1953 SC 53: 1953 SCR 334 9

G. S. Pathak and R. S. Pathak, for Applicant; Standing Counsel and S. C. Khare, for Opposite Party.

ORDER : This is a petition under Art. 226 of the Constitution. The petitioner is a public limited company which carried on the business of manufacturing and selling textiles and other commercial products. A branch of the petitioner's business is carried on under the name of Cooper Allen & Co., and on 13-4-1951, the petitioner issued a notice to its employees in that branch informing them that the directors had sanctioned the payment of a gratuity (by which, it is common ground, is meant what is ordinarily termed a bonus) in respect of the year ending 31-12-1950, equal to three months' basic wages. Certain qualifying conditions were laid down in the notice which further stated that acceptance of the gratuity would be held to imply that it had been accept-

ed in full and complete satisfaction of all claims for a gratuity in respect of that period. Payment of the bonus was made accordingly by the petitioner in May, 1951, to all the employees of Cooper Allen & Co., who qualified therefor, and receipts were given by such employees in full and final sttlement of all claims for bonus in respect of that year.

(2) On 28-7-1951, the Kanpur Mechanical and Technical Workers' Union, respondent no. 4, made an application to the Chairman of the Regional Conciliation Board (Leather), Kanpur, in which it was prayed:

"that all the temporary and permanent workers who have not been paid bonus are entitled for bonus for the year 1950, and they should be paid the same for this year of 1950.

That the quantum of bonus for the year 1950 should be enhanced to 6 months' wages with dear food allowance.

That no condition should be attached to the payment of bonus.

That the company should be asked to pay 12½ per cent. interest on the aggregate amount of money of the workers unlawfully withheld by them."

(3) After the receipt of this application an attempt was made to constitute a Conciliation Board, but it appears that the attempt failed because of a mistake in the notification with regard to the name of the employer with the consequence that the petitioner did not nominate a member.

(4) Thereafter on 27-10-1951, the Governor issued a Notification, No. 5122(TD)/XVIII-40(TD)/51, in which, after reciting that an industrial dispute existed between the concern known as Cooper Allen & Co., managed by the petitioner and its workmen, it referred that dispute to the State Industrial Tribunal which was required to determine :

"whether the rate of bonus declared by the employers for the year 1950, and the terms and conditions attached thereto need any revision? If so, in what manner."

This reference was made in exercise of powers conferred by Ss. 3, 4 and 8 of the U. P. Industrial Disputes Act, 1947, and in pursuance of the provisions of Cl. 10 of an order made on 15-3-1951, under that Act. On 16-11-1951, this petition was filed, and by an order of the Court of that date proceedings before the State Industrial Tribunal were stayed. The petitioner seeks, first, the issue of a writ in the nature of 'mandamus' directing the State Government and the Minister for Labour therein, who are the first and second respondents, to withdraw the Notification of 27-10-1951, so far as it is sought to be applied to Cooper Allen & Co.; secondly, a writ in the nature of prohibition prohibiting the State Industrial Tribunal, which is respondent No. 3, from giving effect to the provisions of that Notification so far as it is sought to be applied to Cooper Allen & Co., and from continuing the proceedings thereunder, and thirdly, a writ in the nature of certiorari quashing the proceedings pending before the State Industrial Tribunal.

(5) The first submission made on behalf of the petitioner is that the power conferred by the Uttar Pradesh Legislature on the State Government by S. 3, U. P. Industrial Disputes Act, 1947, to constitute industrial courts is invalid as it amounts to the delegation of an essential legislative function.

(6) The impugned section, so far as it is material, reads as follows :

"3. 'Power to prevent strikes, lock-outs etc.' If in the opinion of the State Government, it is necessary or expedient so to do for securing the public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community, or for maintaining employment, it may, by general or special order make provision :

(a) for prohibiting, subject to the provisions of the order, strikes, or lock-outs generally, or strike or lock-out in connexion with any industrial dispute;

(b) for requiring employers, workmen or both to observe for such period, as may be specified in the order, such terms and conditions of employment as may be determined in accordance with the order;

(c) for appointing industrial courts;

(d) for referring any industrial disputes for conciliation or adjudication in the manner provided in the order."

Sri Pathak's argument is that the United Provinces Legislature had no power to confer upon the State Government authority to appoint industrial courts and that Cl. (c) of S. 3 is therefore invalid. His contention is that the constitution of courts is an essential legislative function which the Legislature cannot delegate to any other body or person. The Legislature in enacting S. 3, Cl. (c) of the U. P. Industrial Disputes Act did not, he contends, exercise its judgment on matters without a pronouncement on which no such legislation could be valid. It has not laid down what are to be the qualifications of the persons who can act as judges on such tribunals, it has not prescribed the procedure which they shall follow, nor has it imposed any limitation upon the orders which they may make. Vital matters of policy were left undetermined.

In support of his submissions Sri Pathak referred us to well known case of — 'Queen v. Burah', 5 Ind App 178 (PC) (A); — Emperor v. Benori Lal Sarma', AIR 1945 PC 48 (B); — 'State of Bombay v. Narottam Das Jetha Bhai', AIR 1951 SC 69 (C); — 'Jitendra Nath v. Province of Bihar", AIR 1949 FC 175 (D) and to what is known as the — 'Delhi Laws Act (1912)', etc., in re AIR 1951 SC 332 (E)'. Sri Pathak's argument was forceful one, and it is due to no want of respect for learned counsel that we do not propose to discuss the cases to which he has referred. It appears to us however unnecessary to do because the question of the extent to which a legislature can delegate its powers has been considered in two bench decisions of this Court which are binding on us.

(7) In — 'Basti Sugar Mills v. State of Uttar Pradesh', AIR 1954 All 538 (F)' a Full Bench of this Court had to consider the validity of an order made in July, 1950, by the State Government under S. 3 of this same Act, the U. P. Industrial Disputes Act, 1947, directing certain sugar factories to make payment of bonus for the preceding years 1947-48 and 1948-49. This order was made by the State Government under Cl. (b) of S. 3 of the Act, but it is apparent from the argument of learned counsel and from the statement of the grounds set out in the judgment, upon which relief was sought, that the validity of section itself was made the subject of attack. Ground no. 4, for instance, was in these terms :

"(4) That in any event section 3 of the U. P. Industrial Disputes Act was 'ultra vires' inasmuch as the power to decide an industrial dis-

pute could not be conferred on the executive." Similarly in ground No. 5 the contention was:

"That it was not open to the legislature to delegate its own functions to the executive."

The validity of S. 3 was also challenged in grounds Nos. 6, 11, 12 and 14. In the course of his judgment Mr. Justice Bhargava, who delivered the leading judgment, said:

"Sri Pathak, learned counsel for the petitioners, challenging the validity of S. 3 of the U. P. Industrial Disputes Act (Act 28 of 1947) principally contended that this section contained delegation of such legislative powers by the Legislature to the Executive as was unconstitutional and 'ultra vires' the Legislature."

and the learned Judge expressly held (on page 14 of the typed judgment) that the Act was valid and binding in the State of Uttar Pradesh. This he repeated on page 550 when he said:

"I consequently hold that S. 3 of the U. P. Industrial Disputes Act (U. P. Act 28 of 1947) is valid and not ultra vires the legislature on the ground of unauthorised delegation of legislative power."

Mr. Justice Sapru did not differ from Mr. Justice Bhargava on the question of the State Legislature's power of delegation. He said:

"No doubt a law can be challenged on the ground of the incompetency of the particular legislature, whether Federal or State, to enact it or on the ground of its inconsistency with the fundamental rights granted by the Constitution, but provided the legislature concerned does not abdicate its power of legislation by wiping itself out and retains its control so as to be able to withdraw the legislative power conferred upon a subordinate authority whenever it considers proper to do so, it is not for courts to decide how much authority should be delegated or for how long such delegation should continue. (See the observations of Das, J., in —'AIR 1951 SC 332 at p. 422 (E)', referred to above).

The powers given by S. 3 may be, and are indeed, of a most wide character, but that fact alone cannot affect its validity. The remedy against delegated legislation is not judicial but political control with which courts have no concern. I am, therefore, clear in my mind that S. 3 of the U. P. Industrial Disputes Act, 1947 (Act 28 of 1947) was not beyond the competence of the legislature and cannot be declared 'ultra vires' on the ground that it delegates legislative rule-making power of an unspecified character to the executive government

Mr. Justice Sapru doubted the correctness of the conclusion reached by Mr. Justice Bhargava on a matter wholly unconnected with the question of delegation, namely whether clause (b) of S. 3 had retrospective effect. The learned Chief Justice stated that he was in agreement with the views expressed by the other members of the Bench on the question of the legislature's power of delegation. It will be observed that although it would have been sufficient for the learned Judges in this case to have held that S. 3 was not invalid on any of the grounds advanced by learned counsel, they have gone further and have expressly held the section to be valid.

(8) The decision in the 'Basti Sugar Mills case, (F)', appears to us therefore to conclude the matter against the petitioner in the present petition. But if we are wrong in this, and the correct view is that the decision in the 'Basti Sugar Mills case, (F)', must be construed as being limited in its application to the validity of Cl. (b) of S. 3, then the question whether Cl. (d) is valid remains to be considered. The question of the extent to which a legislature may delegate its powers was exhaustively considered by the Supreme Court in the 'Delhi Laws Act case (E)', and the decision in that case has been the subject of consideration and interpretation by another Full Bench of this Court in — 'Bhushan Lal v. State', AIR 1952 All 866 (G). The question which the Court had in that case to consider was whether Ss. 3, 4 and 6 of the Essential Supplies (Temporary Powers) Act, 1946, were valid, and in order to determine this question it was necessary for the Court to consider how far the legislature had power to delegate its legislative functions. The Court held that the correct view was that if an Act of the legislature can be held to be "legislation" on a particular subject the extent of delegation is immaterial. What it said was this:

"If the correct view be that if an Act of the legislature can be held to be 'legislation' on a particular subject, the extent of delegation is immaterial, (& in our opinion this is the correct view), then there can be no question that Ss. 3 & 4 of the Essential Supplies Act are legislation and are 'intra vires' the legislature. If, on the other hand, the correct view be that legislation must in all cases lay down a policy or standard for the guidance of the delegates of the power of subordinate legislation, even then in our opinion Ss. 3 and 4 of the Essential Supplies Act are 'intra vires'."

There can in our opinion be no doubt that the Industrial Disputes Act is legislation on the subject of industrial and labour disputes, a matter within the competence of the State Legislature, and S. 3 of the Act cannot therefore, in view of the decision in — 'Bhushan Lal's case, (G)', be successfully challenged on the ground of legislative incompetence. Even on the alternative view that in order to be valid the legislation must lay down a policy for the guidance of the delegates of the power of subordinate legislation such a policy is, in our view, laid down in the Act.

Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, authorised the Central Government to regulate or prohibit the production, supply and distribution of essential supplies and trade and commerce therein, and it laid down that the regulation and prohibition was for a definite object, namely for maintaining or increasing supplies of essential commodities or securing their equitable distribution and availability at fair prices. This Court in — 'Bhushan Lal's case, (G)', held that this section enunciated a definite policy in the shape of the objective to be achieved. So also it appears to us that S. 3, U. P. Industrial Disputes Act no less enunciates a definite policy, that policy being stated in the opening words of the section, namely, "securing the public safety or convenience or the maintenance of public order or supplies and services essential for the life of the community, or for maintaining employment". We are of opinion, therefore, that Sri Pathak's first submission is concluded against him by authority which is binding on us.

(9) Sri Pathak's second submission was that there existed no industrial dispute and that consequently there could be no valid reference to an Industrial Tribunal under Cl. (d) of S. 3 of the Act. His contention is that no such dispute existed either at the time the Government sought to constitute a Conciliation Board or when the reference was made to the Industrial Tribunal; but he

concedes that if an industrial dispute existed at the latter date that would be enough.

Under clause 10 (1) of the Notification dated 15th March 1951, the State Government is empowered "if it is satisfied that an industrial dispute exists" to refer that dispute to an Industrial Tribunal; and in making a reference under this clause the Government is doing an administrative act: —'Sri Kastur Chand Gupta v. State of Uttar Pradesh', Writ Petn. No. 731 of 1953 (All) (H). As Patanjali Sastri C. J., said in — 'State of Madras v. C. P. Sarathy', AIR 1953 SC 53 at p. 57 (I) :

> "If the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters."

It is, we think, sufficient to say that in the present case there was in our opinion ample material upon which the Government could come to the conclusion that, at the time it made the reference, an industrial dispute existed.

(10) Finally it was submitted that if the Tribunal made an award requiring the petitioners to pay a further sum to its employees, that award would contravene the fundamental right guaranteed to the petitioner under Art. 19(1)(f) of the Constitution. Apart from the fact that no award has yet been made, the argument that an order for the payment of a bonus made under S. 3 of the U. P. Industrial Disputes Act can in any way be held to interfere with the right of the employer to acquire, hold or dispose of property was conclusively rejected in the 'Basti Sugar Company's case, (F)'.

(11) In our opinion this petition fails and must be dismissed with costs, which we assess at Rs. 300.

A/D. R. R. Petition dismissed.

A.I.R. 1954 ALLAHABAD 553 (Vol. 41, C.N. 218)

V. BHARGAVA J. (20-1-1954)

Radha Kishan Anandeshwar, Petitioner **v.** Commr. of Sales Tax, U. P., Lucknow and others, Opposite Party.

Civil Misc. Writ No. 22 of 1954.

Constitution of India, Art. 226 — Writ of prohibition — Sales Tax proceedings.

Where the Sales Tax Officers are competent to deal with the assessment proceedings in question they cannot be barred from continuing those proceedings by issue of writs of prohibition. It cannot be said that they have no jurisdiction because the assessees anticipate wrong decisions. (Para 4)

Further, when, even if the Sales Tax Officers do give incorrect decisions, the assessees have the right to go up in appeal, to Judges Appeals appointed under the Act and from their incorrect decisions to the Judge revisions and if those decisions be incorrect to seek reference to the High Court, there is no reason why the ordinary remedy provided for by law should be by-passed and the High Court should start entertaining writ petitions in case of individual assessees though at a stage when the validity of the provisions of the Sales Tax Act is yet in question and no decision had been given by the High Court, in spite of the ordinary remedy provided by law, exercise of jurisdiction under Art. 226 would be appropriate as the question would be of general importance and one decision by the High Court would be necessary for the purpose of guiding the Sales Tax authorities. AIR 1952 All 764, Rel. on. (Para 5)

The argument that the alternative remedy provided by law is not equally convenient and speedy inasmuch as proceedings under the Sales Tax Act are likely to be prolonged and the assessees' right to come to the High Court will only accrue at a very late stage after having first moved the Judge Appeals and Judge revisions is not tenable because to accept that argument would mean that the regular procedure prescribed under the law should be completely scrapped. Obviously writ jurisdiction was not meant to do away altogether with the alternative procedure which the legislature considered was appropriate for the particular situation. (Para 5)

Nor should the writ jurisdiction be used on the ground that a resort to the procedure provided by law would operate hardship on the assessees because to go in appeal they shall have to deposit the tax. The legislature having required that condition in pursuance of its express policy the writ proceedings should not be used as a means of overriding that policy. (Para 6)

Held also that the writs could not issue in the case. The reason was that the assessees, who alleged that the Sales Tax Officers were seeking to assess on forward contract transactions contrary to the decision of the High Court, had not stated in their affidavits that the assessment proceedings were simply in respect of transactions in forward contracts in which no deliveries took place at all and that there was no other business of theirs in respect of which proceedings were being taken. Further, even if the proceedings were in respect of forward transactions not liable to tax, the affidavits did not contain anything to show that they were not liable to be assessed on other grounds, such as realisation of tax by them which was not due in their capacity as registered dealers and which they were liable to deposit in the treasury under the provisions of Sales Tax Act. These were all questions of fact which could only be determined by proceeding according to the procedure laid down in the Sales Tax Act itself and which could not be properly gone into in writ petitions. (Para 7)

CASE REFERRED : Para

(A) (V39) AIR 1952 All 764: 1952 All LJ 332 1, 4, 5

M. N. Shukla, for Petitioner.

ORDER : All these four writ petitions have been filed by persons carrying on business in Kanpur in various commodities, for example, silver, gold, 'bardana', cerials etc. Proceedings are going on against all these petitioners for assessment of sales tax under the U. P. Sales Tax Act of 1948.

The petitioners have filed these petitions praying for the quashing of the proceedings that are going on before the Sales Tax Officers on the allegation that the Sales Tax Officers are seeking

to assess tax on the petitioners in respect of forward transactions only and taxation on such forward transactions is not permissible by law as held by a Division Bench of this Court in — 'Budh Prakash Jai Prakash v. Sales Tax Officer, Kanpur', AIR 1952 All 764 (A).

In dealing with these petitions, I have had considerable difficulty for the reason that the affidavits filed are not straightforward, do not give facts clearly and concisely and have not been properly verified. In almost all these cases, the petitioners were given opportunity to file supplementary affidavits and in one of them the petitioner has filed a second supplementary affidavit. This last case is case No. 22 of 1954. In spite of these supplementary affidavits, the facts are not clear and are not sufficient to enable this Court to decide the writ petitions properly.

(2) The main ground on which the petitioners have come to this Court for issue of writs is that the assessing authorities are seeking to assess the petitioners in respect of forward transactions which are not taxable in view of the decision of the Division Bench of this Court mentioned above. The affidavits filed in all these petitions are, however, so unsatisfactory that in none of the cases can I be satisfied that the assessment proceedings going on against the petitioners are in respect of only such forward transactions as are not taxable according to the view of this Court.

The affidavits mentioned that the petitioners carried on various businesses and particularly business in ready goods in gold and silver species. In addition, the affidavits mentioned that they carried on business in forward transactions in gold, silver, bardana and grains. It is not said in plain words in the affidavits that the forward transaction business of the petitioners is exclusively of those cases in which no actual delivery at all takes place. Learned counsel, when arguing these petitions, submitted that the petitioners, when mentioning that they deal in transactions known as ready transactions in gold and silver species or in bardana, meant to refer to transactions of forward transactions in which deliveries actually take place and not transactions in which the settlement of accounts and the delivery are all simultaneous.

This interpretation of the affidavits cannot be accepted. In several of the affidavits where mention is made of ready transactions, the commodities mentioned are 'gold', 'silver' and 'bardana' whereas, when the forward contract business is mentioned, besides these commodities 'grains' are also mentioned. If the assessment proceedings are simply in respect of transactions in forward contracts in which no deliveries take place at all and there is no other business of the petitioners in respect of which proceedings are being taken, it should have been possible for the petitioners to say so in clear and unequivocal terms which they have avoided doing. In these circumstances, on the affidavits filed it is not possible to come to any finding that the assessment proceedings relate to only such forward transactions as are not liable to tax, and consequently those proceedings cannot be quashed.

(3) There is further nothing in the affidavits filed in support of any of the petitions to show that, even if the proceedings are in respect of forward transactions not liable to tax, the petitioners are not liable to be assessed on other grounds such as realisation of tax by them which was not due in their capacity as registered dealers and which they are liable to deposit in the treasury under S. 8-A(4), U. P. Sales Tax Act of 1948. It is after proceedings have been gone through and facts have been investigated that it can be determined whether the petitioners should or should not be taxed and, while such determination is necessary, the proceedings for determination before proper authorities cannot be quashed.

(4) In this connection, it is important to notice that in the case of none of the four petitioners except one has there yet been any determination by the Sales Tax Officer holding that forward transactions are liable to sales tax. The petitioners proceeded on the assumption that the Sales Tax Officers, when they proceed to pass orders of assessment, would give decisions which would be contrary to the decision of this Court in AIR 1952 All 764 (A). Such an assumption is not justified. The proceedings are yet pending before the Sales Tax Officers and they have to decide whether there are any turnovers of the petitioners which are liable to be assessed to sales tax. There is a possibility that there may be turnovers of these petitioners liable to sales tax which are not of the nature declared not liable to sales tax by this Court in the case mentioned above.

In one case, learned counsel has filed a certified copy of an order of the Sales Tax Officer holding that the turnovers of forward transactions of the petitioners are liable to tax, but that decision was given in the month of March 1952 when, it appears, the decision of this Court was not available and was not produced before the Sales Tax Officer for his guidance. The affidavit merely mentions that some verbal reference to the decision of this Court was made on behalf of the petitioners before the Sales Tax Officer without producing either a certified copy of the judgment of this Court or the report of the decision in any recognised law reports, and no request was made to the Sales Tax Officer for time to produce a certified copy or an authorised law report. If the Sales Tax Officer in these circumstances gave a decision which is contrary to the view of the High Court, it cannot be said that even subsequently the decisions are bound to be wrong.

In writ petition No. 22 of 1954 the petitioner has today filed copies of orders by several Sales Tax Officers, Kanpur in which also sales tax has been assessed on turnovers of forward transactions and it has been urged that these show that even in the case of the petitioners the Sales Tax Officers would give similar decisions. None of the orders produced shows that the decision of this Court was brought to the notice of the Sales Tax Officers in those cases. It is for the petitioners to produce before the Sales Tax Officers authorised reports of the decision of this Court.

The Sales Tax Officers are competent to deal with the assessment proceedings and, when dealing with them, they may come to the view that no sales tax is payable from the petitioners. It cannot be said that because the petitioners anticipate that the Sales Tax Officers will give incorrect decisions, the Sales Tax Officers have no jurisdiction to deal with the assessment proceedings at all and can be barred from continuing those proceedings by issue of writs of prohibition.

(5) Further, even if the Sales Tax Officers do give incorrect decisions, the petitioners have been given the right to go up in appeal to Judges Appeals appointed under the Act and from their incorrect decisions to the Judge revisions. If the decisions be incorrect, even from that court they

can seek reference to this Court. The petitioners have therefore an alternative remedy by which they can ultimately come to this Court and seek redress and there is no reason why the ordinary remedy provided for by law should be by-passed and this Court should start entertaining writ petitions in all cases of individual assessees.

The position was different when the validity of the provisions of the Sales Tax Act was yet in question and no decision had been given by this Court. At that stage, in spite of the ordinary remedy provided by law, exercise of jurisdiction under Art. 226 of the Constitution by this Court was appropriate as one decision by this Court was necessary for the purpose of guiding the Sales Tax authorities. The question at that stage was of general importance. At this stage, the cases are of individuals and the principle has already been laid down by this Court in another writ case. If in such cases, incorrect decisions are given it is clear that the persons affected should be left to seek their ordinary remedy provided by law.

This Court should not, in exercise of its writ jurisdiction, start doing the work which has been entrusted by law to other appropriate authorities. Even if it be assumed that the Sales Tax Officers would not follow the decision of this Court, there is at least no basis at all for assuming that the Judge, Appeals or Judge, Revisions would not follow the decision and arrive at correct conclusions when dealing with the appeals or revisions of these petitioners.

Learned counsel urged that the alternative remedy provided by law was not equally convenient and speedy inasmuch as proceedings under that law are likely to be prolonged and the petitioners' right to come to this Court will only accrue at a very late stage. If, however, the decisions are correctly given by Judge Appeals or the Sales Tax Officers themselves, the remedy there would obviously be much more speedy and convenient.

If the argument of learned counsel be accepted that, because the assessees can only come to this Court after having first moved the Judge, Appeals and Judge, revisions, this Court should interfere in exercise of its writ jurisdiction under Art. 226 of the Constitution, it would mean that the regular procedure prescribed under the law should be completely scrapped as in all cases grievances made on behalf of the petitioners can be put forward in the identical form. Obviously writ jurisdiction was not meant to do away altogether with the alternative procedure which the legislature considered was appropriate for the particular situation.

In AIR 1952 All 764 (A) the writ petition was entertained principally on the ground that the point involved related to the validity of a law, the question was of general importance and it was necessary that a decision be given by this Court for the guidance of the Sales Tax authorities. That consideration does not now exist.

(6) The petitioners' further grievance is that, if they are asked to resort to the usual procedure provided by law, they would be required to deposit the tax first before they could be heard in appeal by the Judge, Appeals and this would operate hardship on the petitioners. This again ignores the policy laid down by the legislature in the Act itself.

If the legislature had intended that the assessee should not be required to pay until the liability to pay had been finally determined, such a provision could easily have been made in the Sales Tax Act itself. But a contrary provision that the assessee should have no right of appeal unless he has first paid the tax assessed by the Sales Tax Officer was obviously made by the legislature in pursuance of its policy that the tax should be deposited as soon as the first assessment proceedings were over, and the writ jurisdiction should not be a means of overriding such express policy of the legislature.

The amount of tax assessed on the assessees, considering the scale of their business, is not such that it can be held that the depositing of the tax by the petitioners would operate harshly on them.

(7) Finally, there is the aspect that there are questions of fact to be determined which can only be determined by proceeding according to the procedure laid down in the Sales Tax Act itself and which cannot be properly gone into in these writ petitions.

(8) For all these reasons I hold that these writ petitions should not be entertained by this Court at this stage and they are therefore rejected.

A/M.K.S. Petitions rejected.

A.I.R. 1954 ALLAHABAD 555 (Vol. 41, C.N. 219)

BRIJ MOHAN LALL J. (18-2-1954)

Raghubar Dayal and others, Applicants v. The Sarrafa Chamber and others, Opposite Party.

Company Case No. 51 of 1952.

†(a) **Companies Act (1913), Ss. 4(2) and 162 — Illegal company — Winding up.**

A Court should not entertain a petition for winding up of a company which was formed in contravention of S. 4(2). (Para 6)

Anno: Comp. Act, S. 4 N. 5; S. 162 N. 1.

(b) **Companies Act (1913), Ss. 4(2), 270 and 271 — Illegal company — Winding up.**

Part IX of the Act is intended to cover the cases of those companies which can legitimately remain unregistered. In other words, it provides that companies consisting of not more than ten members in cases of banking companies and not more than twenty members in case of other companies can be wound up. Part IX therefore does not contemplate that a company formed contrary to the provisions of S. 4 can also be wound up through Court. (Para 9)

Anno: Companies Act, S. 4 N. 5; S. 270 N. 1; S. 271 N. 1.

CASES REFERRED: Paras

(A) (1881-82) 20 Ch D 137: 51 LJ Ch 344 7

(B) (V13) AIR 1926 All 591: 24 All LJ 777 8

S. S. Varma, Shambhu Pd. and Lalji Sinha, for Applicants; S. N. Varma, Satyendra Nath Varma and Baleshwari Pd., for Opposite Party.

ORDER: This is a petition by three shareholders of the Sarrafa Chamber, Jhansi (hereinafter described as the Company) for its winding up on the ground that it is just and equitable to do so.

(2) This Company was formed in 1946 with a nominal capital of rupees one lakh divided in 200 shares of rupees five hundred each. The object of the Company was to carry on trade in gold and silver. The Company was never registered.

(3) This petition is resisted mainly by opposite parties Nos. 2 and 3. It is not necessary to mention the defence raised by them on merits because a preliminary question has arisen for deci-

sion whether the Company consists of more than twenty members and whether an application for winding up of such a Company can be entertained. It may, however, be remarked that although in the counter-affidavit filed by the opposite parties it was expressly stated that the Company consisted of forty-eight partners no plea was taken to the effect that the application was on that ground not maintainable. The learned counsel for the petitioners contended that the question of maintainability of the petition could not be entertained by Court. This contention is, however, without force. A question of law can be raised at any stage. In order to enable the learned counsel for the petitioners to prepare himself to meet this new point an adjournment was given to him as desired by him.

(4) Before taking up the question of law there arises a question of fact as to whether the Company consists of more than twenty members. In this connection it may be pointed out that the opposite parties' allegation, viz., that there are forty-eight members, has not been controverted in the rejoinder affidavit. On the contrary, one finds that besides the petitioners opposite parties Nos. 2 to 17 are described by the petitioners themselves as members of the Company. This brings the total number of the share-holders to nineteen.

It may also be pointed out that opposite parties Nos. 12 and 15 to 17 are firms. Naturally they consist of more partners than one. Thus on the petitioners' own showing the number exceeds twenty. The learned counsel for the petitioners also admitted that although the number to start with did not exceed seven, fresh members were admitted and the total number in course of time exceeded twenty. Thus, it is now common ground between the parties that the members of this Company exceed twenty in number.

(5) Section 4(1) of the Indian Companies Act 7 of 1913 lays down that

> "No company, association or partnership consisting of more than ten persons shall be formed for the purposes of carrying on the business of banking unless it is registered."

Sub-section (2) runs as follows :

> "No Company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business" i.e. a business other than banking business "that has for its object the acquisition of gain by the Company, association or partnership, or by individual members thereof, unless it is registered as a Company under this Act or is formed in pursuance of an Act of Parliament of the United Kingdom or some other Indian Law or of Royal Charter or Letters Patent."

(6) It is conceded on either hand that the object of the present Company was "acquisition of gain". Since its membership exceeded twenty it was obligatory on the members to get the Company registered. This, as already stated, was not done. The result, therefore, was that not only this partnership did not acquire the status of a Company as contemplated by law but, on the contrary, it was an association of which the formation was forbidden by law. The question for consideration is whether members of such an association can come to Court and seek redress through it.

By acceding to the petitioners' request to wind up the Company the Court will be indirectly according recognition to the Company. Since the law has forbidden the formation of such companies it could never have been its intention to lend its helping hand to members who had formed this forbidden association. If such members are given the same rights and privileges as are provided by law for persons who form associations permitted by law they suffer no penalty for having disregarded the express provisions of law regarding the formation of companies. I am, therefore, of the opinion that the Court should not entertain this petition for winding up of a company which was formed in contravention of section 4(2) of the Indian Companies Act.

(7) I am fortified in this view by the case of — 'In re Padstow Total Loss and Collision Assurance Association', (1881-82) 20 Ch D 137 (A). This is a case exactly parallel to the present one. There also members exceeding twenty in number had formed an association for the object of acquisition of gain. An application was made for the winding up of such a company. It was held that this application could not be entertained.

(8) This case came up for consideration before a Bench of this Court in — 'Mewa Ram v. Ram Gopal', AIR 1926 All 591 (B). In that case the prayer was not for winding up of the Company but for dissolution of that partnership. The majority view (expressed by Walsh and Mukerji JJ., Sulaiman J. dissenting) was that a suit for dissolution of such a partnership could not lie because the Court would not recognise such a partnership. The learned Judges relied on the aforesaid English case. Even Sulaiman J., who gave a dissenting judgment, was of the opinion that had the petition been for winding up it could not be entertained. He remarked at p. 593:

> "There is ample justification for holding that a winding up order of an illegal association cannot be made."

Thus it will appear that although there was a difference of opinion among the Judges constituting that Bench about the maintainability of a suit for dissolution of a forbidden partnership there was complete unanimity between them on the question of non-maintainability of a petition for winding up in respect of a Company formed in contravention of the provisions of section 4 of the Act.

(9) The learned counsel for the petitioners took his stand on Part IX of the Indian Companies Act which relates to winding up of un-registered Companies. He relied on the definition of the term "un-registered Company" in S. 270 which runs as follows :

> "The expression 'unregistered company' shall not include a railway company incorporated by Act of Parliament of the United Kingdom or by an Indian law nor a company registered under the Indian Companies Act, 1866 (10 of 1866) or under any Act repealed thereby, or under the Indian Companies Act, 1882 (6 of 1882), or under this Act, but save as aforesaid, shall include any partnership, association or company consisting of more than seven members."

His contention was that the Company in question came within the definition of the terms "unregistered Company" and, therefore, it could be wound up under the provisions of Chapter IX, subject to the limitations mentioned therein, and since there was no express provision in Part IX laying down that Companies formed in contravention of the provisions of S. 4 could not be wound up, his petition was maintainable. This argument has no force. Part IX is intended to cover the cases of those Companies which can

legitimately remain un-registered. In other words, it provides that Companies consisting of not more than ten members in cases of banking companies and not more than twenty members in case of other companies can be wound up.

It was not the intention of law to lend recognition to companies formed in violation of the provisions of the Indian Companies Act. But for Part IX an un-registered company, though permissible in law, could not be wound up. Part V of the Act which relates to winding up provides for winding up of a "Company". The term "Company" is defined in S. 2(2) as meaning "a company formed and registered under this Act or an existing company." An "existing Company" has been defined by S. 2(7) to mean

"a company formed and registered under the Indian Companies Act, 1866 (10 of 1866) or under any Act or Acts repealed thereby, or under the Indian Companies Act, 1882 (6 of 1882)."

It will, therefore, follow that according to the definition contained in the Act "Company" means a registered Company only and, therefore, Part V could not apply to the winding up of un-registered companies though lawfully formed. The legislature, therefore, felt the need to enact special provisions in Part IX to provide for the winding up of un-registered companies legitimately formed. In the circumstances, I find no force in the contention put forward by the learned counsel for petitioners viz. that Part IX contemplates that a Company formed contrary to the provisions of S. 4 can also be wound up through Court.

(10) I am, therefore, of the opinion that this petition must fail on the preliminary ground that the Court cannot entertain a petition for the winding up of a Company formed in contravention of the provisions of S. 4 of the Act. I make no orders as to costs because the opposite parties are also privy to the formation of an association forbidden by law. Moreover, they had not taken in their reply the point on which they have succeeded.

(11) The petition is dismissed. Parties shall bear their own costs. Stay orders dated 15-12-52 and 7-8-53 are vacated.

A/V.R.B. Petition dismissed.

A.I.R. 1954 ALLAHABAD 557 (Vol. 41, C.N. 220)

HARISH CHANDRA J. (5-1-1954).

Kapildeo Upadhya, Applicant v. State.

Criminal Revn. Nos. 205 and 206 of 1953, against order of S. J., Banaras, D/- 18-12-1952.

(a) Criminal P. C. (1898), S. 227 — Alteration or addition more than once.

The language of S. 227 is very wide and does not seem to indicate that any alteration or addition to a charge can be made only once and not more than once. (Para 4)

Anno: Cr. P. C., S. 227, N. 4.

(b) Criminal P. C. (1898), Ss. 234, 235 — Whether exclusive — Cri Ref 267 of 1951, D/- 4-12-1951 (All), dissented from.

Ss. 234 and 235 can be combined for the purpose of the trial of an accused person at one trial. Thus three offences under S. 466, Penal Code, could be combined at one trial with three offences of the same kind under S. 477A and three offences of the same kind under S. 409, Penal Code. AIR 1950 All 167; AIR 1953 All 228, Rel. on. (Para 5)

Anno: Cr. P. C., S. 233, N. 1; S. 239, N. 2.

(c) Criminal P. C. (1898), S. 227 — Alteration by Sessions Judge — 1 Cri LJ 794 (Cal); 3 Mad 351, dissented from.

The power of the Court to alter or add to, any charge is very wide and so far as the Court of Sessions is concerned, such alteration or addition can be made before the verdict of the jury is returned or the opinions of the assessors are expressed. It does not appear that the intention of the legislature was that the Court of Session cannot make any alteration or addition to a charge framed by the committing Magistrate unless it is supported by the evidence recorded before the committing Magistrate. (Paras 11, 12)

Anno: Cr. P. C., S. 227, N. 4 and 7a.

CASES REFERRED: Paras

(A) (V37) AIR 1950 All 167: 1950 All LJ 155: 51 Cri LJ 571 6, 7
(B) (V40) AIR 1953 All 228: 1953 All LJ 108: 1953 Cri LJ 601 7
(C) ('51) Cr Ref No. 267 of 1951, D/- 4-12-1951 (All) 7
(D) ('04) 1 Cri LJ 794: 32 Cal 22 8
(E) ('81) 3 Mad 351: 2 Weir 269 9
(F) (V2) AIR 1915 Sind 50: 16 Cri LJ 573 12
(G) ('87) 9 All 525: 1887 All WN 155 12
(H) (V14) AIR 1927 Sind 28: 27 Cri LJ 1217 13

S. N. Misra, for Applicant; J. R. Bhatt Asstt. Govt. Advocate, for the State.

ORDER: These are two applications in revision arising out of Sessions Trials Nos. 35 and 36 of 1951 pending in the Court of the Assistant Sessions Judge, Banaras, on behalf of Sri Kapildeo Upadhya. He was an employee of the Water Works Department at Banaras and charges under Ss. 466, 409 and 477A, Penal Code have been framed against him in each case. The Committing Magistrate, when he committed these cases to the Court of Sessions, charged him in S. T. No. 35 with three offences of forgery alleged to have been committed by the applicant with respect to certain documents between 28-2-1947 and 13-3-1947 and also with having committed the offences of falsification of accounts and criminal breach of trust between the same dates. In Sessions Trial No. 36, he similarly charged him with having committed three offences of forgery with respect to certain documents between 1-11-1945 and 31-3-1946. He charged him in this case also with offences under Ss. 477A and 409 said to have been committed between the same dates. These other offences are said to be connected with the offences of forgery with which the applicant was charged in each case.

(2) The learned Sessions Judge after recording some evidence, altered and realtered the charges so that the period during which the offences in the one case are alleged to have been committed now is between 28-2-1947 and 27-2-1948 in one case & between 1-11-1945 and 31-10-1946 (sic). It is said that the procedure adopted by him was illegal.

(3) Three points are urged before me:

1. that under S. 227, Criminal P. C. the Court can alter or add to any charge only once and not more than once;

2. that the three offences of the same kind with which the applicant has been charged cannot be combined with three offences of other kinds in the same trial; and

3. that a charge could not be altered by the Sessions Judge so as to go beyond the scope of the enquiry in the Court of the Committing Magistrate.

(4) The language of S. 227 is very wide and does not seem to indicate that any alteration or addition to a charge can be made only once and I do not think the procedure adopted by the learned Assistant Sessions Judge was in any manner contrary to the provisions of that section.

(5) Section 234 authorises the court to charge an accused person with and try him at one trial for any number of offences of the same kind not exceeding three in number. Section 235 provides that:

"If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence."

It is not denied that the applicant could have been tried at one trial for offences under Ss. 466, 477A and 409, Penal Code, if the alleged acts were so connected together as to form the same transaction, as in the present case. What is objected to is that three offences under S. 466 could not be combined at one trial with three offences of the same kind under S. 477A and three offences of the same kind under S. 409. In other words, it is said that Ss. 234 and 235, Criminal P. C. are exclusive of one another and cannot be combined for the purpose of the trial of an accused person at one trial.

(6) A number of cases has been cited before me. But I need not refer to them all. For the matter has been set at rest by the decision of a Division Bench of this Court in — 'Rex v. Daya Shankar', AIR 1950 All 167 (A), in which it was held that charges for criminal misappropriation with respect to three items could be linked with three charges for falsification of accounts arising out of the same three transactions. This decision was arrived at by the Court on a consideration of a number of cases that were cited before it.

The following is reproduced from the judgment delivered by my brother Agarwala, J.:

"The principle underlying Ss. 235 and 236 is that if more offences than one are committed in one transaction, or it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges can be tried at one trial. The reason is that when the transaction is one, the evidence in proof of it will be the same, whatever be the nature of different offences committed by means of that transaction, and in such a case the legislature considers that there is no harm in combining the trial of different offences either cumulatively or alternatively when the transaction is the same.

In all such cases the main offence usually committed is one and the other offences are subsidiary ones. If it is considered advisable to try the subsidiary offences along with the main offence arising out of the same transaction, it does not stand to reason that these subsidiary offences, which go along with the main offence as part of the same transaction, may not be tagged on to the main offences, when three such main offences are considered by the legislature to be fit for joint trial under S. 234.

The combination of the subsidiary offences with the main offence is no more likely to confuse the jury or the Judge or to prejudice the accused than the trial of the three main offences themselves, because in both the cases the evidence will be the same. Even if the offences cannot be described as main or primary and secondary, the principle remains the same. Indeed, if the rule were otherwise, unnecessary multiplicity of proceedings and duplication of evidence and waste of public time and even harassment of the accused may be the result. In our opinion, Ss. 234, 235, 236 and 239 ought to be read as supplemental and not as exclusive of one another."

(7) In another case — 'Mangi v. State', AIR 1953 All 228 (B), the view expressed in — 'Rex v. Daya Shankar (A)' was endorsed. No doubt, a contrary view was expressed by a single Judge of this Court in — 'Damodar Swarup v. State', Cri. Ref. No. 267 of 1951 decided by Brij Mohan Lal J. on 4-12-1951 (All) (C); but obviously his attention was not invited to these and other cases previously decided by this Court and, I think, I am bound to follow the view taken by a Division Bench of this Court in — 'Daya Shankar Jaitly's case (A)' and hold that the charges as framed are not illegal.

(8) In regard to the last contention of learned counsel for the applicant, I am referred to the Calcutta case of — 'Birendra Lal v. Emperor', 1 Cri L J 794 (Cal) (D). In that case the accused had been convicted under S. 420 read with S. 511, Penal Code for an attempt to cheat the Jessore Loan Office. The accused had, however, been committed by the Magistrate to the Court of Session for trial on a complaint by a person who had no concern with the Jessore Loan Office and whose complaint related to antecedent events. The court held that the amendment of the charge so as to relate to the alleged offence of cheating the Jessore Loan Office was not in accordance with law.

(9) Another case which has been cited before me is — 'Mutirakkal Kovilagatha Rama Varma Raja v. Queen', 3 Mad 351 (E), in which it was held by the Madras High Court that an amendment of the charges by the Sessions Judge which is not based on any evidence recorded by the committing Magistrate was illegal. It appeared that the amended charge was based on the evidence of a witness who had not been examined at the enquiry by the Magistrate and was for the first time examined in the Court of Session.

(10) The provisions of S. 227, Criminal P. C. are, however, very wide. The section is as follows:

"(1) Any Court may alter or add to any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed. (2) Every such alteration or addition shall be read and explained to the accused."

The subsequent sections, namely, Ss. 228, 229, 230 and 231, Criminal P. C. are also of importance.

(11) According to S. 228, if the alteration or addition is such as is not likely, in the opinion of the Court, to prejudice the accused in his defence, the trial may proceed as if the new or altered charge had been the original charge. According to S. 229, if, in the opinion of the Court, the alteration or amendment is likely to prejudice the accused or the prosecutor, the Court may either direct a new trial or adjourn the trial for such period as may be necessary. According to S. 230, if the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with unless such sanction is obtained.

According to S. 231,

"whenever a charge is altered or added to by the Court after the commencement of the trial, the

prosecutor and the accused shall be allowed to re-call or re-summon, and examine with reference to such alteration, or addition, any witness who may have been examined and also to call any further witness whom the Court may think to be material."

It would thus appear that the power of the Court to alter or add to, any charge is very wide and so far as the Court of Session is concerned, such alteration or addition can be made before the verdict of the jury is returned or the opinions of the assessors are expressed.

(12) On a perusal of these sections it does not appear that the intention of the legislature was that the Court of Session cannot make any alteration or addition to a charge framed by the committing Magistrate unless it is supported by the evidence recorded before the committing Magistrate. In a Sind case — 'Dodo v. Emperor', AIR 1915 Sind 50 (F), these two cases were considered and the view expressed by the Calcutta and Madras High Courts was not accepted. I respectfully agree with the reasoning adopted by the learned Judges who decided that case.

They have referred to an Allahabad case — 'Queen-Empress v. Gordon', 9 All 525 (G). In that case, charges under Ss. 467 and 471, Penal Code had been framed against the accused. A number of witnesses was called in support of the charges. When the case for the prosecution had concluded and the prisoner had made a statement, it was submitted by counsel for the accused that there was no case to go to the jury upon either of the charges. After hearing the public prosecutor, the Judge directed the clerk of the Crown to add a charge of fabricating false evidence under S. 193, Penal Code with reference to the provisions of S. 227, Criminal P. C. The objection that the court could not add another charge was overruled and a charge under S. 193, was added and on that charge he was found guilty and convicted.

(13) Another case — 'Emperor v. Stewart', AIR 1927 Sind 28 (H), was cited before me by learned counsel for the applicant. This case was also decided by the Judicial Commissioner's Court at Sind. In this case the Sessions Judge had refused to frame a charge at the suggestion made by the prosecution. Ultimately the accused was acquitted on the charge already framed against him. There was an appeal against the order of acquittal and it was said that the Judge was wrong in refusing to amend a charge at the suggestion made by the prosecution. The judgment shows that what the court considered was whether the discretion exercised by the Sessions Judge was or was not correct and whether the accused would or would not be prejudiced in his trial by the suggested amendment of the charge; the power of the Judge to amend the charge was not questioned, although one of the Judges who decided the case expressed a doubt as to whether the Sessions Court had jurisdiction to add or substitute a new charge on fresh evidence led or to be led in the Sessions Court for the first time.

(14) Having regard to the generality of the provisions of S. 227 and the subsequent sections, namely, Ss. 228, 229, 230 and 231, Criminal P. C., my view is that the alteration made by the learned Assistant Sessions Judge in the charges framed against the applicant was in accordance with law. It will be noted that they clearly relate to the original charges and cannot be said to have been based on entirely new evidence. The Judge has also taken ample precaution to avoid any prejudice being caused to the applicant and has allowed him to cross-examine the prosecution witnesses afresh and to produce such evidence in his defence as he may consider proper.

(15) One other point has also been raised on behalf of the applicant and it is this. It appears from the order of the learned Assistant Sessions Judge that the evidence recorded by the Committing Magistrate was very sketchy and that all the documents which should have been exhibited in the case were not exhibited before him. Some further witnesses had also to be examined in the Sessions Court. It is said that the commitment was, therefore, defective and that it should for that reason be set aside. But, in my view, this cannot be done. Under S. 537, Criminal P. C., no finding or sentence or order passed by a court of competent jurisdiction can be reversed or altered on appeal or revision on account of any error, omission or irregularity in the order, judgment or other proceeding before or during trial or in any inquiry or other proceeding under the Code of Criminal Procedure, unless such error, omission or irregularity has, in fact, occasioned a failure of justice.

There is nothing to indicate that the alleged irregularity on the part of the committing Magistrate has prejudiced the applicant in any way. As a matter of fact, this point was not even raised in the grounds of revision either before the learned Sessions Judge or in this Court. The evidence of the witnesses was recorded in his presence in the Court of Session and he was given full opportunity to cross-examine them. After the alteration of the charges too he is to be given a further opportunity to cross-examine the prosecution witnesses and to produce such evidence as he may desire.

(16) For the reasons given above, I dismiss the applications in revision. Let the records be returned so that the cases may now proceed without any further delay. The orders staying the proceedings are discharged.

(17) A certificate that these are fit cases for appeal to the Supreme Court is asked for but is refused.

B/D.H.Z. Revision dismissed.

A.I.R. 1954 ALLAHABAD 559 (Vol. 41, C.N. 221)

LUCKNOW BENCH — RANDHIR SINGH J. (2-12-1953)

Haji Muzahir Ali, Plaintiff-Appellant v. Lachman Prasad and others, Defendants-Respondents.

Misc. Appeal No. 18 of 1948, against decree of Dist. J., Barabanki, D/- 6-2-1948.

(a) Civil P. C. (1908), S. 151, O. 41 R. 23 (Allahabad), O. 43 R. 1 — Appeal against order of remand.

A remand not made under the provisions of O. 41 R. 23 or under O. 41 R. 25 would be a remand under the inherent powers of the appellate Court and as such an appeal would not lie against such an order of remand. The amended rule 23 of O. 41 clearly shows that wherever it is found that all points arising in the case have not been decided by the trial Court, it would be open to the appellate Court to remand the case under O. 41 R. 23. A remand under O. 41 R. 23 would, therefore, be competent even if an issue has not been specifically framed but the question did arise and has been left

undecided and an appeal against the order of remand passed by the lower appellate Court would be competent. 1943 Oudh WN 310, Disting. (Para 5)

Anno: Civil P. C., S. 151 N. 2(4) (See also O. 41 R. 23 N. 10).

1953 Mulla: S. 151, P. 476 N. "Inherent .... Court" Pt. (t), O. 41 R. 23 P. 1211 N. "Inherent .... irregularity" O. 41 R. 33 P. 1229 N. "Remand", O. 42 R. 1 P. 1231 N. "Inherent .... appeal" (4 Pts. extra in N. 10 to O. 41 R. 23 in AIR Com. — Views of Nagpur, Oudh, Rangoon and Sind not noticed in Mulla).

Civil P. C., O. 41 R. 23 N. 21.

1953 Mulla: O. 41 R. 23, P. 1213 N. "Appeal" (5 Pts. extra in N. 21 to O. 41 R. 23 in AIR Com. Lahore, Nagpur, Oudh, Rangoon and Madras views on pt. (t) not noticed in Mulla — AIR 1929 Cal 689 (FB) criticising the previous view in 32 Cal 1023 (1029) (DB), not noticed in N. 21 to O. 41 R. 23 in AIR Com.).

Civil P. C., O. 41 R. 23 N. 22.

1953 Mulla: O. 41 R. 23 P. 1213 N. "Appeal .... power" (Pts. 3 to 8 extra in N. 22 to O. 41 R. 23 in AIR Com.).

(b) Civil P. C. (1908), O. 34, R. 1 — Non-joinder of subsequent mortgagee.

A prior mortgagee, who omits to implead a subsequent mortgagee and obtains a decree and then gets the property sold and enters into possession of the property, is entitled to set up his mortgage in defence, though right to enforce it may be time-barred. The subsequent mortgagee, however, cannot be compelled to redeem the earlier mortgage and it is only if he institutes a suit that the prior mortgagee, omitting to implead the subsequent mortgagee, can set up a mortgage as a shield.

The plaintiff was in possession of the land in dispute under a possessory mortgage made in 1928. The mortgage held by the defendants was a simple mortgage executed in 1923, and on the basis of their earlier mortgage, they obtained a decree. They did not implead the subsequent usufructuary mortgagee. They put their decree into execution and the collector without considering the claims of the usufructuary mortgagee who was not party to the execution proceedings, ordered a self-liquidating mortgage to be granted to the defendants and luckily for themselves, defendants obtained actual possession.

Held that defendants were not entitled to get into possession of the property which was in the possession of the subsequent mortgagee as an usufructuary mortgagee and their possession on the property though obtained under colour of a self-liquidating mortgage was unlawful. Though the prior mortgagee was in possession of the property and the plaintiff, who was a subsequent mortgagee, had filed a suit for possession, the plaintiff should not be asked to redeem the mortgage held by defendants. The plaintiff was entitled to a decree for possession. AIR 1940 Mad 646; AIR 1933 All 412, Rel. on. (Paras 7, 8)

Anno: C. P. C., O. 34, R. 1 N. 19.

1953 Mulla: O. 34 R. 1 P. 1083 N "Consequences .....non-joinder" (Various conflicts noticed in N. 19 to O. 34 R. 1 in AIR Com. not noted in Mulla. For example see Pts. 8 to 10a in N. 19 to O. 34 R. 1 in AIR Com. — Discussion in AIR Com. exhaustive and illustrative.)

CASES REFERRED: Paras

(A) ('43) 1943 Oudh WN 310 5

(B) (V27) AIR 1940 Mad 646: 1940-1 Mad LJ 740 7

(C) (V20) AIR 1933 All 412: 145 Ind Cas 304 7

M. L. Trivedi and B. K. Dhaon, for Appellant; H. D. Srivastava, for Respondents 1 and 2.

JUDGMENT: This is a plaintiff's appeal against the judgment of the District Judge of Barabanki who allowed the appeal instituted by the defendants against the decree of the Munsif of Barabanki in a suit for possession.

(2) In order to appreciate the controversy in this case, a brief reference to facts may be made at the outset. One Irshad Husain made a simple mortgage of his property on 10-7-1923, in favour of defendants 1 and 2. He subsequently made a usufructuary mortgage of the property in favour of the appellant on 13-1-1928, but this is not very relevant for the purposes of this appeal. The defendants 1 and 2, who were the simple mortgagees, obtained a decree on the basis of their mortgage dated 10-7-1923 against the mortgagor but in the suit, however, they failed to implead the subsequent usufructuary mortgagee, who is the appellant in the present appeal. After obtaining the decree on the basis of the prior mortgage dated 10-7-1923, defendants 1 and 2 put it into execution against the mortgagor and this execution was transferred to the Collector.

The Collector granted a self-liquidating mortgage for 20 years in respect of the property under S. 17 of the Debt Redemption Act, and in execution of this order the defendants 1 and 2 on 21-9-1945, obtained actual possession of the plots which were in the possession of the appellant. The appellant filed an objection under O. 21, R. 100, C. P. C. but this objection was dismissed and he was ordered to seek his remedy in the proper forum. He then instituted the suit which has given rise to this appeal on 17-10-1946.

(3) Defendants 1 and 2 contested the suit and contended that they were entitled to use their earlier mortgage as a shield in defence of the suit for possession although they did not implead the plaintiff, who was the subsequent transferee in the suit brought by them on the basis of their mortgage. It was further contended on their behalf that the plaintiff could not obtain possession of the property except on payment of the amount due to defendants 1 and 2 under the mortgage held by them.

(4) The learned Munsif who tried the case found in favour of the plaintiff and decreed the suit. The defendant, however, went up in appeal. The lower appellate court reversed the finding of the learned Munsif and came to the conclusion that the plaintiff ought to redeem the mortgage on the basis of which the self-liquidating mortgage was granted by the Collector in execution of the decree passed on the basis of that mortgage. He, therefore, remanded the case to the trial court with directions to find the amount payable by the plaintiff to the defendants under the prior mortgage. The plaintiff has come up in second appeal against this order of remand.

(5) A preliminary objection has been taken on behalf of the respondents on the ground that an appeal against the order of remand passed by the lower appellate Court was not competent. The learned counsel relies on the provisions of O. 41, R. 23 C. P. C. and it is contended that the case has not been decided by the trial court on any preliminary point and as such the remand made by the lower appellate Court should be deemed to be a remand under the inherent powers of that

Court and not under the provisions of O. 41, R. 23 C. P. C. It is now a well settled law that a remand not made under the provisions of O. 41, R. 23 or under O. 41 R. 25, C. P. C. would be a remand under the inherent powers of the appellate Court and as such an appeal would not lie against such an order of remand. The only point which arises for consideration, therefore, is whether the order passed by the lower appellate Court was an order under O. 41, R. 23, C. P. C.

The trial court had framed three issues in this case and one of the issues was:

"Is the plaintiff entitled to possession without paying the prior mortgage, as alleged?"

No issue was framed by the trial Court as to what amount was payable under the prior mortgage if the plaintiff was allowed possession on his paying off that mortgage. O. 41, R. 23 was amended by the Allahabad High Court and this rule as applicable to this State is as follows:

"Where an appellate Court has reversed a decree and all questions arising in the case have not been decided the appellate court may if it thinks fit....."

The amended rule, therefore, clearly shows that wherever it is found that all points arising in the case have not been decided by the trial court, it would be open to the appellate Court to remand the case under O. 41, R. 23, C. P. C. A remand under O. 41, R. 23 C. P. C. would, therefore, be competent even if an issue has not been specifically framed but the question did arise and has been left undecided. The contention of the learned counsel for the respondents that no issue has been left undecided has, therefore, no force.

Admittedly the question did arise in the Court below as to what amount would be payable in case the contention of the defendants that the plaintiff should pay up their mortgage before seeking possession was held to be well-founded and this question was not decided by the trial Court. It was precisely on account of this omission of the trial Court that the case had to be remanded by the lower appellate Court to the trial Court for a finding on this point when the lower appellate court came to the conclusion that the plaintiff was liable to redeem the mortgage held by the defendants before being put in possession of the property.

The ruling cited by the learned counsel for the respondents on this preliminary point, — 'Barkat Beg v. Azim', 1943 Oudh W. N 310 (A), is of no assistance to him. In the reported case no question had been left undecided by the trial court and it was held that the remand was not one under O. 41, R. 23 C. P. C. but one under S. 151 C. P. C. and as such an appeal was not competent. In the present case a question had definitely been left undecided by the trial court and the order of remand passed by the lower appellate court was evidently under the provisions of O. 41, R. 23, C. P. C. The preliminary objection raised by the respondent has, therefore, no merits.

(6) The only point pressed on behalf of the appellant in this case is that the lower appellate Court was in error in forcing the plaintiff to redeem the mortgage held by the defendants. The facts of this case are somewhat unusual and no authority bordering on the point in issue in this case has been cited by learned counsel for the parties. It is not disputed that the plaintiff was in possession of the land in dispute under a possessory mortgage made by Irshad Husain in 1923. The mortgage held by the defendants was a simple mortgage executed in 1923. No doubt the defendants were earlier mortgagees but they were simple mortgagees and on the basis of their earlier mortgage, they obtained a decree. In execution of this decree, they were certainly entitled to put the whole of the mortgage property to auction but as they did not implead the subsequent usufructuary mortgagee, they could not obtain actual possession of the property. They put their decree into execution and the Collector without considering the claims of the usufructuary mortgagee who was no party to the execution proceedings, ordered a self-liquidating mortgage to be granted to the defendants and luckily for themselves, defendants 1 and 2 obtained actual possession of the plots.

(7) The lower appellate court has put defendants 1 and 2 on the same plane as a prior mortgagee getting into possession of the property in execution of his decree. It is now well settled law that a prior mortgagee, who omits to implead a subsequent mortgagee and obtains a decree and then gets the property sold and enters into possession of the property, is entitled to set up his mortgage in defence, though right to enforce it may be time-barred vide — 'Sengamuthu Gounder v. Thayarammal', AIR 1940 Mad 646 (B) & — 'Sarda Prasad v. Kanhai Lal', AIR 1933 All 412 (C). The subsequent mortgagee, however, cannot be compelled to redeem the earlier mortgage and it is only if he institutes a suit that the prior mortgagee, omitting to implead the subsequent mortgagee, can set up a mortgage as a shield.

(8) In the present case defendants 1 and 2 were not entitled to get into possession of the property which was in the possession of the subsequent mortgagee as an usufructuary mortgagee and his possession on the property though obtained under colour of a self-liquidating mortgage is unlawful. He would be on the same level as a prior mortgagee entering into forcible possession of the property in the possession of a subsequent usufructuary mortgagee. The mere fact that somehow the prior mortgagee has succeeded in entering into possession of the property would not give him the same status as would be available if a prior mortgagee gets into lawful possession of the property. The prior mortgagee gets all the rights of the mortgagor by putting his mortgage into effect without impleading the subsequent mortgagee, but even the mortgagor was not entitled to take possession of the property in the possession of the subsequent mortgagee except in due course of law.

I am unable to agree with the view taken by the lower appellate court that as the prior mortgagee is in possession of the property and the plaintiff, who is a subsequent mortgagee, has filed a suit for possession, the plaintiff should be asked to redeem the mortgage held by defendants 1 and 2. The learned District Judge has observed that it was not open to defendants 1 and 2 to successfully defend a suit if brought by the plaintiff under Section 9 of the Specific Relief Act, but as the suit which has given rise to this appeal was a regular suit, it was open to defendants 1 and 2 to set up their mortgage. As remarked above defendants 1 and 2 were not in lawful possession of the property, as they were not entitled to oust the plaintiff under the decree obtained by them on the basis of their earlier mortgage without impleading the subsequent mortgagee. The plaintiff asked for the simple relief of possession on the allegations that defendants 1 and 2 have entered into possession without any right inasmuch as the decree obtained by defendants 1 and 2 could not be executed against the plaintiff who was no party to the decree obtained by defendants 1 and 2.

The view taken by the trial court appears to me, therefore, to be the correct view and the plaintiff was entitled to a decree for possession against defendants 1 and 2 as he was wrongfully dispossessed by them.

(9) As a result the appeal is allowed and the plaintiff's suit for possession is decreed with costs in all the courts. Leave to appeal under Chap. 8, Rule 5 of the Rules of Court is granted.

B/D.H.Z. Appeal allowed.

A.I.R. 1954 ALLAHABAD 562 (Vol. 41, C.N. 222)

DESAI AND BEG JJ. (10-2-1954)

Rama Shanker Tewari, Applicant v. State.

Criminal Revn. No. 1033 of 1951, against order of Sessions Judge, Azamgarh, D/- 11-6-1951.

(a) General Clauses Act (1896), S. 6(d) — Repeal of Act 23 of 1931 by Act 56 of 1951 — Effect on conviction under repealed Act.

The Indian Press (Emergency Powers) Act, 1931, is repealed by the Press (Objectionable Matters) Act, (56 of 1951) and is no longer in force. But the repeal does not affect the conviction of the applicant under the repealed Act. (Para 3)

Anno: Gen. Cls. Act, S. 6 N. 4.

†(b) Press (Emergency Powers) Act (1931), Ss. 15, 18 — Validity — (Constitution of India, Art. 19(1) (a) and 19(2) (Before and after amendment).

Sections 15 and 18 of Act 23 of 1931 provide for the obtaining of a permit by every person who wants to publish any news sheet and for punishment for making, selling, distributing and keeping for sale, distribution etc. any unauthorised news sheet. This is prior restraint or censorship on the publication of news sheets and amounts to an infringement of the freedom of speech and expression guaranteed under Art. 19(1)(a). The provisions would, therefore, be valid after 26-1-1950, only if they are covered by the saving clause in Art. 19(2). Case law referred. (Para 7)

The law that is saved by Art. 19(2) is one that relates exclusively, or at least principally, to any of the matters specified therein. The object of the impugned Act is stated to be "to provide for the better control of the press". Thus the express object of the Act has nothing to do with the security of the State. Besides, it is only one of the several objects to be achieved by the Act. (Para 7)

Even if it be said that the object behind the impugned provisions was to control matters which may undermine the security of, or tend to overthrow, the State, they cannot be said to relate to such matters. The impugned Ss. 15 and 18 are not confined to documents containing only the objectionable matters, but govern all news sheets regardless of their contents. Merely because they apply to all news sheets including those containing matters which undermine the security of; or tend to overthrow, the State, they cannot be said to relate to matters undermining the security etc. and are not saved by Art. 19(2). The sections have thus become void on 26-1-1950. (Paras 7, 9)

Further the impugned provisions are not even covered by the amendment in Art. 19 (2). It cannot be said that the restrictions imposed by the sections are reasonable, because S. 15 confers absolute discretion to the District Magistrate to grant or refuse permit to any one and there is absolutely nothing to guide him in his discretion. Another reason is that the section does not require the District Magistrate to give any reason for his order and no judicial review is provided against it. Therefore, the amendment in Art. 19(2) does not help and does not save the Act from becoming void under Art. 13. Case law referred. (Para 12)

Anno: Const. India, Art. 19 N. 27, 28.

(c) Constitution of India, Art. 13 — Invalidity of part of law — Effect — (Press (Emergency Powers) Act (1931), Ss. 15, 18).

Article 13(1) does contemplate the judging of the constitutionality of an enactment in parts. An existing law does not become wholly void under it because it is inconsistent with the provisions of Part III of the Constitution. If there is inconsistency, the law is void only to the extent of such inconsistency; the other law remains intact. AIR 1951 Mad 70 (SB) and AIR 1951 Pat 12 (SB), Ref. (Para 7a)

It may not be necessary or even possible in every case to consider all the provisions of an enactment together. If an enactment relates to only one matter that can be done; but if it relates to several distinct matters, then some provisions cannot be considered along with others. In such a case, it is not possible to take the Act as a whole and to find whether the whole of it is constitutional or not. It is possible that some parts of it are constitutional, but others are not. (Para 7a)

Held, that the constitutionality of Ss. 15 and 18 of the Press (Emergency Powers) Act, 1931, did not depend on the constitutionality of the other provisions, as the sections formed a separate part of the Act. (Para 7a)

Anno: Const. Ind., Art. 13 N. 5.

(d) Constitution of India, Art. 19(2) (before amendment) — Law relating to — Meaning — (Words and Phrases).

The expression 'law relating to' contemplates that the relation must be real, reasonable and proximate and not far fetched or problematical. AIR 1950 FC 67 and AIR 1951 SC 118, Rel. on. (Para 8)

(e) Constitution of India, Art. 20 — Law in force — Meaning — (Words and Phrases).

The expression "Law in force" in Art. 20 means "law actually in force and not law deemed to be in force by retrospective operation of an amendment. (Para 10)

Anno: Const. Ind., Art. 20 N. 3 Pt. 20.

†(f) Press (Emergency Powers) Act (1931), Ss. 15, 18 — Possession of unauthorised news sheets on 11-6-50 — Conviction under S. 18 on 23-2-1951 — Validity — (Constitution of India, Arts. 19, 20).

As Ss. 15 and 18 of the Act became void on 26-1-1950 as infringing provisions of Arts. 19(1)(a) and 14 and not being saved by the provisions in Art. 19(2), either before or after the amendment, the accused committed no offence by having in his possession the news sheets on 11-6-1950. Even if the impugned provisions were valid by virtue of the amendment to Art. 19, the applicant could not be convicted for doing the act before the

Article was amended, as there is nothing in the amendment to suggest that Art. 20 was not to apply or that a person could be convicted for violating an Act that had actually become void but is now deemed not to have become void. It is a well known principle that no greater retrospective effect should be given to an Act than is warranted by its language. (Paras 9, 10, 15)

†(g) **Press (Emergency Powers) Act (1931), Ss. 15, 18 — Validity — (Constitution of India, Art. 14).**

It is not necessary that the legislature should have intention to deny the equal protection of the law. Even if this denial results from or arises on the express terms of the statute itself, it is void and if a selection is left to absolute and unfettered discretion of the executive government with nothing to guide or control its action, it is arbitrary selection. AIR 1952 SC 75, Rel. on. (Para 14)

Sections 15 and 18 of the Act contravened Art. 14 of the Constitution as they divided the public into two classes, one of persons who could publish news sheets without being liable to be punished and the other of others who could not publish news sheets without such liability. S. 15 itself brought into existence these two classes by directing District Magistrates to permit some persons to publish news sheets. There was nothing to guide the District Magistrates in putting persons in one class or the other. The consequence was that some persons became liable to be punished for doing an act for which others were not liable. There was thus a denial of the equal protection of laws brought into existence by these provisions and hence they are void under Art. 14. Case law referred. (Para 13)

Anno: Const. Ind. Art. 14 N. 25, 42.

CASES REFERRED: Paras

(A) (1930) 283 US 697: 75 Law Ed 1357 5, 6, 12
(B) (1940) 303 US 444: 82 Law Ed 949 5, 6, 12
(C) (1951) 343 US 495: 96 Law Ed 1098 5, 6, 12
(D) (1939) 84 Law Ed 155: 308 US 147 5, 6
(E) (1950) 334 US 558: 92 Law Ed 1574 6, 12
(F) (1951) 348 US 290: 95 Law Ed 280 6
(G) (1914) 236 US 230: 59 Law Ed 552 6
(H) (V38) AIR 1951 Mad 70: 1951-1 Mad LJ 115 (SB) 7a
(I) (V38) AIR 1951 Pat 12: 52 Cri LJ 309 (SB) 7a
(J) (V38) AIR 1951 Pat 75: 52 Cri LJ 799 (SB) 7a
(K) (V37) AIR 1950 SC 124: 1950 SCR 594: 51 Cri LJ 1514 (SC) 8
(L) (V36) AIR 1949 All 513: 1949 All LJ 397: 50 Cri LJ 798 (FB) 8
(M) (V37) AIR 1950 FC 67: 51 Cri LJ 1011 (SC) 8
(N) (V38) AIR 1951 SC 118: 1950 SCR 759 (SC) 8, 12
(O) (V40) AIR 1953 SC 394: 1953 Cri LJ 1480 10
(P) (1951) 343 US 960: 96 Law Ed 1359 12
(Q) (V40) AIR 1953 SC 373: 1953 SCR 1049 (SC) 12
(R) (V39) AIR 1952 SC 196: 1952 Cri LJ 966 (SC) 12
(S) (1885) 30 Law Ed 220: 118 US 356 13
(T) (V39) AIR 1952 SC 75: 1952 Cri LJ 510 14
(U) (1943) 88 Law Ed 497: 321 US 1 14
(V) (1945) 328 US 80: 90 Law Ed 1096 14

S. N. Dwivedi, for Applicant; K. L. Misra Advocate General and Sri Ram Dy. G. A. for the State.

DESAI J.:

This is an application in revision against conviction under section 18 of the Indian Press (Emergency Powers) Act (Act No. 23 of 1931). There is no dispute about the facts; the conviction is challenged on the ground that the Act was unconstitutional and became void on the passing of the Constitution. On a search of the applicant's house on 11-6-1950 in execution of a search warrant issued by the District Magistrate of Azamgarh cyclostyled leaflets were recovered. Some leaflets contained the constitution of the United Provinces Khet Majdoor Union, some were entitled "Conspiracy of Great Britain and America to start third world War" and the others contained communist propaganda. The name of the printer was not printed on any of them.

(2) Section 15 of the Act lays down that a District Magistrate may

"by order in writing and subject to such conditions as he may think fit to impose, authorise any person by name to publish a news sheet, or to publish news sheets from time to time".

A news sheet is defined in S. 2 of the Act to mean

"any document other than a newspaper containing published news or comments on public news or any matter described in sub-sec. (1) of S. 4".

It was admitted before us by Shri S. N. Dwivedi that the documents recovered from the possession of the applicant contained public news or comments on public news and are news sheets as defined in the Act. It is therefore not necessary for us to deal with S. 4(1). "Any news sheet other than a news sheet published by a person authorised under S. 15 to publish it" is an unauthorised news sheet. Section 18 makes anyone who sells, distributes or keeps for sale or distribution any unauthorised news sheets punishable with imprisonment extending to six months or with fine or with both.

It is conceded that nobody was authorised by the District Magistrate to publish the news sheets that were recovered from the applicant's possession. So they were unauthorised news sheets. It is also conceded that the applicant made or kept for distribution or publication the unauthorised news sheets; he was, therefore, liable to be convicted under S. 18 if the Act was validly in force on 11-6-1950. It was contended, however, that it became void under Art. 13 of the Constitution as soon as the Constitution came in force.

(3) All laws in force immediately before the commencement of the Constitution, in so far as they are inconsistent with Arts. 14 to 35, to the extent of such inconsistency, are void under Art. 13. Under Art. 19(1)(a) "all citizens shall have the right to freedom of speech and expression". As the Article stood on 11-6-50 this freedom was subject to the right of the State to make any law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State. The Article was amended on 18-6-1951, that is, after the commission of the alleged offence by the applicant. The effect of the amendment is that the freedom of speech and expression is subject to the right of the State to make any law which imposes "reasonable restrictions" on the exercise of the right "in the interests of the security of the State or public order" etc.

It is further laid down in the amendment that no law in force immediately before the commencement of the Constitution which is consistent with Article 19 as amended shall be deemed to be void or ever to have become void on the ground only that being a law which takes away or abridges the

freedom of speech and expression, its operation was not saved by clause (2) of the Article as originally enacted. In other words, the amendment of Art. 19 has been given retrospective effect. Article 14 enjoins upon the State not to deny any person "the equal protection of the laws". Article 20 is to the effect that

"no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence".

The Indian Press (Emergency Powers) Act was repealed by the Press (Objectionable Matters) Act (No. 56 of 1951) and is no longer in force. But the repeal does not affect the conviction of the applicant if it was valid.

(4) It was contended on behalf of the applicant that Ss. 15 and 18 of the Act were unconstitutional and became void under Art. 13, because they abridged the freedom of speech and expression, were not a law relating to any matter which undermines the security of, or tends to overthrow, the State and denied the equal protection of the laws. With reference to the amendment of Art. 19 after the commission of the offence (and even the conviction by the Magistrate), it was contended that the restrictions imposed by Ss. 15 and 18 upon the freedom of speech and expression were not reasonable and were not imposed in the interest of the security of the State and were therefore not covered by the saving clause. It was further contended that if the sections became void on 26-1-1950 on the passing of the Constitution, and consequently the act done by the applicant on 11-6-1950 was not an offence, the retrospective effect given to the amendment of Art. 19 did not have the effect of converting the act into an offence in contravention of the provisions of Art. 20. The contention was that if the act when it was done was not an offence the applicant could not possibly be convicted for doing the act.

(5) It was not disputed that the freedom of speech and expression includes liberty of the press. Amendment 14 of the American Constitution is that no State shall deprive any person of life, liberty or property without due process of law or deny to any person the equal protection of the laws. It has been held in — 'Near v. Minnesota Ex. Rel. Olson', (1930) 283 US 697 (A); — 'Lovell v. Griffin', (1940) 303 US 444 (B) and — 'Burstyn v. Wilson', (1951) 343 US 495: 96 Law Ed 1098 (C), that liberty of the press and of speech is within the liberty safeguarded by the 14th Amendment. In — 'Schneider v. Irvington', (1939) 84 Law Ed 155 (D), it was stated:

"This court has characterised the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses.... the importance of preventing the restriction of enjoyment of these liberties" (pages 164-165 of the Lawyers' Edition).

"Freedom of the press and freedom of speech are the same, being distinguished only in the form of utterance. The 'liberty of the press' is not confined to newspapers and periodicals, but necessarily embraces pamphlets, leaflets and every sort of publication affording a vehicle of information and opinion".

(16 Corpus Juris Secundum, Constitutional law, paragraph 213)

(6) The First Amendment of the American Constitution prohibits the Congress from making any law "abridging the freedom of speech or of the press". It is supposed to have the same scope as the due process clause of the 14th Amendment, the difference being that it imposes a restriction on the powers of the Congress, while the 14th Amendment imposes a restriction on the powers of the States. The amendments are held not to create any rights or privileges of personal liberty but only to protect those which people already have, by giving them an immunity against governments. It is stated by Willis on Constitutional Law, p. 490 that

"since freedom from censorship had become a privilege of Englishmen long before our Revolutionary War, it certainly must be held that the First Amendment intended to guarantee at least freedom from censorship."

The guarantee from freedom from censorship, however, does not mean as much as the uninformed might at first think. The limitation is only against legal censorship, that is, censorship which depends upon the power of law. Further the guarantee does not give complete protection against even legal censorship. Willis writes on page 491(17) that there are so many exceptions to the rule of immunity against censorship that not a great deal of the rule is now left. Among the exceptions are the many forms of censorship exercised by courts of equity jurisdiction, and prohibition by legislation of intimidation by speech and writing, publication of indecent matter, Government employees' engaging in political activities & publications dangerous to the conduct of military operations in war time. These exceptions constitute important qualifications of the rule against censorship but outside of them it may be said that the people of United States are guaranteed freedom of speech and of the press immune from censorship.

It is settled that freedom of speech and of the press means something more than immunity from previous restraints. According to Corpus Juris Secundum Vol. 16, "Constitutional Law" paragraph 213, the chief purpose of the constitutional guarantees is to prevent previous restraints or censorship on speech or press, that the guarantees are not intended to constitute an absolute licence to speak and to publish anything that one pleases that they rank no higher than other rights protected by the constitution, that the right is to be enjoyed subject to implied limitations, that is, limitations created by statutes enacted in exercise of the Government's power of taxation or in the legitimate exercise of the police powers, or by the inherent powers of the court to punish for contempt or by the law relating to libel and slander. In — 'Near v. Minnesota', (A) C. J. Hughes stated at p. 713:

"It is the chief purpose of the guarantee to prevent previous restraints upon publication",

and pointed out that while in England the executive has no power to impose restraint upon publication though the legislature can impose it, in the United States even the legislature cannot impose it, being prohibited by the Amendments. He referred to the statement in 4 Black's Commentaries pp. 151 and 152 to the effect that

"the liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censor for criminal matter when published."

In that case a State had passed an Act providing for an injunction against publishing or selling newspapers containing obscene malicious or defamatory matter. The Supreme Court held the Act to be unconstitutional as infringing the liberty of the press. In — 'Lovell v. Griffin', (B) an ordi-

nance making it an offence for any one to distribute circulars etc., without permission from the City Manager was held to be unconstitutional. It was pointed out that the ordinance in its broad sweep prohibited distribution of magazines, periodicals etc., was not limited to literature that was obscene or offensive to public morals and struck "at the very foundation of the freedom of the press by subjecting it to licence and censorship".

In the case — 'Burstyn v. Wilson', (C) it was held that a State cannot ban a film on the basis of a censor's certificate that it is sacrilegious. The statute under consideration required denial of licence if a film was sacrilegious. Clark, J. following 'Near's case', (A) observed at page 1106:

> "The statute involved here does not seek to punish, as a past offence, speech or writing falling within the permissible scope, of subsequent punishment.... Such a previous restraint is a form of infringement upon freedom of expression to be especially condemned."

In — 'Schneider's case', (D), it was held that:

> "To require a censorship through licence which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of constitutional guarantees."

In — 'Samuel Saia v. People of the State of New York', (1950) 334 US 558 (E), a municipal ordinance prohibiting the use of amplifying devices, except with the permission of the Commissioner of Police, was held to establish a previous restraint on the right to free speech. In 'Kunz v. New York', (1951) 348 US 290: 95 Law Ed. 280 (F), C. J. Vinson, following — 'Samuel Saia v. People of the State of New York', (E), observed at page 284 of the Lawyer's Edition:

> "..an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such the ordinance is clearly invalid as a prior restraint on the exercise of the First Amendment rights."

As against these authorities, there is — 'Mutual Film Corporation v. Industrial Commission of Ohio', (1914) 236 U.S. 230: 59 Law Ed. 552 (G), which upheld a State Act providing that the censors were to pass only such films as are of a moral, educational or entertaining & harmless character and making it an offence for any one to exhibit films without the censor's approval. It was held that the creation of a censor to examine and censor a film and to approve only such films as are of a moral .....character does not infringe the freedom of speech and publication. But McKenna, said on page 559:

> "Freedom of opinion and its expression, whether by speech, writing, or printing. They are too certain to need discussion....Nor can there be any doubt of their breadth, nor that their underlying safeguard is.....'that opinion is free, and that conduct alone is amenable to law'."

He based his decision on his view that guarantees of free opinion and speech cannot be extended to multitudinous shows which are advertised on bill boards and motion pictures cannot be brought "into practical and legal similitude to a free press and liberty of opinion" (p. 559), and that "the exhibition of moving pictures is a business, pure & simple". So even that case is no authority for the view that prior restraint or censorship is not an infringement of the freedom of speech and the press. The view that expression by means of motion pictures is not included within the free speech & free press guarantee of the Amendments was expressly overruled in the case of 'Burstyn' (C).

(7) Sections 15 and 18 of the Act under consideration provide for the obtaining of a permit by every person who wants to publish any news sheet and for punishment for making, selling, distributing and keeping for sale, distribution etc., any unauthorised news sheet. This is prior restraint or censorship on the publication of news sheets and amounts to an infringement of the freedom of speech and expression guaranteed under Art. 19 (1)(a). The provisions would, therefore, be valid after 26-1-1950, only if they are covered by the saving clause in Art. 19(2). I am considering for the present Art. 19(2) as it was originally enacted.

The only exception to the freedom of speech and expression is a law made by a State relating to certain specified matters. The only matter that is relevant to the enquiry before us is matter "which undermines the security of, or tends to overthrow, the State". If the impugned provisions of S. 15 can be said to be a law relating to such a matter, they would be saved. Originally the Act was enacted to provide

> "against the publication of matter inciting to, or encouraging, murder or violence."

The preamble of the Act was amended by the Criminal Law Amendment Act (No. 23 of 1932) and now the object of the Act is stated to be "to provide for the better control of the press". Thus the express object of the Act has nothing to do with the security of the State. Of course, security of the State would be one of the objects to be achieved by the Act, but it would be only one of the objects and there would be several other objects to be achieved by the Act. The law that is saved by Art. 19(2) is one that relates exclusively, or at least principally, to any of the matters specified therein. The very object behind specifying the matters is that the law must deal exclusively or principally with, those matters. Had the framers of the Constitution intended to save any general law which did not specifically deal with any of the matters, they would not have specified the matters. The impugned Act cannot possibly be said to relate to any matter which undermines the security of, or tends to overthrow, the State. Nor is keeping a press or publishing newspapers and periodicals such a matter. Even if it be said that the object behind the impugned provisions was to control matters which may undermine the security of, or tend to overthrow, the State, they cannot be said to relate to such matters. They do not relate any more to matters which undermine the security of, or tend to overthrow, the State than to matters which offend against decency or morality or to libel, slander and contempt of court, or as a matter of fact to any other matter which can be spoken or expressed.

The Act provides for demanding security from persons keeping printing presses or publishing newspapers, for the forfeiture of the security if the printing press is used for printing, or the newspaper contains, any words inciting to any cognisable offence involving violence or seducing any soldier, sailor etc., from the armed forces or bringing into hatred or contempt the Government established by law or promoting feelings of enmity or hatred between different classes of the subjects or prejudicing the recruiting of persons to serve in the forces or encouraging or inciting anyone to interfere with the administration of law or with maintenance of law and order, for keeping press or publishing newspaper without making deposit, for authorising persons to publish news sheets, for punishing selling, distributing or keeping for sale, distribution etc., unauthorised news sheets, for de-

claring certain publications as forfeited and for authorising customs and postal officers to detain packages containing newspapers or other documents of objectionable nature.

Section 4 is the only section which describes objectionable matters. I have given a summary of them above. It may be said that some of those matters undermine the security of, or tend to overthrow the State but the provisions relating to the objectionable matters come in for application only when the security furnished by a keeper of a printing press or a publisher of a newspaper is to be forfeited or when a Customs or Postal official has to decide whether to detain a package. So far as the demanding of the security itself is concerned, the demand has nothing to do with the objectionable matters; the security can be demanded from any keeper of a printing press or publisher. Any document which contains the objectionable matters is a news sheet, but any other document containing public news or comments on public news also is a news sheet. Therefore, the impugned provisions in Ss. 15 and 18 are not confined to documents containing only the objectionable matters, but govern all news sheets regardless of their contents. Merely because they apply to all news sheets including those containing matters which undermine the security of or tend to overthrow, the State, it cannot be said that they relate to matters undermining the security etc. They can be said to relate only to news sheets containing only particular matters.

(7a) The learned Advocate General contended that the word "law" in Art. 19(2) means the entire enactment and not a particular provision of it that is impugned. He contended that in order to decide whether an existing law is covered by the saving clause or not, the court must take into consideration the entire enactment and not only a particular provision of it in isolation. He pointed out that an enactment may contain some sections which are only incidental, auxiliary or collateral to or support, others which form the principal feature of the enactment and contended that it could not have been intended by the framers of the Constitution that they should be considered in isolation and that their constitutionality should be judged by deciding whether they themselves relate to any of the specified matters or not. He particularly referred to a provision common in many enactments conferring power upon an authority to make rules to carry out the purposes of the enactment; if that provision is considered in isolation, certainly it cannot be found to relate to any of the specified matters even though the principal provisions of the enactment do relate to them.

There is considerable force in the contention of the learned Advocate General, but it may not be necessary or even possible in every case to consider all the provisions of an enactment together. If an enactment relates to only one matter that can be done, but if it relates to several distinct matters, then some provisions cannot be considered along with others. The Act under consideration deals with several distinct matters; it deals with printing presses, with publication of newspapers and with publication of news sheets. In such a case, it is not possible to take the Act as a whole and to find whether the whole of it is constitutional or not. It is possible that some parts of it are constitutional, being saved by Art. 19(2), but others are not. The provisions relating to printing presses or to publication of newspapers may be found to be a law relating to matters which undermine the security etc., but it does not follow that the provisions relating to news sheets also are such a law. All provisions relating to news sheets may be considered together, but there is no justification for considering along with them the other provisions of the Act.

I may point out that the provisions relating to news sheets contained in Ss. 15 to 18 form a separate part of the Act under the heading "Nefarious news sheets and newspapers". They have no concern with any of the other provisions of the Act except that containing definitions. Article 13(1) does contemplate the judging of the constitutionality of an enactment in parts. An existing law does not become wholly void under it because it is inconsistent with the provisions of part III of the Constitution. If there is inconsistency, the law is void only to the extent of such inconsistency; the other law remains in tact. If an enactment in its entirety were to be found to relate, or not to relate, to any of the matters specified in Art. 19(2), the whole of it would be void or no part of it, and there would have arisen no question of its being void only to the extent of inconsistency.

Numerous instances can be quoted in which only particular provisions of enactments have been struck down as unconstitutional. In the Act under consideration itself the provisions of section 4 have been held to be unconstitutional as infringing the freedom of speech and expression; See — 'Srinivasa Bhat v. State of Madras', AIR 1951 Mad 70 (H), 'In the matter of the Bharati Press', AIR 1951 Pat 12 (SB) (I) and — 'Chander Deo v. State of Bihar', AIR 1951 Pat 75 (SB) (J). Therefore, the constitutionality of the impugned provisions does not depend on the constitutionality of the other provisions. They would be constitutional only if they are a law relating to any of the matters specified in Art. 19(2).

(8) In — 'Romesh Thappar v. State of Madras', AIR 1950 SC 124 (K), Patanjali Shastri, J. (as he then was) on p. 129 expressed the court's opinion as follows:

> "Unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under cl. (2) of Art. 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order. It follows that S. 9(1-A) (of the Madras Maintenance of Public Order Act, 1949) which authorises imposition of restriction for the wider purpose of securing public safety or the maintenance of public order falls outside the scope of authorised restrictions under cl. (2) and is therefore void and unconstitutional".

The same reasoning would apply in the present case to make Ss. 15 and 18 void and unconstitutional. In — 'Basudeva v. Rex', AIR 1949 All 513 (L), Basudeva was detained under S. 3(1) of the U. P. Prevention of Blackmarketing Act, 1948, and the question arose whether the Act was not ultra vires the State Legislature. It was contended on behalf of Basudeva that the Act was not covered by items 1 and 29 of list II of the Government of India Act because it was not with respect to preventive detention for maintenance of public order or to production, supply and distribution of goods. A Full Bench of this Court held that the Act was ultra vires because the words "for reasons connected with" must mean a real and genuine connection and not a fanciful or highly problematical connection. The decision was upheld by the Federal Court in — 'Rex v. Basudeva', AIR 1950

FC 67 (M) Patanjali Shastri, J. observed at page 69:

"The connection contemplated must.....be real and proximate, not far fetched or problematical".

The words that came in for interpretation there were, "for reasons connected with", whereas the words under interpretation in the instant case are "law relating to". The principle laid down by the Federal Court, however, is applicable in the instant case; the relation must be real and proximate and not far fetched or problematical.

The relation must be reasonable as pointed out by the Supreme Court in — 'Chintaman Rao v. Madhya Pradesh', AIR 1951 SC 118 (N). The State of Madhya Pradesh enacted Regulation of Manufacture of Biris Act, 64 of 1948, empowering District Magistrates to prohibit manufacture of biris during agricultural season in particular villages. The Act abridged the right conferred by Art. 19(1) (g) to practise any profession or to carry on any occupation, trade or business. Article 19(6) excepted from the operation of Art. 19(1) (g) any law imposing "in the interests of the general public" reasonable restrictions on the exercise of the right. The Supreme Court held that the restrictions imposed by the Act could not be said to be "in the interests of general public" because there was no reasonable relation between them and the general public. It may be that certain prohibition of manufacture of biris was in the interests of the general public; still the Act as a whole was held to be not in the interests of general public.

Requiring every person to obtain a permit for making or publishing or selling news sheets may in certain cases prevent the undermining of the security etc., but on that ground requiring every person to obtain a permit cannot be said to relate to a matter which undermines the security etc. The mere fact that objectionable as well as harmless news sheets were controlled by Ss. 15 and 18 does not mean that they were enacted with the object of preventing the undermining of the security of the State etc. As a matter of fact, the court is not concerned with the object behind an enactment; it is simply concerned with what matters it relates to. The object of an enactment is different from the matters to which it relates. So even if the object behind the impugned Act was to safeguard against the undermining of the security of the State etc., it might relate to matters which cannot be described as matters which undermine the security etc. Whatever might have been the object behind the Act, the matters to which it relates were printing and publishing of newspapers and news sheets and keeping printing presses.

It may be that better control of the press was essential for controlling acts which undermine the security of the State but that did not mean that the Act related to such matters. The fact that the legislature could not control objectionable news sheets unless it also controlled harmless ones did not change the nature of the matters to which it related. It might have been absurd to say that S. 15 should have required a permit for the publishing of news sheets which had a tendency to undermine the security etc., of the State (because no permit could possibly be granted for the publication of such news sheets) but the fact remains that the Act dealt with the publication of news sheets regardless of their contents. A law relating to publication of news sheets is not covered by the saving clause. I am, therefore, of the opinion that the impugned provisions of the Act were not a law relating to any matter which undermines the security of, or tends to overthrow, the State.

(9) The effect of the above finding is that the impugned sections become void on 26-1-1950. On 11-6-1950 there was no law, which required a permit for publication of news sheets or which punished keeping for sale or distribution or publication any news sheet published without a permit. It is not known when the news sheets recovered from the applicant's possession were published. If there were published before 26-1-1950, they required a permit for their publication. If no permit was obtained, they became unauthorised news sheets prior to 26-1-1950. Though S. 15 became void on 26-1-1950, the news sheets remained unauthorised news sheets. The passing of the Constitution made only S. 15 void; it did not have the effect of undoing anything that had been done under it. But as S. 18 also became void along with S. 15, the possession of the unauthorised news sheets was not an offence after 26-1-1950 and the applicant could not be punished. If the news sheets were published after 26-1-1950, then they did not even become unauthorised news sheets and even if S. 18 remained in force, the applicant committed no offence. The result was that the act committed by the applicant on 11-6-1950 was not an offence.

(10) Before I come to the question of the effect of the amendment of Art. 19, I would deal with the question whether that amendment has the retrospective effect which the learned Advocate-General wants to be given to it. I have found that on 11-6-1950 the applicant did not violate any law in force by keeping the news sheets in his possession. Under Art. 20, he cannot be convicted. The bar on his conviction is absolute. There is no way of getting over it. If the impugned provisions could be said to impose "reasonable restrictions" on the exercise of the right conferred by Art. 19(1)(a)

"in the interests of the security of the State, friendly relations with foreign States, public order, decency, or morality, or in relation to contempt of court, defamation or incitement to an offence,"

the amendment of the Constitution expressly laid down that they will not be deemed to be void, or even to have become void.

In other words, the amendment of the Constitution prevented the operation of Art. 13 and retained the provisions as a valid law. Actually the provisions had become void and remained void up to 17-6-1951, but since 18-6-1951 they became valid with retrospective effect. The result is that though they were void between 26-1-50 and 18-6-1951, whenever the question of their validity arises after 18-6-1951, they will be deemed to have been always valid. The applicant was convicted on 23-2-1951 on which date the provisions were actually void. Therefore, apart from the question of Art. 20, the Magistrate could not convict the applicant on 23-2-1951 and the conviction was illegal.

The applicant's appeal was dismissed by the Sessions Judge on 11-6-1951; even on that date the provisions were actually void and the conviction could not be maintained by the Sessions Judge. He ought to have set aside the conviction. There is nothing in the language of the amendment of the Constitution to suggest that the conviction illegally recorded by the Magistrate and by the Sessions Judge became valid. The amendment only kept the provisions alive, but did not convert illegal conviction into legal conviction or an innocent act into an offence. The amendment was

made in the face of the provisions of Art. 20; yet it did not save the operation of Art. 20. Therefore, Art. 20 remained in full force and must be given effect to. "Law in force" in that Article means "law actually in force and not law deemed to be in force by retrospective operation". In — 'Shiv Bahadur Singh v. State of Vindhya Pradesh' AIR 1953 SC 394 (O), Jagannadha Das, J. stated at page 398:

"'Law in force' referred to therein must be taken to relate not to a law deemed to be in force and thus brought into force but the law factually in operation at the time or what may be called the then existing law. Otherwise, it is clear that the whole purpose of Art. 20 would be completely defeated in its application.....Every such 'ex post facto' law can be made retrospective as it must be, if it is to regulate acts committed before the actual passing of the Act, and it can well be urged that by such retrospective operation it becomes the law in force at the time of the commencement of the Act."

That law was laid down before the amendment of the Constitution and it may be said that the Supreme Court did not deal with retrospective operation being given to a provision of the Constitution itself. It may be urged that previously the Constitution did not recognise law "deemed" to be in force and that when under the amendment it recognised law "deemed" to be in force, there has been a change in the circumstances in which the Supreme Court laid down the above law. Though there is considerable force in these arguments, I do not think that language of the amendment warrants the conclusion that the law that is prevented with retrospective effect from being void by the amendment is "law in force" within the meaning of Art. 20. There is nothing in the amendment to suggest that Art. 20 was not to apply or that a person can be convicted for violating an Act that had actually become void but is now deemed not to have become void. It is a well known principle that no greater retrospective effect should be given to an Act than is warranted by its language. Had the amendment laid down that a person who had violated the Act after 26-1-50 can be convicted on that Act being deemed not to have become void, then and then only was it possible to convict the applicant. The impugned provisions may be deemed to have always remained in force but that would be for all purposes except that of convicting persons. It is not possible to interpret the words "law in force" in Art. 20 to include the law deemed to be in force by a provision of the Constitution itself or to ignore the provisions of Art. 20 and to convict a person for an act which was not an offence when it was done. The amendment of the Constitution did not create new offences. The only effect of the retrospective operation given to it was that the laws that had become void did not require to be re-enacted. Unless the amendment was given retrospective effect and thereby laws were prevented from having become void at all, it would have become necessary for the legislatures to re-enact those laws after the amendment of the Constitution.

(11) There is really no conflict between the provisions of Art. 20 & the amendment of the Constitution & there is no necessity of deciding which provision should prevail over the other. Both the provisions can be given effect to simultaneously; they can be harmonised by saying that Art. 20 does not make an enactment invalid but simply prohibits conviction while the amendment makes an enactment valid but does not expressly lay down that a person can be convicted for violation of a law that had actually become void under Art. 13 but is deemed under the amendment not to have become void.

This matter has come before us in revision and we have to consider it from the point of view of the Magistrate who tried the case. On the date on which he convicted the applicant the impugned provisions had become void and had not been deemed not to have become void. He had, therefore, no option but to acquit him. That was also the situation before the learned Sessions Judge. Even if the Magistrate illegally convicted the applicant, he should have set aside the conviction. What we have to see is whether the order passed by him was legal or not. Had the matter come before us prior to 18-6-51, there would have been no difficulty and we would have set aside the conviction as soon as we found that the impugned provisions had become void on 26-1-50. The accident that it came before us after 18-6-1951 does not make any difference to the order that we ought to pass. In the absence of there having come into existence a law declaring that the applicant's conviction was valid, I think we are bound to do what the courts below ought to have done, namely to acquit the applicant. Even if the Magistrate had passed the judgment after 18-6-1951, he would have been bound to acquit the applicant; when he passed it before 18-6-1951, he was all the more bound to acquit him.

(12) In view of the above finding it may not be necessary to decide whether the impugned provisions are covered by the amendment in Art. 19 (2), but since the matter was argued at length before us, I think it proper to deal with it. It may be said that the restrictions imposed by the impugned provisions are in the interests of the security of the State etc. But the important question is whether they are reasonable. In my opinion, they are not. In the first place S. 15 confers absolute discretion to the District Magistrate to grant or refuse permit to anyone. There is absolutely nothing to guide him in his discretion. Not only are any standards laid down but also one cannot imagine any. It is not possible for us to say that when a person applies to a District Magistrate for a permit to publish a newspaper, he should grant it if certain circumstances exist and should refuse it if certain other circumstances exist. The provisions of S. 15 remind one of the following observation of Clark, J. in Burstyn's case (C):

"The censor is set adrift upon a boundless sea and a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxes" (P 1107).

The District Magistrate is in exactly the same position as the censor in 'Burstyn's' case (C). Even when a statute authorises refusal of licence if the authority is of the opinion that the film is of such a character as to be prejudicial to the best interests of the citizens, it can be struck down, as was done in — 'Gelling v. State of Texas', (1951) 343 US 960 (P). In — 'Thakur Raghubar Singh v. Court of Wards Ajmer', AIR 1953 SC 373 (Q), the Act provided that a landlord habitually infringing tenant's rights would be deemed to be disqualified within the meaning of a regulation and this was held to be not a reasonable restriction, one of the reasons given being that the ground was indefinite. Secondly the granting or refusal of permit is left to the subjective determination of the District Magistrate. That was another reason given in the above case.

Then the District Magistrate was not required to give any reasons for his order and no judicial review was provided against it. Howsoever arbitrarily or unreasonably he acted, a person aggrieved by his act had absolutely no remedy. Though S. 15 referred only to permitting persons to publish news sheets, it certainly contemplated permitting some and not permitting others. It certainly did not contemplate that every person should be permitted, (though different condition might be imposed upon different applicants). It was open to the District Magistrate to refuse permit to any applicant. Therefore, there was scope for a provision calling upon the District Magistrate to give reasons for refusing permit to any applicant. Absence of review, judicial or otherwise, of executive discretion is undoubtedly not an exceptional feature of a statute and a restriction may not be said to be unreasonable solely because no provision is made for review. But the absence of a provision for review is certainly a factor to be taken into consideration in deciding whether a restriction is reasonable or not.

I do not agree with the learned Advocate-General that the District Magistrate was bound to grant permit to everybody, that whatever discretion he had was only in selecting conditions to be imposed upon the applicants and that the discretion left with District Magistrate was so small that the legislature did not think fit to provide for a review of his order. The Act was permanent and not enacted to meet an emergency. It is immaterial if its title included the words "emergency powers", or if it was repealed in 1951. When it was enacted it was to remain in force for an indefinite period. Section 15 gave vast powers to the District Magistrate to impose any conditions he liked. The restriction imposed under it was of a preventive nature and not punitive. Making it an offence for anyone to say or write something would also be a restriction on his freedom of speech and expression, but there is a difference between such a restriction which is of a punitive nature and a restriction as in the instant case, which is of a preventive nature. If a person in exercise of his right of speech and expression says or writes something which harms others, let him be punished but there is no justification for requiring everybody to obtain a permit in advance for saying or writing anything. The restriction imposed in the instant case is too wide; it is not limited to objectionable news sheets only.

As I said above, it might have been meaningless for the legislature to lay down that no person can publish an objectionable news sheet without a permit but that would not make it reasonable to require every person wanting to publish a news sheet to obtain a permit. In the case of — 'Near (A)', the Statute was struck down because it did not aim at redress of individual wrong; but was directed also against publication of wholesome matter and its object was not punishment but putting the publisher under an effective censorship. In — '95 Law Ed 1196', there is an observation to the effect that "as regards freedom from censorship the scope of the constitutional protection is greater than as regards freedom from punishment". See also the observation of Clark, J. in — 'Burstyn's case (C)' quoted earlier.

In — 'Lovell's case (B)' it was pointed out that the impugned Act was not limited to literature that was obscene or offensive to public morals. In ' Chintaman Rao's case (N)', the Act was held to be drastic in scope and it was observed that if the restrictions are too wide and include reasonable and unreasonable restrictions or if there is the possibility of its being applied for non-sanctioned purposes, it is void. The Supreme Court on 11-1-54 declared the provision of cl. 4(3) of the U. P. Coal Control Order void, as composing an unreasonable restriction upon the freedom of trade on similar grounds. The Act held to be unconstitutional in — 'Saia's case (E)' did not lay down any standards to guide the discretion of the chief of the police and was not narrowed down to regulate hours or places of use of amplifying devices or the decibels to which they must be adjusted.

Section 15(2)(b) of Criminal Law Amendment Act (No. 14 of 1908) was declared by the Supreme Court to be unconstitutional because there was no provision for testing, in factual legal respects the grounds of imposition of the restriction and it was a permanent Act; see the — 'State of Madras v. V. G. Rao', AIR 1952 SC 196 (R). One or two of the reasons given above may not be conclusive but when all are taken into consideration there should be no hesitation in saying that the restrictions imposed by the impugned provisions were unreasonable. Therefore, the amendment in Article 19(2) did not help and did not save the Act from becoming void under Art. 13.

(13) The provisions also contravened Art. 14. They divided the public into two classes, one of persons who could publish news sheets without being liable to be punished and the other or others who could not publish news sheets without such liability. Section 15 itself brought into existence these two classes by directing District Magistrates to permit some persons to publish news sheets. There was nothing to guide the District Magistrates in putting persons in one class or the other. He could put any person in either class according to his caprice. The consequence was that some persons became liable to be punished for doing an act for which others were not liable. There was thus a denial of the equal protection of laws brought into existence by S. 15 itself.

It was conceded by the learned Advocate-General that a District Magistrate was not obliged to permit every one to publish a news sheet, but contended that mere refusal or mere contingency of refusal to permit a person did not amount to an inequality. He argued that no discretion vested in the District Magistrate to discriminate between one person and another or between one news sheet and another news sheet. The language of S. 15 does not support this contention. It allowed a District Magistrate to discriminate between two persons similarly circumstanced or between two news sheets having the same contents and to permit one person to publish news sheets and not the other or to permit the publication of one news sheet and not the other. There was absolutely nothing in S. 15 to prevent his doing so.

It cannot be said that the discrimination resulted from an act of the District Magistrate; if discrimination resulted, it resulted not because of any fault on the part of the District Magistrate but because the section itself permitted it. Had standards been laid down for his guidance and had he been required to grant a permit in certain circumstances or to refuse it in certain other circumstances, the legislature would have done all within its power to prevent discrimination and if still discrimination resulted, it would have been attributed not to the legislation but to an erroneous act of the District Magistrate. In — 'Yick Wo v. Hopkins', (1885) 30 Law Ed 220 (S), Matthews, J. observed with reference to ordinances vesting in

a board of supervisors a discretion of granting or withdrawing their assent to the use of wooden buildings:

"They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.....

x x x x

It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure." (page 225 of the Lawyers' Edition).

(14) In — 'the State of West Bengal v. Anwar Ali', AIR 1952 SC 75 (T), it was stated that it is not necessary that the legislature should have an intention to deny the equal protection of the law, that if this denial results from or arises on the express terms of the statute itself, it is void and that if a selection is left to absolute and unfettered discretion of the executive government with nothing to guide or control its action, it is arbitrary selection.

'Snowden v. Hughes', (1943) 88 Law Ed 497 (U) and — 'Queenside Hills Realty Co. v. Saxl', (1945) 328 U S 80 (V) relied upon by the learned Advocate-General are distinguishable. In the former case, it was observed that

"the unlawful administration by State officers of a State statute, fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection, unless there is shown to be present in it an element of intention or purposeful discrimination."

Here the provision itself was not fair on its face and if discrimination resulted it was not because of unlawful administration by the District Magistrate. All that was decided in the latter case is that

"lack of equal protection is found in the actual existence of an invidious discrimination, not in the mere possibility that there will be like or similar cases which will be treated more leniently."

The discrimination made by the impugned provisions actually existed when they were enacted. The amendment of the Constitution has no effect on a statute if it infringed the equal protection clause.

(15) I hold that Ss. 15 and 18 of the Act became void on 26-1-1950 as infringing provisions of Arts. 19(1)(a) and 14 and not being saved by the provisions in Art. 19(2), either before or after the amendment, that the applicant committed no offence by having in his possession the news sheets on 11-6-1950 and that, even if the impugned provisions were valid by virtue of the amendment to Art. 19, the applicant could not be convicted for doing the act before the Article was amended. He ought therefore to be acquitted.

(16) BEG, J.: I agree.

BY THE COURT:

(17) The application is allowed, the applicant's conviction and sentence are set aside, and he is acquitted.

(Certified under Art. 132(1) that the case involved a substantial question of law as to the interpretation of the constitution.)

A/D.R.R. Application allowed.

A.I.R. 1954 ALLAHABAD 570 (Vol. 41, C.N. 223)

B. MUKERJI J. (8-12-1953)

S. K. Dutt, Plaintiff v. Law Book Co. and others, Defendants.

Original Suit No. 9 of 1949.

Copyright Act (1914), Sch. I— Copyright Act, 1911, S. 2 — Law Commentary — Infringement of copyright — Common source — Copyright in selection.

An author of a law commentary cannot claim that once he quoted a passage in his book from either a decided case or a standard work then no one else has any right again to quote that passage. Otherwise the defence of "common source" can never be available to anyone. (Paras 10, 11)

It cannot be contended that by quoting a passage from a decision or from another work he is in effect "selecting" the passage and since the copyright law protects selection he is protected and nobody else can thereafter make the same selection. Only those selections are protected which the author makes for purposes of incorporating them in a book of "selections". It does not protect a selection which he makes for purposes of explaining a legal or a scientific proposition that he has to explain while writing a commentary for the other man who after the plaintiff writes a commentary on that subject must per necessity have to make the same selection. Decisions reported in law reports are 'common property' for commentators on the law, and they must per necessity have to have recourse to them because without reference to them no commentator can give to his readers a correct idea of the law. AIR 1924 PC 75, Explained. (Para 11)

In order to be an infringement of a man's copyright there must be a substantial infringement of the work. Fair dealing with any work has been kept out of the mischief of the Copyright Act. (Para 12)

The sameness of the thing delineated must produce similarity in delineation. The mere fact of resemblance is not in itself evidence of piracy where the subject dealt with is the same. (Para 36)

A publication of which the text consists of a reprint of passages selected for use from a work which does not enjoy the protection of copyright may be entitled to copyright, if the selection of the passages would require, for the purpose of effecting the object in view, accurate scientific knowledge, sound judgment, and literary skill, but the question what amount of such knowledge, judgment and skill is necessary in order to acquire copyright is a question of degree. In every case it must depend largely on the special facts of that case and must in each case be very much a question of degree. (Para 37)

Several persons may originate similar works in the same general form without anyone infringing the law in regard to copyright. The infringement comes in only when it can be shown that someone has, instead of utilizing the available sources to originate his work, appropriated the labours of another by resorting to a slavish copy or mere colourable imitation thereof. The 'animus furandi', that is an intention to take from another for purposes of saving labour, is one of the important ingredients to be found against a defendant before he can, in a suit under the Copyright Act, be damnified. (Para 38)

The burden lies on the plaintiff to satisfy the Court that the defendants had in fact infringed his copyright. (Para 39)

In deciding the question whether one book is a copy of the other or not the Court has to keep in mind the two features of the two books, namely, the external and the internal features. By external features is meant, the get-up and the 'overall' scope of the publication. By internal features is meant the general lay out of the subject-matter, the manner of the treatment of the subject-matter and the amount of material contained in the book. (Para 40)

Anno: Copyright Act, Sch. I, S. 2 N. 1.

CASES REFERRED: Paras

(A) (V11) AIR 1924 PC 75: 40 TLR 186 (PC) 11, 37
(B) (1802) 170 ER 679: 4 Esp 168 11
(C) (1853) 22 LJ Ch 457: 1 WR 109 11
(D) (1905) 140 F 539 11
(E) (V21) AIR 1934 Lah 777: 16 Lah 103 13
(F) (1905) 1905-1 Ch 519: 74 LJ Ch 304 13
(G) (1824) 2 LJ Ch 90: 2 Sim & St 1 36
(H) (1912-13) 29 TLR 570 38

Plaintiff in person and also S. B. L. Gaur and Balishwari Prasad, for Plaintiff; J. Swarup, for Defendants.

JUDGMENT: Sri S. K. Dutt, an advocate practising in this Court, has filed this suit purporting to be one under S. 13, Copyright Act, 1914. The plaintiff alleges that he is the author and sole owner of the copyright in the work entitled "The Indian Partnership Act by Mukerji and Dutt". This work, the plaintiff alleges, he published in the year 1934 in collaboration with Sir Manmotho Nath Mukerji, an ex-Chief Justice of the High Court at Calcutta and an ex-Law Member of the Government of India.

The plaintiff further alleges that the aforementioned book—the Law of Partnership in India—has earned a great reputation and it has had sales in the United States of America, in England and practically throughout this country. The plaintiff's case further is that defendant No. 2, namely, J. N. Bagga, published a work entitled "Law Book Company's Commentaries of Law & Practice of Partnership & Private Companies in India" in the year 1947. This rival publication, according to the plaintiff, contained numerous passages which had been pirated from the plaintiff's work.

The said rival publication purports to be written by K. L. Gauba, Barrister-at-law, defendant No. 3. H. D. Suri, B.A.,LL.B., defendant No. 5, and S. K. Iyer, B.A.,B.L., defendant No. 4; the Law Book Company defendant No. 1, are the publishers of this work while defendant No. 2 is said to have had the book published for defendant No. 1, that is the Law Book Company. This book was published by the Law Book Company when it existed at Lahore. It may be noticed that the present location of this Company is at Allahabad.

(2) The plaintiff's case further is that the defendants wrongfully infringed his copyright and that they did not refrain from discontinuing the sale of the infringed book even after notice had been served on them calling upon them to desist from such unlawful activity.

(3) The plaitiff alleges that he got knowledge of his copyright having been infringed by the rival publication sometime in July 1948. By the suit the plaintiff has claimed the following reliefs:

(a) That an account of the profits be rendered or in the alternative damages be awarded to him—the plaintiff has tentatively valued this relief at Rs. 1,200/-.

(b) That an order for the delivering up of all the copies of the rival publication or such part or parts thereof as may be found to infringe the copyright of the plaintiff's publication be made and that such of the infringing copies as are in the possession, custody or control of the defendants, their servants or agents, together with any plate, block or blocks of such infringing work be ordered to be delivered up to the plaintiff—this relief the plaintiff values tentatively at Rs. 200/-.

(c) That a permanent injunction restraining the defendants, their agents or servants from continuing or repeating further or doing any act or acts to infringe or injure the plaintiff's copyright be granted—this relief the plaintiff values at Rs. 100/-.

(d) That costs of this suit and such other relief as the Court may deem fit be allowed.

(4) The suit was contested by defendants 1 and 2 only and they filed a joint written statement. By this written statement the defendants did not admit the allegation of the plaintiff that he was the sole author of the book or that he had a copyright in the same. The defendants denied that their book was published in 1947 for they said that it was published in 1946. The defendants also denied having infringed any copyright that may subsist in favour of the plaintiff in the book entitled "The Indian Partnership Act".

The defendants further alleged that their book contained much more material than was contained in the plaintiff's work. The defendants further denied that their publication contained numerous passages which could be said to have been pirated from the plaintiff's book. The defendants alleged in paragraph 14 of their written statement that their publication had a very good sale from the time of its publication and that when the plaintiff learnt that they wished to bring out a second edition he filed this suit in order to obstruct them from making profits out of the subsequent edition of the book which they contemplated publishing.

(5) This suit was filed on 6-12-1949, and its hearing was delayed for several reasons, the main reason being, as I can see from the order sheets, that the plaintiff made numerous applications, many of them unsubstantial, and that these applications had to be decided before the case could finally be fixed for hearing.

(6) This case was fixed for the settlement of issues for 23-9-1952, and issues were settled on that date. The following issues were struck in the case by a Bench of this Court of which I too was a member:

"1. Has the plaintiff got the sole copyright in the book entitled 'Indian Partnership Act' by Mukerji and Dutt and if so, to what extent?

2. Have the defendants infringed the copyright of the plaintiff in his book and if so, to what extent?

3. Are the defendants liable for rendition of accounts?

4. Are the defendants liable for delivering up to the plaintiff all copies of their book?

5. To what damages, if any, is the plaintiff entitled and from which of the defendants?"

(7) An order was made on the same date that the suit as against defendants 3 to 5 was to proceed 'ex parte', inasmuch as, those defendants did not enter appearance.

In his statement under O. 10, R. 2, C. P. C., the plaintiff stated that his copyright had been infringed in "arrangement and in copying passages" from his book. He further stated that there had been an infringement of his copyright because the defendants had adopted his passages and had at some places used the same composition. The plaintiff was called upon by the Court, on an application made by the defendants, by an order dated 19-11-1951, to give particulars of such passage as according to him, had been pirated by the defendants from his book. The plaintiff was granted three weeks' time for this purpose

On 7-12-1951, the plaintiff filed a chart of sorts along with an application. This chart is paper No. A28/2 of the record and a perusal of it will show that it is a perfectly useless chart, for, from this it is impossible to discover what was meant to be conveyed or illustrated. The plaintiff marked a large number of passages in his book which is Ex. 1 and in the defendants' book which is Ex. 2 to indicate piracies. These passages, according to the plaintiff's testimony, number 797.

(8) A large number of applications were filed for eliciting further particulars by the plaintiff. Orders in regard to these are to be found either on the order sheet or on the applications themselves. Many of these particulars which were discovered on appropriate affidavit were not at all utilized by the plaintiff for the purposes of the case during the course of the hearing. They only helped in delaying the hearing of the suit and in swelling the costs of the cause.

(9) The hearing of the suit was fixed for 28-9-1953, and the case was called for hearing before me on that date. The plaintiff made a request for the adjournment of the case on the ground that he was not ready to proceed with the case. The motion for adjournment was opposed on behalf of the defendants and was disallowed by me because no adequate reason for adjournment was given by the plaintiff.

The plaintiff then entered the witness-box and examined himself and was thereafter cross-examined, at length, by Sri Jagdish Swarup appearing on behalf of the contesting defendants. In his statement the plaintiff said that every bit of his book, save the introduction and a little revision here and there, by Sir M. N. Mukerji, was his composition. The plaintiff further stated that he claimed a copyright in those passages also which he had quoted either from other text book writers or from decided cases. The plaintiff said that he claimed copyright in quotations or selections because he had made changes in them.

A question was put to him by me in these words:

"Have you indicated in your book that you have made alterations of your own in the passages which you have quoted and which on a perusal of the book appear to be from other sources than your own?"

To this the plaintiff answered as follows:

"By intelligent perusal of the book it will appear to anyone that there is difference between my selection and the original."

He was further asked as to what he meant by "intelligent perusal" and he answered thus:

"By a reference to the original."

He was further asked:

"Is there anything on the face of those quotations to indicate that you have modified or altered those quotations?"

The plaintiff answered thus:

"At some places there is, but mostly not."

The plaintiff was asked by me to indicate his point by one example. In answer he referred to page 208, note (a). To me this example did not illustrate what I wished him to illustrate. I, therefore, put him the following question:

"I have looked at page 208, note (a), but I do not find any indication in it of what I asked you. Will you please explain?"

To this the plaintiff returned the following answer:

"Please refer to line 3 of the quotation and refer to the two words in 'present clause (i)' which have been put in by me in square brackets there."

This answer did not, in my opinion, meet the point which I wished the plaintiff to clarify. In his evidence the plaintiff indicated the extent of the infringement of his copyright by saying this:

"I find that 797 passages have been infringed by way of copying and this includes 22 quotations, 9 appendices and 8 rules made under the Indian Partnership Act by the various Governments."

The plaintiff in his evidence felt satisfied by saying the above only in regard to his proof of the infringement of his copyright by the defendants.

(10) The Court found considerable difficulty in assessing whether or not there were infringing passages in the defendants' book—passages which in substance were infringements of the plaintiff's work and not passages which the plaintiff and the defendants could have borrowed from other works or from decided cases. It was to obviate this difficulty that the plaintiff had been ordered, long back, to file a chart indicating the various alleged infringements classifying them under appropriate heads. He was called upon to do this by an order of a Bench dated 22-9-1952.

While in the witness-box I asked him the following question in order to make certain whether or not the chart which he was called upon to file in Court had been filed by him:

"Did you file a chart as was required by the Court by its order dated September 22, 1952?"

The plaintiff made the following answer:

"No, I did not file the chart because I thought that the Bench before which the case went after the order dated September 22, 1952, would not want such a chart."

This answer clearly indicates, to my mind, the mentality which guided the plaintiff throughout the proceedings of this suit. Counsel for the defendants was, therefore, faced with the unenviable task of facing the plaintiff during cross-examination with every passage, and the total of such passages according to the plaintiff's computation was 797, which had been marked by the plaintiff in the two books Exs. 1 and 2, and asking him questions to demonstrate that there was no infringement. By far the largest number of these passages had been taken by the plaintiff himself from either standard commentaries on the law of partnership or from the statement of the law as found in Halsbury's Laws of England or from decided cases. If counsel for the defendants had been permitted to take all the passages one by one to show that the defendants did not take them from the plaintiff's book but from some other source which was open to them then the case would have dragged on for months and months.

In order, therefore, to cut down the time of the Court and save parties' costs I called upon the parties to address me on the question whether the plaintiff's claim that once he quoted a passage in his book from either a decided case or a standard work then no one else had any right again to quote that passage was or was not correct. I heard arguments on this question on 29-9-1953, and after hearing arguments I decided that the proposition which was enunciated by the plaintiff was not a correct proposition. I refrained from giving all my reasons in my order of 29-9-1953, because I wished to incorporate the reasons which impelled me to come to that conclusion then in this judgment.

(11) If what the plaintiff contended for was right then the defence of "common source" could never be available to anyone. The plaintiff based his contention on the ground that by quoting a passage from a decision or from another work he was in effect "selecting" the passage and since the copyright law protects selection he was protected and nobody else could thereafter make the same selection. I do not think the plaintiff was right in this contention of his. As I understand the law which protects selections I understand it to mean that only those selections are protected which the plaintiff makes for purposes of incorporating them in a "book of selections". It does not protect a selection which the plaintiff makes for purposes of explaining a legal or a scientific proposition that he has to explain while writing a commentary for the other man who after the plaintiff writes a commentary on that subject must, 'per necessity' have to make the same selection.

Decisions reported in law reports are 'common property' for commentators on the law, and they must per necessity have to have recourse to them because without reference to them no commentator can give to his readers a correct idea of the law.

Counsel for the defendants drew my attention to several other commentaries on the law of partnership to show that the same selection of cases had been made by the respective authors of those books.

Reliance was placed by the plaintiff on the case of Macmillan and Co., Ltd. v. K. & J. Cooper' AIR 1924 PC 75 (A). It was contended on the authority of this case that an author gets a copyright if he makes a selection of passages from the works of others. I do not consider that this case on which the plaintiff relies supports any such general proposition. Their Lordships pointed out that the mere process of selecting passages from works readily accessible to the public is not protected, but what is protected is a selection that manifests skill sufficient to give the selection the character of an original literary work.

Their Lordships further pointed out that the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it, within the meaning of Copyright Act of 1911, cannot be defined in precise terms. "In every case" their Lordships pointed out,

"it must depend largely on the special facts of that case and in each case be very much a question of degree."

I may here refer to the law in regard to this matter as stated in Corpus Juris Secundum Volume 18, at 228, under the head "Law Books". This is what is stated there:

"Law Books of all kinds belong broadly to the class of compilations, and on a question of infringement the general rules stated supra this section as to infringement of other kinds of compilations are fully applicable; but they also belong to the class of works treating of the arts and sciences, the publication of which implies consent to some use of them by subsequent writers, to the end that there may be progress in the particular art or science, and this affects the question of what constitutes infringement of law books."

It was further pointed out that "where the similarities and identities are due to coincidence and the necessities of the case" then there can be no question of copy.

I may further refer to what Lord Ellenborough said in the case of — 'Cary v. Kearsley', (1802) 170 ER 679 at p. 680 (B). What his Lordship said was this:

"That part of the work of one author is found in another, is not of itself piracy, or sufficient to support an action; a man may fairly adopt part of the work of another; he may so make use of another's labour for the promotion of science, and the benefit of the public; but having done so, the question will be: Was the matter so taken used fairly with that view, and without what I may term 'animus furandi'?"

I may further refer to the decision of Vice Chancellor Kindersley in the case of — 'Murray v Bogue', (1853) 22 LJ Ch 457 (C), and quote the following observations of the learned Vice Chancellor at p. 466:

".....it is an extremely difficult thing to see how far, the subject being the same and the details necessarily to a great extent the same. the one has fairly or unfairly used the work of the other."

It was further pointed out that the real test in a matter like this is to see whether the defendant has done what Lord Cottenham called "the extraction of the vital parts of the book".

In Canada the position in regard to text books was stated by Putnam, J. in the case of — 'Sampson & Murdock Co. v. Seaver-Radford Co.', (1905) 140 F. 539 (D), as follows:

"....it is clear that, under some circumstances and for certain purposes, a subsequent publisher

may draw from the earlier publication its identical words, and make use of them. This is peculiarly so with reference to works in regard to the arts and sciences, using these words in the broadest sense, because, with reference to them, any publication is given out as a development in the way of progress, and to certain extent, by common consent, including the implied consent of the first publisher, others interested in advancing the same art of science may commence where the prior author stopped. This includes medical and legal publications, in which the entire community has an interest, and which the authors are supposed to give forth, not only for their own pecuniary profit, but for the advancement of science."

(12) In order to be an infringement of a man's copyright there must be a 'substantial infringement' of the work. Fair dealing with any work has been kept out of the mischief of the Copyright Act.

(13) It was pointed out in the case of — 'Kartar Singh v. Ladha Singh', AIR 1934 Lah 777 (E), as follows:

"Every man can take what is useful from the original work, improve, add and give to the public the whole, comprising the original work, with the additions and improvements; and in such a case there is no invasion of any right."

As was pointed out in — 'Hanfastaengal v. W. H. Smith & Son', (1905) 1 Ch 519 (F),

"a copy is that which comes so near to the original as to give to every person seeing it the idea created by the original".

It was pointed out by the House of Lords in 1895 in a case that this

"question may be solved by taking each of the works to be compared as a whole and determining whether there is not merely a similarity or resemblance in some leading feature or in certain of the details, but whether keeping in view the idea and general effect created by the original, there is such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original".

(14) It was in order to make it possible for me to apply the tests which previous authorities have laid down in regard to judging such matters that I insisted upon the plaintiff supplying to the Court a chart of the infringements. I asked the plaintiff to classify the infringements so as to show which infringements were infringements of his original composition and which were infringements in regard to arrangement and selection. The plaintiff, as I have already stated, did not put in this chart till much after he had left the witness-box so that counsel for the defendants could not cross-examine him in regard to this chart. During the course of his submissions I asked the plaintiff to give me instances—specific instances—of passages which, according to him, were his original compositions and which had been copied by the defendants. The plaintiff gave me in all 17 such illustrations. The matter contained in the entire list of illustrations would be covered in very much less than half the number of composed pages. This is but one aspect of the matter. The other aspect of the matter was that when I started comparing the passages in the two books I discovered that there was obvious difference in regard to at least 9 of these 17 illustrations.

I may point out one particular instance to show that what the plaintiff called his own composition was really a copy of what was stated in Halsbury on the subject. This was in regard to what is stated at page 17, note (f) in the plaintiff's book, the corresponding portion in the defendant's book being at page 50, note (6). I may point out two other illustrations taken by the plaintiff from page 11, notes (e) and (g) of his book. These passages the plaintiff claimed as his original, but it was shown by learned counsel for the defendants that they were taken from Lindley's book on Partnership, page 93.

(15) As I have pointed out earlier, the plaintiff contented himself by stating in his evidence that as many as 797 passages of his work had been pirated by the defendants. The plaintiff did not in his evidence refer specifically to any of these passages, but he was cross-examined on behalf of the defendants in regard to many of these. A large portion of the alleged infringements consists of passages which occur in reported decisions. Attempt was made, naturally, by counsel for the defendants to show that the plaintiff hismelf did not select these passages from the decisions but got those passages, or at any rate a clue to those passages, from other commentators on the law of partnership.

Questions were put to the plaintiff to demonstrate that he could not possibly have had the time and the opportunity to examine and read all the cases which he has cited in his book. I shall now quote some of these questions and the answers returned by the plaintiff to examine the effect of the plaintiff's evidence on this assertion of the defendants. The following are some of the questions and answers which would assist in determining this matter:

"Q. Did you have time and opportunity of consulting the English authorities and the reports from which you purport to have quoted so largly in your book?

A. Yes.

Q. Did you read each and every case which you have referred to in your book?

A. Yes.

Q. Do you possess these books in your library?

"A. No. I consulted them in other libraries.

Q. How much time did you take in accumulating the material for your book?

A. I cannot tell you that.

Q. Did you check up and read all the cases referred to in Mew's Digest on partnership?

A. I read all the cases referred to in the Mew's Digest.

Q. Did you read all the cases on partnership referred to in Halsbury's Laws of England?

A. Yes."

(16) It was contended on the above evidence of the plaintiff that the plaintiff's claim to having read the entire material himself was a false claim because it was not possible for the plaintiff, handicapped as he was for want of a library of his own and the short time within which he brought out his book, to do all that he claims to have done. It is, in my view, not easy to say that what the plaintiff said he did was an impossible task, but from other parts of his evidence, as also from intrinsic evidence available in the plaintiff's book, it looks to me that the plaintiff's claim of having read all the cases himself before he made use of them was not a correct claim.

(17) The plaintiff in his illustrations showing infringements showed such passages also which 'prima facie' appear to have been taken from

judgments. The plaintiff was asked this question.

"Q. Have you or have you not marked passages in the defendant's book which have been taken from judgments?

A. No. There may be a few passages."

(18) After the aforequoted answer had been returned by the plaintiff learned counsel for the defendants demonstrated by asking certain other questions to the plaintiff that this assertion of his was not well founded.

I shall now refer to a few questions to indicate how the plaintiff insisted on saying that there was infringement of his work in respect of certain passages even though by his cross-examination it was made clear that his case in regard to these infringements was without substance. Counsel for the defendants took up a passage appearing in the plaintiff's book at page 157, note (a), and a corresponding passage which was alleged to be an infringement in the defendant's book at page 323, note 6, and showed that the passage which the defendants had in their book was from a judgment. It was also pointed out to the plaintiff that there was a difference — an obvious difference — in the two passages and then he was asked whether or not he still insisted in saying that the defendants had copied the passage from his book.

To this the plaintiff answered that the infringement was on the ground of arrangement. It would be interesting to quote some of the questions and the answers on which I have made the above observation. They are as follows:

"Q. Is it or is it not a fact that the judgment says that false entries had been made in accounts and the defendant's book also says so?

A. Yes.

Q. Is it or is it not a fact that these lines do not occur in your book but in the defendant's book?

A. These lines do not occur in my book but they occur in the defendant's book.

Q. Will you please still say that this passage has infringed your copyright?

A. I have already said that the infringement is in arrangement?"

Counsel for the defendants took another passage and put it to the plaintiff thus:

"Q. Will you kindly see page 347 of the defendant's book and page 177 of your book and tell the Court the source from which you got this passage?

A. So far as I remember the principle has been culled out from the rulings cited and the statement is in my own language."

(19) After the aforementioned answer was returned by the plaintiff the following question was put to him by me:

"Q. The reading of the two passages will indicate or will it not that the two authors wrote the respective passages independently?

A. No."

(20) Counsel for the defendants then put this question to the plaintiff:

"Q. I say that you have taken this passage from 1 Bombay Law Reporter and the defendant's passage is a faithful reproduction of that. Is it or is it not a fact?"

The plaintiff had to answer in the affirmative.

(21) The plaintiff was further asked this:

"Q. Is it or is not a fact that you have changed the word 'management" into 'arrangement' whereas in the judgment the word 'management' occurs?"

The plaintiff anwered in the affirmative.

(22) He was asked this:

"Q. Is it or is it not a fact that in the defendant's book the word 'management' occurs?"

(23) He again answered in the affirmative and then he was asked:

"Q. Do you still say that this passage has been copied from your book?"

(24) To this the plaintiff returned the following answer:

"A. Yes, I still maintain that this passage has been copied from my book. I say so because I used the word 'surviving' and the defendant too has used the word 'surviving', a word which has not been used in the judgment."

The use of the word 'surviving' by both the plaintiff and the defendants in their respective books does not appear to me to be of any real consequence because the use of that word was natural to the context and the word was not such an uncommon word as to lead anyone to the conclusion that because that word appears in the two passages the one passage must have been the copy of the other.

(25) Counsel for the defendants put another question to the plaintiff in these words:

"Q. Kindly have page 317 of the defendant's book, note 3, and the corresponding passage in your book at page 155, note (f), and please tell the Court if you will admit that the language is not entirely different?"

(26) The plaintiff returned an answer in the affirmative to this question. Learned counsel for the defendants then asked him this question:

"Q. I put it to you that in 25 Bombay the words are exactly what have been used by the defendant and not used by you. Is it so?

A. Here I have complained of the arrangement."

(27) The plaintiff then volunteered and said that he had made a mistake and that he cannot give an answer to this question.

(28) The plaintiff claimed originality in respect of several passages and counsel for the defendants naturally attempted to show that such a claim was unjustified. I should like to refer to some questions and answers to show that the plaintiff was severely shaken in his cross-examination in regard to this matter. The plaintiff was asked these questions:

"Q. Yesterday you told the Court that you have never consulted the Century Digest in writing your book. Do you still maintain that position?

A. I did not consult the Century Digest.

Q. Have you not taken the passage appearing in your book at page 178, note (f), from the Century Digest which I have shown to you?

A. No, although the passages are exactly identical."

(29) The witness while thus cornered in cross-examination volunteered by saying that if there was coincidence in similarity of expression between him and Sanjiva Rao—the author of the Century Digest—then he could give no adequate reason why there could not be similarity of expression between him and the defendants This statement which was volunteered by the plaintiff, to my mind, indicated that he gave up his stand which he had taken in regard to those passages which could be found in other books also.

(30) A good deal of emphasis was laid by the plaintiff on what he called 'his arrangement' and which, according to him, was the subject-matter

of his copyright and which further, according to him, had been infringed by the defendants. It, therefore, became necessary for counsel for the defendants to ask the plaintiff some questions to clarify the position. The plaintiff was asked:

"Q. Will you kindly tell the Court what do you mean by arrangement in a book?

A. Arrangement means 'order'."

He was then asked:

"Q. Will you kindly explain what do you mean by the word 'order'?

A. Order of notes, by which I mean the notes indicating the passages or the passages indicating notes."

(31) I must say that I do not understand what exactly the plaintiff meant by the answer that he gave. Learned counsel for the defendants also did not appear to understand the plaintiff sufficiently and, therefore, he seems to have asked him the following questions:

"Q. Do you mean to say that an order or arrangement is indicated by your sub-headings?

A. It is not indicated in my sub-heading."

The plaintiff was then asked:

"Q. Do you mean to say that the cases cited under a particular section go to constitute an order or arrangement?

The plaintiff answered in the affirmative."

The plaintiff was then asked:

"Q. Do you or do you not expect that any commentator on any particular section will cite all the relevant case law under that section?

A. Of course, yes."

He was thereafter put this question:

"Q. Would it not then be in this case that the cases cited by you would be the same as the cases cited by the defendant under a particular section?"

The plaintiff answered in the affirmative.

(32) From what I have quoted above it appears to me that the plaintiff's claim to his copyright in regard to arrangement having been infringed must fail. It may further be pointed out that arrangement of a book is, to my mind, best indicated by the headings and the sub-headings under which the author deals with the subject-matter. A comparison of the two works would make it perfectly clear that the defendants in their book have a much larger number of headings and sub-headings than the plaintiff has. The plaintiff was asked whether or not the headings and sub-headings of the defendant's book were largely different from those in his book, but the plaintiff did not admit this. In my view this denial of the plaintiff must be held to be futile because it would be clear to anyone on a comparison of the two works that it is so. The plaintiff was asked this question:

"Q. Is it or is it not a fact that the defendant's book has a large number of sub-heads which do not find place in your book?

A. May be, I am not challenging that."

(33) This answer of the plaintiff, to my mind, clearly demonstrates that "though vanquished he could argue still". Counsel for the defendants just chose another line to attack this part of the plaintiff's claim. The plaintiff was asked this:

"Q. If the defendant has dealt with the question of goodwill under section 14 and you have dealt with that subject under a different section, could you still say that the defendant has copied your arrangement?

A. No."

(34) After learned counsel for the defendants obtained the above admission from the plaintiff he put him this question:

"Q. Will you kindly turn to pages 108 to 111 of the defendant's book and compare them with your page 37 and say whether or not the arrangement is the same with respect to the subject-matter of goodwill?

A. It is different."

The plaintiff was again asked this question:

"Q. Will you please refer to S. 26 as dealt with in the defendant's book and compare it with your book and say whether any of the headings are common?"

The plaintiff answered "No".

The plaintiff was further asked this:

"Q. Please tell the Court whether or not the headings in the defendant's book have been suggested from the words of the section itself?"

The plaintiff answered thus:

"I have not considered this matter at all and I cannot answer it."

(35) It appears to me that the plaintiff by refusing to answer that question gave up this part of his case more or less in sheer despair. I shall only take a few more passages from the plaintiff's statement on this matter to show how utterly hopeless his contention in regard to it was. The plaintiff was asked this:

"Q. Will you kindly look at S. 13, clause (c), and say whether the subject matter falling under this clause has been dealt with in the defendant's book under 1, 2, 3, 4, 5, 6, 7 and 8 different headings?

A. Yes."

The plaintiff was then asked by me this question:

"Q. Do you still maintain that there has been a copy of your arrangement by the defendant?"

The plaintiff returned an audacious reply in these words:

"I do maintain that still."

(36) I may here state that during his opening argument the plaintiff claimed that the book of the defendant followed precisely the same arrangement which had been followed by him. He, however, whittled down this very general statement of his during the course of the proceedings of the case. Even so, I cannot hold, on the evidence either of the plaintiff as given by him in the witness-box or on a comparison of the two books, that there was any substance in this claim.

It would be appropriate at this stage to notice an old decision of the Court of Chancery in — 'Barfield v. Nicholson', (1824) 2 LJ Ch 90 (G), where it was pointed out that "the sameness of the thing delineated must produce similarity in delineation". It was further pointed out that mere fact of resemblance is not in itself evidence of piracy where the subject dealt with is the same.

(37) The plaintiff based his contention that his "work was original" within the meaning of the Copyright Act even though he had merely made compilations and selections from available sources on the strength of the decision in — 'AIR 1924 PC 75 (A)'. In this case it was held by the Judicial Committee of the Privy Council that

"a publication of which the text consists of a reprint of passages selected for use in schools from a work which does not enjoy the protection of copyright may be entitled to copyright,

if the selection of the passages would require, for the purpose of effecting the object in view, accurate scientific knowledge, sound judgment, and literary skill",

but in the same case it was pointed out that the question

"what amount of such knowledge, judgment, and skill is necessary in order to acquire copyright is a question of degree."

In every case it must depend largely on the special facts of that case and must in each case be very much a question of degree. Bearing this principle in mind it cannot, in my judgment, be stated that the selection that the plaintiff made of cases for the purposes of his commentary or the arrangement that he followed was the result of any such outstanding judgment or skill — a judgment or skill that was not within the ordinary reach of any other commentator which the plaintiff brought to bear on his work.

(38) Reliance was placed by the plaintiff on the decision in — 'Corelli v. Gray', (1912-13) 29 TLR 570 (H), to support his contention that he had a copyright in his book. In my opinion this case in no way assisted the plaintiff's contention but went contra to it. It was pointed out in this case that there was no absolute monopoly given to authors analogous to that conferred on inventors of patents. It was further pointed out that it was possible to produce two precisely similar works wholly independently of one another. The right which an author appeared to have under the Copyright Act was merely a negative right to prevent the appropriation of the labours of an author by another. This case is also an authority for the view that the onus of establishing such appropriation rested upon the plaintiff. There is no denying the fact, on the strength of the authorities, that several persons may originate similar works in the same general form without anyone infringing the law in regard to copyright. The infringement comes in only when it can be shown that someone has, instead of utilizing the available sources to originate his work, appropriated the labours of another by resorting to a slavish copy or mere colourable imitation thereof. The 'animus furandi', that is, an intention to take from another for purposes of saving labour, is one of the important ingredients to be found against a defendant before he can, in a suit under the Copyright Act, be damnified.

(39) It was contended by the plaintiff that the defence of "common source" was not available to the defendants, inasmuch as, the defendants did not take that defence specifically in their written statement nor did they assert such a plea in any evidence. It is no doubt true that the defendants have not in so many words taken the plea of "common source" in their written statement, but a reading of the additional pleas of their written statement makes it clear to me that the defendants in substance and in effect raised a plea of "common source."

None of the defendants entered the witness-box, but that, to my mind made no difference to the defendants' case because the burden lay on the plaintiff to satisfy the Court that the defendants had in fact infringed his copyright. The plaintiff's contention further was that a plaintiff in a copyright case discharged the burden that lay on him by merely stating on oath that the defendant had infringed his copyright and thereafter the burden shifted to the defendant to show that he had not done so. Great emphasis was laid by the plaintiff on the fact that none of the defendants stepped into the witness-box to deny his assertion on oath.

It may here be pointed out that the alleged authors mentioned on the title page of the defendants' book were K. L. Gauba, H. D. Suri and S. K. Iyer. A written-statement was filed on behalf of defendants 1 and 2 to the suit only, namely, the Law Book Company, who published the book, and J. N. Bagga, who had the book published. The other defendants did not choose to put in any appearance. In such circumstances the publishers had to face the trial under great handicaps. The only method by which the publishers could meet the plaintiff's case was by breaking the assertions of the plaintiff by his cross-examination and by referring to the sources from which the materials in the defendants' book had been taken. I have already referred quite extensively to the plaintiff's statement and I have also referred to many of the sources to which reference was made on behalf of the defendants to show that the defendants obtained the materials for their book not from the plaintiff's book but from other sources.

(40) In deciding the question whether one book is a copy of the other or not the Court has, in my view, to keep in mind the two features of the two books, namely, the external and the internal features. By external features I mean the get-up and the 'overall' scope of the publication. By internal features I mean the general lay out of the subject-matter, the manner of the treatment of the subject matter and the amount of material contained in the book. In the external features the two books, one of the plaintiff and the other of the defendants, have no similarity at all. The title of the plaintiff's book is "The Indian Partnership Act" while the title of the defendants' book is "Law & Practice of Partnership and Private Companies in India". The plaintiff's book is a volume of 311 pages while the defendants' book covers 862 pages (barring the index in both the books). The get-up of the two books is also entirely different.

(41) In the internal features too there is a marked dissimilarity. The plaintiff was cross-examined to indicate that the subject-matter dealt with in the defendants' book was far in excess of what was dealt with in his book. The plaintiff was asked this question:

"Is it or is it not a fact that the defendants' book has a large number of sub-heads which do not find place in your book?"

The plaintiff answered thus:

"May be, I am not challenging that".

The plaintiff tried to correct himself the next morning by returning a negative answer to the question, but even then he had to admit that there were a much larger number of subjects dealt with in the defendants' book than in his book. The plaintiff attempted to argue that even though the defendants' book covered a much wider field and had very much more material condensed in it yet the defendants' book infringed his copyright. It, therefore, became necessary for the defence to pursue the cross-examination of the plaintiff to demonstrate that the plaintiff's assertion was a vain assertion. I do not propose to quote from the plaintiff's statement to show that he really failed to substantiate his assertion. A reading of the plaintiff's statement from pages 29 to 36 would clearly demonstrate this.

(42) It was pointed out that in the plaintiff's book there are only about 1500 cases cited while in the defendants' book no less than 3000 cases

have been cited. It was also pointed out that in the plaintiff's book there are no "marginal notes" whereas in the defendants' book there are extensive "marginal notes".

(43) Sri Jagdish Swarup, appearing for the defendants argued that out of the total of 797 passages marked by the plaintiff as infringements, 114 such marked passages related to footnotes and these footnotes were only references to cases in respect of which, it was stated by Sri Jagdish Swarup, the plaintiff could have no copyright. The plaintiff filed a chart indicating in particular certain instances of infringements. This chart was subjected to careful scrutiny and I need only state here the conclusion to which I arrived, namely, that the scrutiny did not reveal that there was any real infringement by the defendants of the plaintiff's copyright.

(44) For the purposes of his argument counsel for the defendants classified the alleged infringements into seven groups, (1) consisted of passages which had been taken verbatim from Lindley on Partnership, (2) passages which had been taken from other standard authors, (3) passages which had been taken from judgments reported in law reports, (4) passages which had been taken from digests, (5) passages which the plaintiff had put down in his book by paraphrasing similar passages from authors like Lindley, (6) passages which on the face of them were dissimilar, and (7) passages in respect of which the plaintiff claimed original composition.

In respect of the first six classes there could be 'prima facie' no infringement unless the plaintiff was able to show that he brought to bear any special skill or judgment in their incorporation in his book. I have already held that the plaintiff did not satisfy me as to his having exercised any special skill or judgment in the appropriation of these passages in his book. Many of the passages in respect of which the plaintiff claimed originality of composition could not stand the test of cross-examination and I am constrained to hold that the plaintiff has failed to prove originality of composition in respect of such passages.

(45) Lastly, the plaintiff stated that in the defendants' book you could find the same mistakes which appeared in the plaintiff's book and it was, therefore, contended that these mistakes, could never have appeared in the defendants' book if the passages had not been copied or taken from the plaintiff's book. This argument would have been substantial to support the plaintiff's contention that, at least, in respect of these passages there was an infringement of his copyright, if he had succeeded in showing that there were a large number of such passages, at least such numbers as could eliminate the element of chance that always is there in such matters. On a scrutiny of these passages it was discovered that there were only three mistakes common both to the plaintiff's book and the defendants' book.

In my judgment this number is much too small to lead one to the conclusion that there was necessarily a copying of these passages from the plaintiff's book. Before a plaintiff is entitled to relief he is bound to show that there has been a substantial taking by the other side from his book; no such substantial taking has been proved in this case. I must, therefore, hold that the plaintiff has failed to prove that there has been any substantial infringement of his work by the defendants. From a perusal of the defendants' book it is clear that when the defendants' book was being compiled the authors had before them the plaintiff's work also — I say this because I find at one or two places in the defendants' book an acknowledgement having been made of the use which the authors made of the plaintiff's book. This acknowledgement by the authors of the fact that they found use from the plaintiff's material leads me to the conclusion that had the authors made any other use of the plaintiff's book for compiling their own book, they would have acknowledged the same. I cannot presume, on the facts which were laid before me in this case that the defendants made any substantial or unfair use of the plaintiff's work.

(46) Many other matters were argued on behalf of the plaintiff, but I consider a reference to these unnecessary for, in my judgment, they were not really pertinent to the main issues which called for determination.

(47) The plaintiff having failed to establish any infringement of his copyright, no question of granting any relief to the plaintiff could arise. It may here be noted, however, that there was on behalf of the plaintiff, no evidence to indicate what damage, if any, accrued to him, assuming that there was an infringement of his copyright by the defendants.

(48) Before, I come to the operative part of my judgment I should like to state that the trial of this case took a long time and that a good deal of the time could have been saved if the plaintiff had followed some proper sequence and had not chosen to digress into unnecessary and unimportant things. The plaintiff resorted to many a delaying tactics to which I had occasion to refer in my order dated 2-11-1953. I also think it proper at this stage to acknowledge the assistance that I got from Sri Jagdish Swarup who very fairly laid everything before the Court in order to assist it to arrive at a correct decision.

(49) For the reasons that I have indicated earlier I dismiss this suit with costs to the answering defendants.

B/R.G.D. Suit dismissed

A.I.R. 1954 ALLAHABAD 578 (Vol. 41, C.N. 224)

MALIK C. J. AND KIDWAI J. (27-11-1953)

Manna and others, Applicants v. State.

Criminal Revn. No. 181 of 1952, against order of Sessions J., Kanpur, D/- 8-12-1951.

Criminal P. C. (1898), S. 342 — Applicability to summons cases.

Section 342 applies both to summons as well as to warrant cases, as it is for the benefit of an accused person to enable him to explain any circumstances appearing in the evidence against him. AIR 1935 All 217, Foll. View held in Madras and Rangoon Full Bench decisions, Not Foll. (Paras 1, 2)

Anno: Cr. P. C., S. 342, N. 3, Pt. 3.

1949 Mitra: S. 342, P. 1037, N. 973, "Scope", para 2 (Reasons for Rangoon view not indicated in Mitra).

CASE REFERRED: Para

(A) (V22) AIR 1935 All 217: 36 Cri LJ 1290 1

Narain Sahai and H. N. Seth, for Applicants; D. P. Uniyal, Dy. Govt. Advocate, for the State.

MALIK C. J.:

This case has been referred to a larger bench by a learned single Judge of this Court on the ground that there is a Full Bench decision of the Madras High Court* and a Full Bench decision

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* (A.I.R. 1924 Mad. 15 (F.B.)—Ed.).

of the Rangoon High Court† which are contrary to the view taken by this Court that S. 342, Criminal P. C. applies both to summons as well as to warrant cases. The last decision of this Court mentioned by the learned single Judge is — 'Sia Ram v. Emperor', AIR 1935 All 217 (A). That was a decision of a division bench. The learned Chief Justice, Sulaiman, C. J. in that case observed as follows:

"It may well be that there is much to be said in support of either view, but the preponderance of opinion has been in favour of the view that S. 342 applies both to summons and warrant cases."

(2) We are bound by the decision of the bench mentioned above and it is, therefore, not possible for us to take a contrary view. In view of the series of decisions of this Court and the fact that S. 342, Criminal P. C. is for the benefit of an accused person to enable him to explain any circumstances appearing in the evidence against him, it does not seem necessary to refer this case to a larger bench.

(3) We, therefore, send the case back to the learned single Judge for decision.

B/V.S.B. Case sent back.

† (A.I.R. 1931 Rang. 244 (F.B.)—Ed.).

A.I.R. 1954 ALLAHABAD 579 (Vol. 41, C.N. 225)

LUCKNOW BENCH

RANDHIR SINGH J. (8-1-1954).

Durga Din, Applicant v. Smt. Rani Udai Kunwar, Opposite Party.

Criminal Revn. No. 224 of 1952, against Order of 1st Addl. Sessions J., Sitapur; D/-11-8-1952.

(a) Criminal P. C. (1898), S. 145 (4), Proviso 2 — Illegal attachment — Subsequent proceedings — Effect on.

A Magistrate acquires jurisdiction to take proceedings under S. 145 only after he expresses his satisfaction, either on a police report or otherwise, that there was a likelihood of a breach of the peace. The option of attachment given to the Sub-Inspector and the subsequent attachment made by him are therefore illegal. However such illegal attachment will not necessarily affect subsequent proceedings as it is not necessary for a Magistrate to pass an order of attachment in every case under S. 145. AIR 1951 All 621; Distinguished. (Paras 3, 4)

Anno: Cr. P. C., S. 145, N. 29, Pt. 4a, 1953 Mitra: S. 145, P. 461-463, N. 420, "Attachment", "Time", "Emergency", "Mode....attachment", "Effect.... attachment" and "Continuity..attachment" (Pts. 5, 6, 16, 19 and 22 in N. 29 to S. 145 in AIR Com extra).

(b) Criminal P. C. (1898), S. 145 — "Is satisfied".

If a Magistrate is very cautious and chooses to call the parties in order to be satisfied as to whether there was or was not an apprehension of a breach of the peace, and passes an order only after hearing them, or in their presence, the order cannot be said to be invalid. (Para 3)

Anno: Cr. P. C., S. 145, N. 7, 1953 Mitra: S. 145, P. 413, N. 390 "Is satisfied" (7 Pts. extra in N. 7 to S. 145 in AIR Com.)

(c) Criminal P. C. (1898), Ss. 145 and 435 — Revision — Finding of fact — Interference.

It is not open to the High Court in revision to disturb a finding of fact in the absence of any compelling or sufficient reasons. (Para 5)

Anno: Cr. P. C., S. 145, N. 61, Pt. 7a, 1953 Mitra: S. 145, P. 488, N. 447 "Revision" (4 Pts. extra in N. 61 to S. 145 in AIR Com.)

Criminal P. C., S. 435, N. 11, 1949 Mitra: S. 435 (Topic discussed in N. 11 to S. 435, not independently dealt with in Mitra — See however, Nts. 1172 and 1173 on pages 1291 and 1294 in 1949 Mitra — Foot notes under N. 11 to S. 435 in AIR Com., exhaustive and illustrative).

CASES REFERRED Paras

(A) (V39) AIR 1952 All 186: 1951 All LJ (Summary of Cases) IV: 1952 Cri LJ 379 3

(B) (V38) AIR 1951 All 621: 1951 All LJ (Summary of Cases) XIX: 52 Cri LJ 893 3, 4

R. K. Srivastava, for Applicant; G. H. Naqvi, for Opposite Party.

ORDER : This is an application in revision against the order of the Additional Sessions Judge of Sitapur dismissing an application in revision against the order passed under S. 145, Criminal P. C., by the Sub-Divisional Magistrate, district Sitapur.

(2) It appears that Smt. Rani Udai Kuar was in possession of certain plots in lieu of maintenance and in which she had "sir' rights. Durga Din applicant was in possession of these plots sometime before 1945, but he was ejected under a decree of the Court and possession was delivered to Rani Udai Kuar. In February, 1950, Rani Udai Kuar made an application to the Sub-Divisional Magistrate complaining that Durga Din was trying to cut away the crop from the plots which belonged to her and that there was a likelihood of a breach of the peace. The Sub-Divisional Magistrate then asked the Station Officer to make an inquiry and report. He also directed the Sub-Inspector to make an attachment of the crop and plots if he found that there was an apprehension of a breach of the peace.

The Sub-Inspector reported that there was a likelihood of a breach of the peace and he had, therefore, attached the crops and plots. On receipt of this report, notice was issued to both the parties and after they had turned up the learned Magisrate passed an order that as he was satisfied that there was an apprehension of a breach of the peace, the parties should file written statements. Thereafter both the parties filed written statements. The case of the applicant was that it was he who was in actual physical possession in spite of the ejectment and that Rani Udai Kuar was not in possession. Both parties then produced evidence, oral and documentary. After hearing the evidence the Sub-Divisional Magistrate came to the conclusion that Rani Udai Kuar was in possession of the plots and the crops and directed the applicant not to disturb her possession.

The applicant then went in revision to the learned Sessions Judge and it was argued that the order of the Magistrate directing the Station Officer to make the attachment if he found that there was an apprehension of a breach of the peace was illegal and as such the proceedings which followed were also irregular and illegal and should be set aside. The learned Sessions Judge agreed with the contention that the learned Magistrate's order delegating his powers to the Sub-Inspector to decide whether attachment should or should not be made was illegal but as

an order under S. 145(1) had been passed by the Magistrate subsequently expressing his satisfaction that there was a likelihood of a breach of the peace, and before the parties had been called upon to file written statements, the subsequent proceedings were neither illegal nor irregular.

(3) The grounds taken up before the learned Sessions Judge have been reiterated in this Court and the first point which has been raised is that the proceedings which followed the attachment were irregular and invalid. In support of this contention, two rulings have been cited by the learned counsel for the applicant, — 'Basdeo v. Badri Narain', AIR 1952 All 186 (A) and — 'State v. Mukanda Singh', AIR 1951 All 621 (B). In both these reported cases, it was held that it was not open to a Magistrate to direct the Sub-Inspector to make an attachment if he found that there was an apprehension of a breach of the peace and that it was the duty of the Magistrate to satisfy himself if there was a likelihood of a breach of the peace and then to pass an order of attachment.

There can be no doubt that a Magistrate acquires jurisdiction to take proceedings under S. 145, Criminal P. C., only after he expresses his satisfaction, either on a police report or otherwise, that there was a likelihood of a breach of the peace. The option of attachment given to the Sub-Inspector in the present case, and the subsequent attachment made by him, were therefore certainly illegal. It remains, however, to be seen if this illegal attachment affected the subsequent proceedings. On 20-5-1950, the Magistrate passed an order in which he mentioned that he was satisfied that there was an apprehension of a breach of the peace and directed the parties to file written statements. No order for filing written statements was made before this order was made, although the Magistrate had asked notice to issue to both parties and both parties had turned up.

It was not necessary for the Magistrate to have issued notice to both parties, but if he did so, the subsequent order will not become invalid on that score. If a Magistrate is very cautious and chooses to call the parties in order to be satisfied as to whether there was or was not an apprehension of a breach of the peace, and passes an order only after hearing them, or in their presence, the order cannot be said to be invalid. It was, therefore, on 20-5-1950, that the Magistrate validly assumed jurisdiction to proceed under S. 145. If the earlier attachment was invalid, it would mean that there was no attachment of the property.

(4) It is not necessary for a Magistrate to pass an interim order of attachment in every case under S. 145, Criminal P. C. The attachment has to be made only if there is an emergency or if the Magistrate thinks it fit so to do. Even, therefore, if there had been no valid attachment in this case, and the Magistrate had assumed jurisdiction by making an order such as the one which was passed on 20-5-1950 he was perfectly competent to proceed with the inquiry, and if he came to the conclusion that the applicant was in possession of the property on the date when the application was made, he was empowered to pass an order directing the party found in possession on the date of the application to be put into possession and to restrain the other party from disturbing the possession of the applicant.

In the case mentioned above, 'State v. Mukanda Singh (B)', the final order passed by the Magistrate was that as he was not satisfied that any of the parties to the dispute was in actual possession, he directed the attachment to continue till the question was decided by a competent Court. It was held that there being no valid attachment the order was invalid. In the present case, however, the non-existence of a valid attachment did not affect the final order in the case which could have been passed even if there had been no attachment. I, therefore, agree with the view taken by the learned Sessions Judge that the illegality of the attachment did not affect the subsequent proceedings.

(5) Another point which has been pressed in arguments is that the applicant was not found in actual physical possession of the plots and as such she should not have been given possession of the plots by the Magistrate. Both the Courts below have found it as a matter of fact that Smt. Rani Udai Kuar had been in possession on the date when the application under S. 145, Criminal P. C. was made. The Magistrate as also the learned Judge have discussed the evidence and have come to a conclusion on a finding of fact and it is not open to me to disturb that finding of fact in the absence of any compelling or sufficient reasons. The applicant had been ejected from the plots in due course and had no valid title to the plots in dispute nor did he claim any lawful right to possession. The High Court would be loath to interfere with a finding of fact in such a case.

There is nothing in the judgment of the Courts below to show that on the date when the application was made, Rani Udai Kuar had not been in actual physical possession of the plots but had been in possession through sub-tenants. There is no doubt some evidence to show that about a year before the application had been made some of her sub-tenants had been in possession of some plots for some time on 'batai'. This evidence was evidently led to prove that the applicant had been in possession all through but did not go to show that on the date when the application was made the plots were in the possession of sub-tenants. The question, therefore, whether the words "actual possession" mentioned in S. 145 would cover cases in which a person claims to be in possession through sub-tenants or tenants does not arise.

(6) Lastly, it has been argued that the decree for possession had been obtained by the Court of Wards and there was nothing on the record to show as to how Rani Udai Kuar claimed to be in possession of the plots. It appears that the plots had been in the possession of Smt. Rani Udai Kuar in lieu of maintenance. This question was also not raised in any of the two Courts below and the contention has no force.

(7) No other point has been pressed in arguments. The application for revision is, therefore, rejected.

B/V.R.B. Application rejected.

A.I.R. 1954 ALLAHABAD 580 (Vol. 41, C.N. 226)

AGARWALA AND ROY JJ. (15-1-1954).

Mushtaq, Appellant v. State.

Criminal Appeal No. 571 and Cri. Revn. No. 1184 of 1951, against Order of Addl. S. J., Moradabad, D/- 2-6-1951.

(a) U. P. First Offenders' Probation Act (6 of 1938), S. 4 — Offence under S. 376, Penal Code.

Section 4 does not apply to a person who is convicted of an offence punishable with death or transportation for life. An offence under S. 376. Penal Code, is punishable with transportation for life. (Para 9)

(b) U. P. Children Act (1 of 1952), Ss. 29, 75 — Applicability of S. 29 during pendency of appeal.

If a person is arrested in connection with offences under the Act itself and if he is a child on that date, he can get the benefit of the Act. Otherwise, a person must be a child on the date on which an application oral or written is made for extending the benefit of S. 29. Where the accused were not arrested in connection with any offence provided for by the Act. The Court can extend the benefit of S. 29 of the Act only if the accused is a child when an oral request is being made to the appellate Court; when the accused is over 16 years of age the Court cannot deal with him under S. 29 on the ground that he was a child when he committed the offence and he was also a child when the proceedings were initiated against him and even when the Court below convicted him. (Para 10)

(c) U. P. Children Act (1 of 1952), Ss. 17, 29 — Scope.

The seduction and indulgence in immoral behaviour is made punishable under the Act if it is done with a girl under the age of 16. As the complainant was a girl under the age of 16 the accused could be punished under S. 17 in addition to their being punished under the Penal Code. But this does not mean that the benefits of S. 29 of the Children Act could not be extended to them, if they were children at this time. (Para 11)

(d) Penal Code (1860), S. 376 — Punishment (Criminal P. C. (1898), S. 439).

What has to be considered by the Court in determining the question of sentence is the age when the person committed the offence, and not when he is being dealt with by the Court. The offence of rape under S. 376 is punishable with transportation for life.

Held that taking everything into consideration, a sentence of eight months' rigorous imprisonment was wholly inadequate and that a sentence of two years' rigorous imprisonment should have been awarded. (Para 13)

Anno: Penal Code, S. 376, N. 6, Cr. P. C., S. 439, N. 29.

D. P. Uniyal, Dy. Govt. Advocate, for the State; S. N. Mulla and Radha Krishna, for Appellant.

AGARWALA J.:

Mushtaq and Kalwa, two boys aged 15 and 14 at the time of the commission of the offence, that is on 8-5-1950, were prosecuted under S. 376, I. P. C. on a charge of committing rape on a girl of 11 years of age.

(2) The prosecution case was that on 8-5-1950, in the afternoon while the girl Dropadi and her brother Rup Chand were digging earth from a village pond, these two boys coming from an adjoining village were grazing their cattle nearby. The brother Rup Chand went away home, and they took advantage of the girl being alone and felled her down and committed rape on her, one after the other. When the girl's brother returned, he heard the cries of his sister and on running up found one of the boys committing rape on her and the other holding her by the hands. He raised an alarm and the two boys ran away. Other people came on the scene and they gave a chase to the boys and caught them and took them to the police station, where the first information report was lodged by Rup Chand on the same day at about 7-5 P.M.

(3) The defence of Mushtaq and Kalwa was that they had nothing to do with the matter and that they had been implicated on account of enmity, and it was suggested on their behalf that somebody else might have committed rape on the girl.

(4) The girl was medically examined and she was found to have been recently raped. The 'lungis' of the boys were also examined and they were found to have blood-stains and spermatozoa on them.

(5) The prosecution produced the girl Dropadi and Rup Chand and four other persons as witnesses. On considering the entire evidence on the record the learned Sessions Judge came to the conclusion that Mushtaq, indeed, did ravish the girl; and so far as Kalwa was concerned that Kalwa did certainly aid Mushtaq but that as against Kalwa himself committing rape there was the solitary statement of the girl, and he held that Kalwa could be convicted only of abetting and aiding the offence which Mushtaq committed. He consequently held that both of them were guilty under section 376, I. P. C. and sentenced each of them to eight months' rigorous imprisonment, and in addition to this he sentenced Mushtaq to eight stripes.

In the case of Kalwa, as he was of the age of 14, the learned Sessions Judge added that the benefit of the First Offenders' Probation Act might be extended to him. He, therefore, ordered that instead of Kalwa being detained in jail, that Kalwa be set at large under section 4 of the U. P. First Offenders' Probation Act with two sureties in the amount of Rs. 250/- to keep the peace and to be of good behaviour for three years and to appear and receive sentence when called upon to do so. He made certain further directions in this connection.

(6) Mushtaq appealed against the sentence and on reading the Sessions Court judgment, a learned Judge of this Court issued notice to Kalwa to show cause why the application of the First Offenders' Probation Act by the Sessions Judge should not be set aside and he should not be sent to jail, and to Mushtaq to show cause why his sentence of imprisonment should not be enhanced. The appeal of Mushtaq and the notice issued to Mushtaq and Kalwa by the learned Judge of this Court have both come up for decision before us now.

(7) After having heard learned counsel for the appellant Mushtaq and also on the notice for enhancement on behalf of both Mushtaq and Kalwa and after perusing the record, we have come to the conclusion that the case against both of them was amply established by the evidence on the record.

(8) The evidence of the girl and of her brother Rup Chand and at least two of the witnesses, Himmat and Phool Singh, is worthy of reliance. They were, therefore, rightly convicted under section 376, I. P. C.

(9) The only question for determination now is whether the sentence in the case of Mushtaq was adequate, and whether the application of the First Offenders' Probation Act in the case

of Kalwa was justified in law or not. The application of the First Offenders' Probation Act was certainly erroneous, because section 4 of the Act does not apply to a person who is convicted of an offence punishable with death or transportation for life. An offence under S. 376, I. P. C. is punishable with transportation for life. The benefit of the First Offenders' Probation Act could not, therefore, have been extended to Kalwa.

But it was urged by learned counsel for the accused that Kalwa could be given the benefit of the U. P. Children Act (Act No. 1 of 1952) which, though not in existence at the time when the learned Sessions Judge recorded the conviction, has now come into existence during the pendency of the appeal. Under this Act a "child", who is defined as a person below the age of 16, can be given the benefits provided by the Act if he is convicted of any offence punishable with transportation for life. Section 29, upon which reliance is placed, reads as follows :

> "Where a child is found to have committed an offence punishable with transportation or imprisonment, the court, if satisfied on inquiry that it is expedient so to deal with the child, may order him to be sent to an approved school for such period of stay as will not exceed beyond the time when the child will attain the age of 18 years or for a shorter period, the reasons for such period to be recorded in writing."

The section empowers the Court to send a "child" to an approved school if it thinks that it is expedient so to deal with the child. "Child", as we have already observed, means a person who is under 16 years of age. Both the accused were under the age of 16 years when they committed the offence; Mushtaq was 15 and Kalwa was 14. Mushtaq was over 16 when he was convicted by the court below, and Kalwa was 15 when he was convicted by the court below. So that Kalwa could have been dealt with under the U. P. Children Act, if that Act had been in existence at that time. The Act has come into force during the pendency of the appeal and the question comes up before us now after three years of the institution of the appeal.

(10) The question is whether the Act at this time when we are asked to apply it is applicable, and, when even Kalwa is over 16 years of age, we can deal with him under S. 29 on the ground that he was a child when he committed the offence and he was also a child when the proceedings were initiated against him and even when the court below convicted him. Under S. 75 of the Act the crucial date on which the age of the accused is to be considered is the date either on which the proceedings under the Act were initiated against him, or on which he was arrested in connection with which proceedings were initiated against him under the Act.

It may be mentioned that the Children Act itself creates certain offences and provides for their punishment. Therefore, if a person is arrested in connection with those offences, and if he is a child on that date, he can get the benefit of the Act. Otherwise, a person must be a child on the date on which an application oral or written is made for extending the benefit of S. 29 of the Act. The former contingency does not apply to the present case as the appellants were not arrested in connection with any offence provided for by the Act. So we can extend the benefit of S. 29 of the Act only if Kalwa is a child 'now' when an oral request is being made to the Court. Since he is over 16, we do not think that we can act under S. 29 at all. Section 29, therefore, cannot be applied to Kalwa much less to Mushtaq.

(11) The learned Deputy Government Advocate had raised a contention in this connection which may also be dealt with here. He urged that because of S. 17 of the Children Act, even if Kalwa was under 16, the benefit of S. 29 could not have been given to him. We do not think that this contention is sound. Section 17 reads as follows :

> "Whoever seduces or indulges in immoral behaviour with a girl under the age of sixteen years shall, on conviction, be punished with imprisonment of either description for a term which may extend to two years or with fine which may extend to one thousand rupees or with both."

All that section 17 does is that it provides for a fresh offence. It creates an offence and provides for its punishment. The offence that it creates is seduction or immoral behaviour with a girl under 16. The section does not necessarily conflict with any other provision of the Indian Penal Code; those provisions are not in any way modified by this Act. The seduction and indulgence in immoral behaviour is made punishable under the Act if it is done with a girl under the age of 16. As Dropadi was a girl under the age of 16, Kalwa and Mushtaq could be punished under section 17 in addition to their being punished under the Indian Penal Code. But this does not mean that the benefits of S. 29 of the Children Act could not be extended to them, if they were children at this time.

(12) The result, therefore, is that Kalwa's sentence under S. 376, I. P. C. of eight months' rigorous imprisonment, which was imposed by the learned Sessions Judge, must be restored and the application of the First Offenders' Probation Act to him must be set aside. He is on bail, he shall be taken into custody forthwith and shall serve out his sentence.

(13) The next question to be decided is whether we should enhance the sentence imposed on Mushtaq. He was 15 at the time when he committed the act and of the age of 16 when the conviction was recorded by the court below. He is now 18½ years of age. But his age at the present moment cannot be taken into consideration in considering the question of enhancement. What has to be considered by the Court in determining the question of sentence is the age when the person committed the offence, and not when he is being dealt with by the Court.

The question, therefore, which we have to consider is, what should be the proper punishment for Mushtaq, assuming him to be of the age of 15 when he committed the offence. The evidence discloses that he was a normally well-built boy of 15 and capable of sexual intercourse. The court below has remarked that such offences should be dealt with severely. We are also of the same opinion. The offence of rape under S. 376 is punishable with transportation for life. Taking everything into consideration, we think that a sentence of eight months' rigorous imprisonment was wholly inadequate and we think that a sentence of two years' rigorous imprisonment should have been awarded to him. We accordingly enhance the sentence of imprisonment imposed on Mushtaq and sentence him to two years' rigorous imprisonment under S.

376, I. P. C. The sentence of stripes will remain and is confirmed. He will surrender to his bail and serve out the sentence. The sentence of stripes will be administered to him when he is medically found fit for the same. The appeal of Mushtaq is dismissed.

(14) Leave to appeal to the Supreme Court is refused. The notice for enhancement is dealt with as stated above.

B/D.H.Z. Order accordingly.

A.I.R. 1954 ALLAHABAD 583 (Vol. 41, C.N. 227)

AGARWALA AND MUKHERJI JJ. (30-11-1953).

State v. Tirath Das, Opposite Party.

Criminal Ref. No. 252 of 1951.

(a) Criminal P. C. (1898), S. 307 — "After giving due weight to the opinions of the Sessions Judge and the jury".

The verdict of the jury is to be disregarded only when it can be said that upon the evidence no reasonable body of men could have reached the conclusion arrived at by it, and it is in this light that the expressions 'perverse' or 'manifestly wrong' or 'against the weight of evidence', should be interpreted. When, however, the High Court calls for further evidence in the case the High Court is not restricted to take the view taken by the jury upon the evidence before it, even though it could not be said that the view was such as no reasonable body of men could have arrived at. The reason is that the fresh evidence taken by the High Court not being before the jury its verdict suffers from an infirmity and could not be given that weight to which it would otherwise be entitled, and in such a case the High Court is directed to do what in its opinion the ends of justice required to be done.

Again, no doubt the opinion of the Sessions Judge is also to be given due weight. But when it could not be said that the verdict of the jury was such as no reasonable body of men could have reached upon the evidence. the opinion of the Sessions Judge is of little weight, and it is the verdict of the jury that ought to prevail. Difference has to be made, no doubt between a verdict of jury which is unanimous, and a verdict which is upon a bare majority. An unanimous verdict will undoubtedly carry more weight with the High Court, and though due weight must be given even to majority verdict, it is not entitled to that amount of weight which will be given to an unanimous verdict.

No difference between a verdict of guilty and a verdict of 'not guilty' can be made. Once the jury has given a verdict either of guilty or not guilty, the scales are even between the State and the private individual, namely, the weight that has to be attached to the verdict of jury whether of guilty or not guilty must be the same and cannot differ merely because it is of 'not guilty' rather than of 'guilty'. Case law referred.

(Paras 8, 9)

Anno: Cr. P. C. S. 307 N. 4 and 11

1949 Mitra: S. 307, P. 985 N. 935 "Necessary .... Justice" and P. 989 N. 938 "When .... interfere" (Conflict in views between different High Courts before the P. C. decision in AIR 1946 P. C. 151 (154) not brought out in Mitra — Conflicting decisions given pell-mell in Mitra.)

Cr. P. C. S. 307 N. 13.

1949 Mitra: S. 307 P. 988 N. 937 "Opinion .... jury "(Conflicts not brought out in Mitra — AIR 1946 P. C. 151 (154) which has settled. Some of the conflicts not noticed in Mitra).

(b) Penal Code (1860), Ss. 405, 409 — Debtor and creditor.

The one underlying idea in S. 405 is undoubtedly this that the property which is the subject matter of entrustment, or in respect of which dominion is passed over to the accused, does not even for the time being, become the property of the accused which he could use for his own purposes. Thus the section does not cover the case of a loan or of an advance of money when the borrower or the depositee intends to use or utilise that money, for the time being, till he is in possession of it, although he may have to return an equivalent amount later on to the person making the advance with or without interest, or compensation for the use thereof.

The amount of Rs. 10,000/- was handed over by the complainant to the accused to be sent to his firm in the first instance, and to be held by the firm for the purchase of goods; no interest was payable and the receipt of the amount was denied when it was demanded.

Held that upon the facts a relation of debtor and creditor was created between the parties. The beneficial ownership in the money so advanced to the accused was intended to be transferred to firm and his partners in the firm, and it could not be said that it was intended that he was to keep the money intact in his possession and make no use of it at all whether or not interest was paid on it. The amount was not to be returned in specie and the depositee was entitled to use the amount in his own business, but was bound to return the equivalent amount according to the directions of the complainant. This was not a case of entrustment of money in respect of which the accused was supposed to have committed any breach of trust within the meaning of S. 409. 'Case law discussed'.

(Paras 10, 11, 13)

Anno: Penal Code, S. 405, N. 3, 15, 20.

CASES REFERRED	Paras
(A) (V33) AIR 1946 PC 151: 47 Cri LJ 905 (PC)	8
(B) (V15) AIR 1928 Cal 732: 55 Cal 879: 29 Cri LJ 823	8
(C) (02) 29 Cal 128: 6 Cal WN 253	8
(D) (V19) AIR 1932 Lah 345: 13 Lah 573: 33 Cri LJ 220	8
(E) ('74) 13 Beng LR App 19: 20 WR Cr 73	8
(F) ('91) 15 Bom 452	8
(G) (V14) AIR 1927 Cal 848: 54 Cal 708	8
(H) (V15) AIR 1928 Mad 1186: 30 Cri LJ 317 (FB)	8
( ) ('32) 34 Bom LR 896	8
(J) (V23) AIR 1936 PC 171: 17 Lah 557 (PC)	11
(K) (V40) AIR 1953 SC 145: 1953 SCR 1057 (SC)	11
(L) ('01) 32 Pun Re Cr 1901: 135 Pun LR 1901	11
(M) ('13) 14 Cri LJ 145: 7 Law Bur Rul 16 (FB)	12
(N) ('94) 16 All 88: 1894 All WN 23	13

B. D. Gupta, for the State; Dr. M. H. Faruqui, Govt. Advocate, for Opposite Party.

AGARWALA J.:

This is a reference by the learned Assistant Sessions Judge of Kanpur in a jury trial. The facts of the case briefly stated are as follows:

(2) The complainant Inder Singh, formerly resided at Lyallpur in West Punjab (Pakistan) and carried on business in cloth. He used to purchase cloth through the agency of a firm called Jhangiram Hukumchand carrying on business of 'pukka Arhatiyas' at Bombay. The firm of Jhangiram Hukumchand was owned by three persons, namely, Hukumchand, now deceased, Tirathdas, opposite party, and one Ram Chandra. The firm as 'pukka Arhatiyas' used to buy goods for their constituents from merchants at Bombay and used to make payment to the sellers for the purchases made by them. Sometimes the constituents would deposit money with the firm in advance to be accounted for later on and set off against future purchases. Once the complainant Inder Singh had deposited a sum of Rs. 14,000/- with this firm, and interest was paid by this firm on this amount. After the partition of India the complainant settled down at Kanpur.

On 22nd July 1949 the complainant entrusted a sum of Rs. 10,000/- to Tirathdas, opposite party, to be sent to Bombay for being deposited in the said firm. An entry relating to this transaction was made by Tirath Das in the books of the complainant and it was to the following effect:

"Lekha Jhangiram Hukumchand Bombaywale Sambat 2006, 10,000/· Sahi Jhangiram Hukumchand Akhri Das Hazar Kanpur men tumne Dia Miti Sawan Badi 12 Bombay Pathan Waste."

This entry did not mention specifically for what purpose this money was handed over to Tirathdas. It was only mentioned that the money was handed over to him to be sent to the Bombay firm Jhangiram Hukumchand. The allegation of the complainant was that certain goods were intended to be purchased by the complainant through the agency of the firm Jhangiram Hukumchand, and this money was given so that it might be utilised for the said purchase.

The money was no doubt sent by Tirathdas to his firm at Bombay. There is an entry of the amount in the books of the firm. Certain rates had been quoted to the complainant by Tirathdas while he was at Kanpur, but the rates having meanwhile gone up the complainant considered that the purchase of the goods would not be profitable, and so he directed the firm Jhangiram Hukumchand not to purchase those goods but to keep the amount of Rs. 10,000/- in deposit with them till the complainant was able to obtain a licence for the sale of whole-sale cloth. The complainant obtained a licence for the sale of whole-sale cloth in the month of December 1949, and sent his younger brother to Bombay to make purchases through the agency of the firm of the opposite party. Five bales of cloth were purchased.

The opposite party, Tirathdas and the deceased Hukumchand were asked to arrange for the payment out of the amount in deposit with them. But they did not do so with the result that the complainant had to pay the amount himself. The complainant then, so the prosecution story ran, went to Bombay and asked Tirathdas and Hukumchand why they did not make the payment as arranged and asked them to return the deposit money. Tirathdas and Hukumchand, according to the prosecution, asked the complainant to wait for ten days when the entire deposit money would be returned.

The complainant waited for ten days. But the deposit money was not returned, and so the complainant lodged a complaint in the Court of the City Magistrate at Kanpur for criminal breach of trust under S. 409, Penal Code against Tirathdas and Hukum Chand. The offence was tried by a jury. During the pendency of the proceedings Hukumchand died. The Magistrate committed Tirathdas, the opposite party, to the Court of session.

(3) Tirathdas's defence was that the financing partner was Hukumchand and that Ram Chandra and he were working partners. The profits and losses were to be in the ratio of ten annas for Hukum Chand, three annas for Ram Chandra and three annas for Tirath Das. The amount of Rs. 10,000/- which was handed over to Tirath Das at Kanpur was duly sent by him to his Bombay firm and credited to the complainant's account in the firm. The amount was deposited by the complainant because the money was lying idle with him and he wanted to earn interest on it, and that it was not trust money, that since Dewali of the year 1949 Tirathdas ceased to be a partner of the firm, and in January 1950 he joined another firm by the name of Lachmandas Asandas and that at the time when the demand is said to have been made in March 1950, he had ceased to be a member of the firm of Jhangiram Hukumchand.

Tirath Das did not give any explanation as to why the firm Jhangiram Hukumchand had failed to return the sum of Rs. 10,000/-. The charge against Tirathdas was that he having been entrusted with Rs. 10,000/- "as agent of the complainant's firm" by the complainant and in the way of his business committed criminal breach of trust in respect of the said sum by conversion thereof on 1-3-1950 by denying the receipt of it.

(4) In support of the prosecution case one Motan Das was examined. He deposed that in his presence Inder Singh is said to have made a demand for the return of Rs. 10,000/- which was refused by Hukum Chand and also Tirathdas. Himmat Singh, a cloth dealer, at Kanpur said that the amount of Rs. 10,000/- was entrusted to Tirathdas 'for the purchase of the goods ordered'. Certain documents were also produced in evidence. These were the entries from the account books of the complainant and the account books of the firm Jhangiram Hukumchand. The entries about the advance of Rs. 14,000/- prior to the advance of Rs. 10,000/- in dispute were also proved, and they showed that interest had been paid on the amount of Rs. 14,000/-. No interest was, however, paid on the sum of Rs. 10,000/-. But it was explained that interest was paid when the amount was returned, and as the amount was not returned no interest was shown to have been paid in the account books.

(5) In defence, besides some formal witnesses, one Panna Lal, a servant of the firm Jhangiram Hukum Chand, was produced. He swore that the rate of interest paid by his firm on outstandings was 6 per cent. per annum, that Hukumchand operated the accounts, that Tirathdas left the firm Jhangiram Hukumchand in Dewali of the year 1949, that money to the extent of Rs. 1,50,000/- was owed by people to the firm Jhangiram Hukumchand, while the firm itself had not to pay more than Rs. 20,000/- to others. In other words, he proved that the firm Jhangiram Hukumchand was an insolvent firm. He also admitted that the amount of Rs. 10,000/- was not paid back to Inder Singh, complainant, nor were the goods supplied to him. The firm Jhangiram Hukumchand ceased to exist about two months before he gave evidence in Court, that is to say, much after the supposed demand was made for the refund of Rs. 10,000/-.

(6) The jury returned a verdict of guilty by a majority of 3 to 2. The learned Judge disagreed with the verdict and made the reference. The

opinion of the learned Additional Sessions Judge was that the amount of Rs. 10,000/- which was handed over by the complainant to Tirathdas, opposite party, was not trust money within the meaning of Section 409 of the Indian Penal Code, and that it was merely a loan to the firm of the opposite party to be accounted for and adjusted as and when purchases were made by the complainant through them and that on outstandings customary interest was payable as had been done on a previous occasion when a sum of Rs. 14,000/- was deposited. He was further of opinion that no reasonable body of men could have come to the conclusion that this was trust money.

(7) There is dispute between the parties whether interest was to be paid on the sum of Rs. 10,000/- so long as it was not used by the opposite party's firm Jhangiram Hukumchand in the purchases made on account of the complainant. Further, there is difference between the parties as to whether the opposite party refused to pay the amount when demanded by the complainant, or denied the receipt of Rs. 10,000/- by the opposite party. The complainant himself denied the receipt of the interest and he led evidence to show that Rs. 10,000/- was demanded, and its payment, even its receipt was denied. If we were to decide for ourselves the disputed points in the case we will have no hesitation in holding that the amount of Rs. 10,000/- was advanced in the usual course of business by the complainant under an expressed or implied agreement that interest as usual, which is shown to be 6 per cent. per annum, was payable on outstandings, and that the amount was to be utilised in the purchase of goods.

We would also hold that the amount was not paid by the Bombay firm, and as the demand was made in March 1950 we would hold that demand was probably made from Hukumchand as Tirathdas had ceased to be a partner by that time, and it was Hukumchand who had refused to make the payment. We would further hold that the strings of the finances of the firm Jhangiram Hukumchand were in the hands of Hukumchand, and Tirathdas having ceased to be a partner was not in a position to return the amount out of the funds of the firm.

But the question that has been argued is whether we should not, before we come to our own conclusions, take into account the verdict of the jury and hold contrary to what has been held that no reasonable set of persons could have come to that conclusion. In fairness to the jury it is possible to say that the jury could have, on the evidence on the record come to its own conclusions, namely, that interest was not payable on the sum of Rs. 10,000/- because it was never paid, that a demand was made from Hukumchand and Tirathdas as deposed to by the witness, Motan Das, and that the very receipt of Rs. 10,000/- was denied by them.

(8) Before the Privy Council decision in — 'Ramanugraha Singh v. Emperor', AIR 1946 PC 151 (A), there used to be difference of opinion amongst the various High Courts in India as to the sanctity to be attached to the verdict of a jury which has not been accepted by the Sessions Judge in a jury trial. One line of cases—('Emperor v. Ramchandra Roy', AIR 1928 Cal 732 (B); — 'Emperor v. Lyall', 29 Cal 128 (C) and — 'Crown v. C. Barwill', AIR 1932 Lah 345 (D)) was to the effect that once the verdict of jury was not accepted by the Sessions Judge and he made the reference to the High Court under S. 307, Criminal P. C., the High Court was absolutely free and untrammelled by the opinion of the jury, to come to its own conclusion on facts and to decide the case accordingly.

The other view was that even though the High Court has power to decide according to its own views, this power should be exercised only when the verdict of the jury is found to be perverse, or in other words, when the High Court considers that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury. It was also said that the High Court would not interfere unless the verdict was manifestly wrong, or clearly against the weight of evidence: — 'Queen v. Sham Bagdi', 13 Beng LR App 19 (E); — 'Queen Empress v. Dada Ana', 15 Bom 452 (F); — 'Emperor v. Harmohan Das', AIR 1927 Cal 848 (G); — 'Veerappa Goundan v. Emperor', AIR 1928 Mad 1186 (H) and — 'Emperor v. Bailali', 34 Bom LR 896 (I).

The Privy Council set at rest the controversy in the cases already mentioned. They held that

"The Legislature no doubt realised that the introduction of trial by jury in the Mofussil would be experimental, and might lead to miscarriages of justice through jurors, in their ignorance and inexperience, returning erroneous verdicts. Section 307 was intended to guard against this danger and not to enable the Sessions Judge and the High Court to deprive the jurors, acting properly within their powers, of the right to determine the facts conferred upon them by the Code.

If the jury have reached a conclusion upon the evidence which a reasonable body of men might reach, it is not necessary for the ends of justice that the Sessions Judge should refer the case to the High Court merely because he himself would have reached a different conclusion upon the facts, since he is not the tribunal to determine the facts. He must go further than that & be of opinion that the verdict is one which no reasonable body of men could have reached upon the evidence."

Their Lordships further observed—

"The powers of the High Court in dealing with the reference are contained in sub-S. (3) of S. 307. It may exercise any of the powers which it might exercise upon an appeal, and this includes the power to call fresh evidence conferred by S. 428. The court must consider the whole case and give due weight to the opinions of the Sessions Judge & jury, and then acquit or convict the accused. In their Lordships' view the paramount consideration in the High Court must be whether the ends of justice require that the verdict of the jury should be set aside.

In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial court, and if the jury take one view of the evidence and the Judge thinks that they should have taken the other, the view of the jury must prevail, since they are the Judges of the fact. In such a case a reference is not justified, and it is only by accepting their view that the High Court can give due weight to the opinion of the jury. If, however, the High Court considers that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then reference was justified and the ends of justice require that the verdict be disregarded."

We think that there can be no doubt about the meaning of their Lordships. They have clearly laid down that the verdict of the jury is to be dis-

regarded only when it can be said that upon the evidence no reasonable body of men could have reached the conclusion arrived at by it, & it is in this light that the expressions 'perverse' or 'manifestly wrong' or 'against the weight of evidence', which had been used by the Indian Courts in the line of cases approved of by the Privy Council, should be interpreted. When, however, the High Court calls for further evidence in the case the High Court was not restricted to take the view taken by the jury upon the evidence before it, even though it could not be said that the view was such as no reasonable body of men could have arrived at.

The reason is that the fresh evidence taken by the High Court not being before the jury its verdict suffers from an infirmity and could not be given that weight to which it would otherwise be entitled, and in such a case the High Court is directed to do what in its opinion the ends of justice required to be done. Again, no doubt the opinion of the Sessions Judge is also to be given due weight. But we have to remember that his opinion is entitled to weight only when he himself has done his duty, namely, of making a reference not merely because he thought that a different conclusion upon the facts should have been reached, but because the verdict of the jury was one which no reasonable body of men could have reached upon the evidence.

Therefore it comes to this that when it could not be said that the verdict of the jury was such as no reasonable body of men could have reached upon the evidence, the opinion of the learned Sessions Judge is of little weight, and it is the verdict of the jury that ought to prevail. Difference has to be made, no doubt between a verdict of jury which is unanimous, and a verdict which is upon a bare majority. An unanimous verdict will undoubtedly carry more weight with this Court, and though due weight must be given even to majority verdict, it is not entitled to that amount of weight which will be given to an unanimous verdict.

(9) It is also urged by the learned counsel that a difference between a verdict of guilty and a verdict of 'not guilty' must also be made and that when the verdict is of 'not guilty' it should be given more weight than when it is of 'guilty'. We are, however, unable to accept this view. The Code makes no distinction between the two verdicts and their Lordships of the Privy Council in the above case made no such distinction. On the other hand, they clearly stated that

> "if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial court, and if the jury take one view of the evidence and the Judge thinks that they should have taken the other, the view of the jury must prevail, since they are the judges of fact."

The court makes no distinction between the parties coming before it. It treats them on equal footing, be it the state or be it a private individual.

No doubt, in a criminal case the court convicts an accused only if the prosecution has proved its case to the satisfaction of the court, and there is no reasonable doubt in the mind of the court as to the guilt of the accused. But once this has been done, and the jury has given a verdict either of guilty or not guilty, the scales are even between the State and the private individual, namely, the weight that has to be attached to the verdict of jury whether of guilty or not guilty must be the same and cannot differ merely because it is of 'not guilty' rather than of 'guilty'.

(10) In the present case, therefore, we would proceed on the assumption that the facts were that the amount of Rs. 10,000/- was handed over to the opposite party to be sent to his firm in the first instance, and as the prosecution evidence itself discloses, to be held by the firm for the purchase of the goods, that no interest may be payable and that the receipt of the amount was denied when it was demanded. This handing over of the money may be termed as a deposit or may be termed as an advance. It is, however, clear that it was not to be returned in specie, and the depositee was entitled to use the amount in his own business, but was bound to return the equivalent amount according to the directions of the complainant. The question still remains whether on these facts there was an entrustment of money in respect of which there was breach of trust within the meaning of S. 409, Penal Code. After giving due consideration to the contentions of the parties we have come to the conclusion that this was not a case of entrustment of money in respect of which the opposite party is supposed to have committed any breach of trust within the meaning of S. 409, Penal Code.

(11) Section 405, Penal Code which defines the offences of criminal breach of trust, runs as follows:

> "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust."

The one underlying idea in S. 405 is undoubtedly this that the property which is the subject-matter of entrustment, or in respect of which dominion is passed over to the accused, does not even for the time being, become the property of the accused which he could use for his own purposes. The creation of the trust or the passing of dominion over certain property implies that the person to whom property is handed over does not become the beneficial owner thereof even for the time that the property is not to be used according to the directions given at the time of entrustment of the property. Thus the section does not cover the case of a loan or of an advance of money when the borrower or the depositee intends to use or utilise that money, for the time being, till he is in possession of it, although he may have to return an equivalent amount later on to the person making the advance with or without interest, or compensation for the use thereof.

When a loan is advanced the relation of a creditor or a debtor is created. In the case of a deposit also the relationship between the parties is nothing else but that of a debtor and a creditor, vide — 'Mahomad Akbar Khan v. Attar Singh', AIR 1936 PC 171 (J) and — 'Lakshmanier and Sons v. Commissioner of Income-tax and Excess Profits Tax, Madras', AIR 1953 SC 145 (K). The money deposited is to be utilised by the depositee, and though an equivalent amount has to be returned with or without interest, it is not intended that the identical amount in specie has to be returned. If, however, the terms of the contract be that the identical amount in specie has to be returned, it is a case which would be covered by

S. 405, Penal Code. That undoubtedly was not the case here. In the present instance, the direction how the money advanced was to be utilised did not apply to the property which was entrusted but to its equivalent.

Again, the breach of the direction must be done not because the person is forced by circumstances beyond his control to act in violation of the directions, but because he dishonestly or, in other words, with the intention of causing wrongful gain to one person or wrongful loss to another person, violates those directions. The facts of the case in — 'Raushan Rai v. Emperor', 32 Pun Re Cr 1901 p. 93 (L), were very similar to the facts of the present case. Certain Afghans of Kandhar used to deposit the proceeds of their stray transactions with the accused who struck balances in favour of the Afghans individually in their book every year, but they refused to pay the sums when the moneys were demanded of them pretending that they were ruined and were unable to pay the debts. It was held that a relation of debtor and creditor was created and that the deposit was a mere deposit, as that of a deposit of money not to be returned in specie, and therefore not a trust and that no criminal liability was incurred.

(12) In — 'Hock Chang & Co. v. Ka Do', 14 Cri LJ 145 (LB) (M), money was advanced to an accused on the undertaking that he should buy paddy at what rate he could and should sell to the advancing firm at the market rate on the day of delivery. It was held that the property in the money passed to the accused and his contract to use the money in a particular way did not operate to create a constructive trust, and that in the circumstances no criminal liability for criminal breach of trust was incurred.

(13) In — 'Queen Empress v. Moss', 16 All 88 (N), the directors of a bank had paid dividends to the share-holders not out of the protfis which the bank had earned but out of the depositors' money in the hands of the bank. In a charge to the jury Sir John Edge pointed out that if the jury found that the directors had dishonestly, that is, knowingly and intentionally, paid over the dividends out of the deposits when there were no profits, intending to cause gain to themselves or other share-holders to which they were not entitled, or to cause wrongful loss to the depositors, the directors were guilty under S. 409, Penal Code.

But this was a case in which the directors merely had dominion over the assets of the bank. It was not a case in which the assets of the bank were transferred to the directors to be used by them in their own business with a condition that the same shall be returned as and when required by the depositors. The offence of the criminal breach of trust was committed 'by the directors', qua moneys of the bank over which they had dominion, and not 'by the bank' qua the moneys which had been deposited with them by the depositors.

Sir John Edge clearly pointed out the distinction between the two classes of cases. Said his Lordship:

"It was doubtful whether the moneys deposited in the bank were 'property' within the meaning of the section 'so far as the depositors were' concerned. When a depositor paid money on deposit, that money was not ear-marked so as to entitle him to receive the specific rupees he paid in, and consequently, after the deposit, the money deposited was not his property. The moneys so deposited might, however, be within the meaning of the section the "property" of the Bank."

When a relation of debtor and creditor alone is created by the bailment of money a civil liability is created. The criminal liability arises in addition to the civil liability when the beneficial ownership in the property is not transferred to the accused and he is placed under an obligation, contractual or otherwise, to utilise the money for the specific purpose for which it was handed over to him. In the present case upon the facts as they appear from the record and as the jury must have found them, a relation of debtor and creditor was created between the parties. The beneficial ownership in the money so advanced to the opposite party was intended to be transferred to the opposite party and his partners in the firm, and it could not be said that it was intended that he was to keep the money intact in his possession and make no use of it at all whether or not interest was paid on it.

(14) In our opinion, the opposite party could not be said to have committed any offence. We, therefore, accept the reference and acquit the opposite party. He is on bail. He need not surrender. His bail bonds are cancelled.

B/D.H.Z. Reference accepted.

A.I.R. 1954 ALLAHABAD 587 (Vol. 41, C.N. 228)

(LUCKNOW BENCH) BEG J. (28-1-1954)

Nan, Defendant-Appellant v. Zamindar, Plaintiff-Respondent.

Second Appeal No. 57 of 1951 against decree of Civil J. of Gonda, D/- 19-1-1951.

Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), Ss. 3 and 16 — Effect of permission.

There is no warrant for the proposition that once permission to file a suit has been granted by the Rent Control and Eviction Officer, the landlord is absolved from his liability to prove any of the grounds mentioned in S. 3(a) to (f), Rent Control and Eviction Act before he can get a decree for ejectment. Under S. 3, U. P. Control of Rent and Eviction Act, the District Magistrate only gives permission to file a suit. He does not and cannot order ejectment of the tenant under that section. Further after the amendment of S. 3 no permission is necessary to file the suit on any of the grounds mentioned in cl. (a) to (f) and hence any permission granted by the District Magistrate or any observations made by him in his order have no legal sanction and should be ignored altogether. Therefore a decree for eviction passed on the ground that the permission to file a suit for ejectment having been given by the Rent Control and Eviction Officer the Civil Court was bound to decree the suit for ejectment is legally incorrect. Section 16 has no application whatsoever to the case.

(Paras 3, 4, 5, 6)

D. P. Khare, for Appellant; Hyder Husain, for Respondent.

JUDGMENT: This is a defendant's appeal. It arises out of a suit brought by the plaintiff for arrears of rent and ejectment. The ejectment of the defendant was sought on the ground that the defendant had caused substantial damage to the accommodation under S. 3(b), U. P. Control of Rent and Eviction Act.

(2) The defendant admitted his liability for arrears of rent but resisted the relief of ejectment

on the ground that he had not caused any damage to the building.

(3) The trial Court decreed the suit for arrears of rent. It, however, dismissed the suit for ejectment holding that the defendant had not caused any damage. Dissatisfied with the judgment of the trial Court on the question of ejectment, the plaintiff filed an appeal which came up for hearing before Sri T. N. Chatterji, Civil Judge, Gonda. Before the lower appellate Court, it was argued that the permission to file a suit for ejectment having been given by the rent control and eviction officer the civil court was bound to decree the suit for ejectment. This argument was accepted by the Court below which allowed the plaintiff's appeal and varied the decree of the trial Court by decreeing ejectment also. The defendant has filed this second appeal against the said judgment.

(4) It has been argued on behalf of the appellant that the order of the lower appellate Court is legally incorrect. This argument must be accepted. There is no warrant for the proposition that once permission to file a suit has been granted by the rent control and eviction officer, the landlord is absolved from his liability to prove any of the grounds mentioned in S. 3(a) to (f), Rent Control and Eviction Act before he can get a decree for ejectment. Reliance has been placed in this connection by the lower appellate Court on S. 16 of the Act.

That section provides as follows:

"No order made under this Act by the State Government or the District Magistrate shall be called in question in any Court."

(5) In my opinion S. 16 has no application whatsoever to the present case. Under S. 3, U. P. Control of Rent and Eviction Act the District Magistrate only gives permission to file a suit. He does not and cannot order ejectment of the tenant under that section. In the present case, however, the suit was brought on the ground that the tenant has caused substantial damage to the accommodation. Section 3, U. P. Control of Rent and Eviction Act states as follows:

"Subject to any order passed under sub-s. (3) no suit shall without the permission of the District Magistrate, be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds;

"(a) .....

"(b) that the tenant has wilfully caused or permitted to be caused substantial damage to the accommodation;

"....."

(6) In view of certain doubts which were created regarding the interpretation of the above provision of law, an amendment had to be enacted to make it clear that no permission was necessary for filing a suit for eviction against a tenant on any of the grounds mentioned in cls. (a) to (f) of the said Act. It is, therefore, clear that the permission of the District Magistrate was not necessary at all for filing the present suit. Any permission granted by the District Magistrate or any observations made by him in his order have therefore no legal sanction and should be ignored altogether. The view taken by the lower appellate Court is clearly erroneous and cannot be sustained.

(7) The judgment of the lower appellate Court is, therefore, set aside and the appeal allowed with costs.

B/M.K.S. Appeal allowed.

A.I.R. 1954 ALLAHABAD 588 (Vol. 41, C.N. 229)

MALIK C. J. AND GURTU J. (17-3-1954)

Mohan Lal and others, Defendants-Appellants v. Mst. Bhudevi, Plaintiff and others, Defendants-Respondents.

First Appeals Nos. 125 and 128 of 1947, against decision of Addl. Civil J., Etah, D/- 7-2-1947.

(a) Hindu Widows' Remarriage Act (1856), S. 2 — Remarriage valid under custom — S. 2 does not apply — Applicability to Aryasamajist — (Hindu Law — Widow).

A Hindu widow loses a widow's estate in her first husband's estate only if the marriage can be said to have been validly performed by reason of the enabling provision of the Hindu Widows' Remarriage Act. If independently of the Act there is a custom the widow can remarry, S. 2 of the Act does not apply. This is so even in respect of a widow who professes to follow Aryasamaj tenets. AIR 1932 All 617 (FB); AIR 1937 All 343, Rel. on. (Paras 10, 11)

Anno: H. W. R. Act, S. 2 N. 2.

(b) Hindu Widows' Remarriage Act (1856), S. 2 — Remarriage of widow — Custom — Loss of estate after remarriage — Burden of proof — (Hindu Law — Widow).

If a custom is established permitting marriage of a Hindu widow so that it is not necessary to have recourse to the Hindu Widows' Remarriage Act for legalising the marriage the provisions of S. 2 do not apply. In such a case if the plaintiff alleges that by reason of the remarriage the Hindu widow had lost the Hindu widow's estate it will be for the plaintiff to prove that that result follows either by reason of any special custom to that effect or by reason of the provisions of the Hindu Law. AIR 1935 All 924, Ref. (Para 12)

Anno: H. W. R. Act, S. 2 N. 2.

(c) Hindu Law — Widow — Remarriage and unchastity.

The provisions of Hindu Law relating to chastity of a Hindu widow after her husband's death do not necessarily apply to re-marriage. By reason of unchastity a Hindu widow does not cease to continue to be a Hindu widow; while by re-marriage she ceases to be such. If there is a custom recognising re-marriage it cannot be said that a widow re-marrying in accordance with such custom was leading a life of unchastity. AIR 1935 All 924, Criticised. (Para 12)

(d) Hindu Widows' Remarriage Act (1856), S. 1 — Act is not invalid — (Constitution of India, Arts. 14 and 19(1) (f)).

The Hindu Widows' Remarriage Act, 1856 is an enabling Act which removed disability under which Hindu widows were suffering and allowed them to remarry. They were given a right where they did not have it before. Hence, the contention that the provisions of the Hindu Widows' Remarriage Act are 'ultra vires' of the Constitution being contrary to the provisions of Art. 19(1)(f) and that Art. 14 is also violated, as the provisions discriminate against Hindu widows, has no force as neither Art. 14 nor Art. 19 of the Constitution has any application. (Para 13)

Anno: H. W. R. Act, S. 1 N. 1.

CASES REFERRED : Paras

(A) (V19) AIR 1932 All 617: 1932 All LJ 941 (FB) 11

(B) (V24) AIR 1937 All 343: 169 Ind Cas 767 11

(C) (V22) AIR 1935 All 924: 160 Ind Cas 321 12

K. C. Saksena, for Appellants; A. P. Gupta and M. A. Kazmi, for Respondents.

MALIK C. J. :

These two cases arise out of one suit and the two appeals have been filed by two different sets of defendants. One Kundan Lal was the owner of the property in suit. He had two sons and two daughters. The sons were Nathu Ram and Sunder Lal and the daughters, Asharfi and Bhudevi. Nathu Ram predeceased his father and on the death of Kundan Lal the entire property was inherited by Sunder Lal. The daughter Asharfi died without any issue and Bhudevi is the plaintiff. Nathu Ram died leaving two daughters, Anandi Devi and Premvati who were married respectively to Suraj Bhan and Gyan Chand. Sunder Lal also died. Imarti Devi, defendant No. 4 was his widow. On 1-7-1944, she remarried one Raj Bahadur of village Dhansari. A few months before her remarriage on 31-3-1944, Imarti Devi sold the residential house to Smt. Gomti, defendant No. 1, for Rs. 2,500/- and on 23-6-1944, she sold the shop to Mohan Lal and Ram Charan for Rs. 4,000/-. Ram Charan is dead and his legal representatives are his widow and two sons. After the remarriage of Imarti Devi on 1-7-1944, the suit out of which these appeals have arisen, suit No. 20 of 1946, was filed by Smt. Bhudevi claiming that the two transfers made by Imarti Devi on 31-3-1944 and 23-6-1944 were without legal necessity and that on the remarriage of Imarti Devi, she (Bhudevi) had become the owner of the property as the nearest heir alive to Sunder Lal.

(2) The suit was defended by Smt. Gomti, Mohan Lal and Ram Charan's widow who filed separate written statements. In Gomti's written statement, she pleaded that the transfer in her favour was for legal necessity and that she had purchased the property for value and after due enquiry. In the written statement of Mohan Lal, the plea taken was that the transfer was justified by legal necessity. In the written statement filed by Ram Piari alias Durga Devi, widow of Ram Charan, pleas were taken that the transfer was for legal necessity and that she had purchased the property in good faith and after due enquiry. A further plea was taken by Smt. Gomti in her written statement, paragraph 17, that Imarti Devi had not contracted a second marriage which fact the other two defendants had also denied and she went on to say that

> "If in the opinion of the Court she is found to have contracted a second marriage then on account of the fact that Mst. Imarti and her relations were the followers of Arya Samaj and they could, as such, remarry, her marriage as a widow could be performed. Second marriage among the members of her brother-hood is lawful according to custom and a widow is not deprived of her husband's property on account of her second marriage according to custom".

The learned Civil Judge, Mr. Gahlaut, on 30-11-1946 in the presence of the parties and their counsel, defendant No. 6, Imarti Devi alone being absent as she had refused to receive the summons and had not filed her written statement, framed the following issues:

1. Were the sale deeds in suit executed for legal necessities? If so, are they binding on the plaintiff?
2. Have defendants 2 to 5 spent anything in repairs of shop? If so, how much?
3. Is the suit for the shop barred by time?
4. Has Imarti Devi remarried and when? What is its effect?
5. Is the plaintiff entitled to take possession and get the damages claimed?

One of the pleas taken by Mohan Lal was that he had spent some money over the repairs of the shop which, it is said, was in a dilapidated condition.

(3) Learned counsel for the appellant has attacked the decree of the lower court both on the merits as well as on the ground that it had framed no issue as regards the custom pleaded in the written statement of Gomti or as regards bona fide enquiry.

(4) It is admitted that Imarti Devi was the widow of Sunderlal and the property in suit had belonged to him. Imarti Devi had, therefore, no right to transfer the property and the transfer would be invalid unless the transferee can show that the transfer was for legal necessity.

(5) The necessity recited in the sale deed dated 31-3-1944, is the building of the shop which, it was said, had become dilapidated, and about the repair of which the tenant had given a notice and to undertake a pilgrimage and perform 'pind-dan' for the benefit of the soul of her husband. It was also mentioned in the sale deed that the income of the property was not sufficient for her maintenance, and that she had been ill for some time. The notice referred to in this letter is dated 27-3-1944, to the effect that the roof of the shop along with the beam had been in a very bad condition for a long time, as a result of which the shop could not be used properly, and unless it was repaired the tenant will not pay the rent.

Though the house was sold three days later on 31-3-1944, & one of the objects mentioned herein was the repair of the shop, nothing was done to effect the repair, & on 23-6-1944, the shop itself was sold for Rs. 4,000/-, and the reasons given in this sale deed are that the executant needed money to maintain herself and for performing pilgrimage and charitable act according to the religious tenets for the benefit of her husband's soul. The shop is described in the sale deed as in a dilapidated condition. The question, therefore, arises whether these statements made in these documents were true or they were merely put in for the purpose of making out a case of legal necessity.

(6) From the manner in which the necessity has been set out in the two documents, and the fact that on the 27th of March, Imarti Devi received a notice that the shop needed repair and it must be repaired otherwise the tenant would not pay the rent, that three days later she sells the house for Rs. 2,400/- to get money for the repair of the shop, and three months later she sells the very shop unrepaired, for the repair of which she had sold the house, and a week after that she remarries, it appears to us that as the lady had decided to remarry and 1-7-1944, was fixed for her re-marriage, she was probably doubtful whether she would have any right to the property after her marriage and these transfer deeds were executed to get rid of the immovable property and convert the same into cash. (After considering the evidence his Lordship held that the evidence of enquiry and of legal necessity was worthless and was rightly disbelieved by the lower court, and with the lower court which disallowed the defendant Mohan Lal's claim for the repairs.)

(7) The next question that arises, however, is whether the plaintiff Bhudevi can get possession of the transferred property as Imarti has re-married, or she must wait till Imarti is dead. Learned counsel has made a grievance that though the plea of custom was raised by Gomti in her written statement, no issue was framed on the point. Paragraph 17 of the written statement of Gomti has been so defectively drafted that it is difficult to say what exactly she wanted to plead, though no doubt the word 'custom' is used at two places in that paragraph. All the defendants denied the re-marriage of Imarti, though at the trial when the witnesses were examined it became clear that Imarti had re-married Raj Bahadur, and the only question that remained was whether she had married him in the Aryasamaj form or according to Sanatandharma form — though in our view this would not have made much difference. The plea raised in paragraph 17 is as follows —

> "The plaintiff's allegation that Mst. Imarti Kuer has contracted a second marriage is totally wrong. If in the opinion of the Court she is found to have contracted a second marriage, then on account of the fact that Mst. Imarti and her relations were the followers of Arya Samaj and they could as such remarry, her marriage as a widow could be performed. Second marriage among the members of her brotherhood is lawful according to custom. A widow is not deprived of her husband's property on account of her second marriage according to custom ...."

We have already said that the issues were framed in the presence of the parties and their counsel, and the defendants' learned counsel never asked for an issue on the point. From the evidence of the witnesses examined on behalf of the defendants it is clear that their case was that Imarti could re-marry as she was an Arya Samajist, and, as regards Arya Samajists since marriage is permissible, she would not forfeit her right as a Hindu widow to remain in possession of her first husband's property during her lifetime. The evidence also shows that re-marriage of widows amongst them is a recent innovation. We are not satisfied that the defendant wanted to plead any special custom by which marriage was permitted before the Hindu Widows' Re-marriage Act of 1856 came into force, and that under the custom then prevailing a widow who re-married did not lose the widow's estate.

(8) As we have already said the defendants had denied the marriage but after the plaintiff had examined a large number of witnesses to prove re-marriage on 1-7-1944, when the defendants led their oral evidence their witnesses also admitted the re-marriage. So it is common case now of the parties that Imarti Devi remarried Raj Bahadur of Dhansari on 1-7-1944.

(9) As we have already said the plaintiff's case was that she married according to the Sanatandharm form while the defendants' case was that she married in the Aryasamaj form. Though in our view the form of the marriage would hardly matter but after having carefully considered the evidence we agree with the trial Court that Imarti Devi was married in the Sanatandharm form. (After reviewing the evidence His Lordship concluded:) In this state of the evidence, we are fully satisfied that the lower Court was right in its conclusion that Imarti Devi was remarried in the Sanatandharm form and not in the Aryasamaj form. It was not pleaded that there was any ancient custom of re-marriage prevailing before the Hindu Widows' Remarriage Act came into force nor does the evidence go to prove any such custom. As a matter of fact Ganeshi Lal admitted that the first remarriage in their community was of his niece about fortyfive years back.

(10) The Hindu Widows' Re-marriage Act (Act 15 of 1856) provides that as there was some difference of opinion on the question whether a Hindu widow could under the Hindu law remarry, therefore, to remove any doubt or legal disability and for the promotion of good morals and public welfare that enactment was made. It provides that the marriage contracted by a Hindu widow will not be invalid. Section 2 of this Act provides that —

> "All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

The law is now well settled that a widow will lose a widow's estate in her first husband's estate only if the marriage could be said to have been validly performed by reason of the enabling provision of the Act. If independently of the Act there was a custom the widow could remarry and section 2 of the Act will not apply.

(11) Aryasamajists are Hindus and there was no special enactment which authorised marriage of widows in that community. The Arya Marriage Validation Act (Act 19 of 1937) only provides that marriages between Aryasmajists will not be invalid by reason of the fact that the husband and wife belong to different castes or different subcastes of Hindus or before the marriage they belonged to any religion other than Hinduism. That Act is not helpful. The general law, therefore, which applies to a Hindu widow will also apply to an Aryasamajist that S. 2 will not apply, if the marriage can be validly performed independently of the provisions of the Act. This view was accepted in the Full Bench decision of this Court in — 'Bhola Umar v. Mt. Kausilla', AIR 1932 All 617 (FB) (A), and by Niamatullah, J. in — 'Narain v. Mohan Singh', AIR 1937 All 343 (B) where the Judge said:

> "If the practice of remarriage is in existence since the passing of the Hindu Widows' Re-marriage Act, it cannot be considered to be a custom properly so called it is nothing but a repetition of instances of remarriages deriving their validity from the Hindu Widows Re-marriage Act. To show that the custom now obtaining is not the result of that Act, but wholly apart from it, some evidence ought to be forthcoming to prove that the custom was in existence before the Act was passed."

From the evidence, as already discussed, it would appear that it is more or less admitted that re-marriage is a practice of recent growth in the brotherhood the oldest instance being only forty-five years old.

(12) An argument has been advanced by learned counsel on the basis of certain observations in the case of — 'Ganga Saran Singh v. Mt. Sirtaji Kuer' AIR 1935 All 924 (C), that it is for the plaintiff to plead and prove that on a remarriage a Hindu Widow loses her first husband's estate. If a custom is established permitting marriage of a

Hindu widow so that it was not necessary to have recourse to the Hindu Widows Re-marriage Act for legalising the marriage the provisions of S. 2, as we have already said, do not apply. In such a case no doubt if the plaintiff alleges that by reason of the remarriage the Hindu widow had lost the Hindu widow's estate it will be for the plaintiff to prove that that result follows either by reason of any special custom to that effect or by reason of the provisions of the Hindu Law. It it not necessary in this case to go into the question whether under the Hindu law a Hindu widow would lose the widow's estate on remarriage as the question has not arisen, the custom of re-marriage not having been proved.

We may, however, with great respect to the learned Judges, who decided — 'Ganga Saran Singh's case (C)', point out that the provisions of Hindu Law relating to chastity of a Hindu widow after her husband's death do not necessarily apply to re-marriage. By reason of unchastity, a Hindu widow does not cease to continue to be a Hindu widow; while by re-marriage she ceases to be such. She ceases to be the surviving half of her deceased husband and becomes a part of some one else. The Hindu Law, as is well recognised, can be modified to well established custom and if there is a custom recognising re-marriage it cannot be said that a widow re-marrying in accordance with such custom was leading a life of unchastity. The analogy, therefore, to our minds did not apply.

(13) Learned counsel for the appellant has urged that the provisions of the Hindu Widows' Re-Marriage Act are 'ultra vires' of the Constitution being contrary to the provisions of Art. 19 (1) (f). They have also been challenged on the ground that Art. 14 was violated, as the provisions discriminated against Hindu widows. Neither of these two points have any force. The Hindu Widows Re-Marriage Act was an enabling Act which removed disability under which Hindu widows were suffering and allowed them to re-marry. They were given a right where they did not have it before. We fail to see how Art. 14 or Art. 19 of the Constitution have any application. Learned counsel, though he mentioned these points, did not in the course of his arguments develop the same.

(14) The result, therefore, is that these appeals fail and are dismissed with costs.

A/V.S.B. Appeals dismissed.

A.I.R. 1954 ALLAHABAD 591 (Vol. 41, C.N. 230)

(LUCKNOW BENCH) KIDWAI J. (4-1-1954).

Badri Prasad and others, Applicants v. The State.

Criminal Misc. No. 335 of 1953, against Order of City Magistrate, Lucknow, D/- 15-5-1953.

Criminal P. C. (1898), Ss. 561A, 107, 117 — Expunging of objectionable matter.

A proceeding was going on against the applicants under Ss. 107/117, Criminal P. C. The Magistrate passed the following order :

"As per S. O.'s report and the A. P. P. endorsement thereon suggesting that there is no apprehension of breach of the peace now, the case is filed and the notices withdrawn with a warning to the accused that they shall not give any chance to the police to report danger to breach of the peace at any time in future. Should such an occasion, however, arise the S. O. shall take immediate N. A":

Held that from a perusal of the order it appeared that without going into the matter at all the Magistrate was inclined to the view that at one time there had in fact been an occasion for a proper report under Ss. 107 and 117, Criminal P. C. He had no justification whatsoever for arriving at any such conclusion without allowing an opportunity to the applicants to show that at no time was there any apprehension of a breach of the peace from them. When he was finally withdrawing the notice, he had no business to issue any warning. He had no reason to anticipate that the accused would give legitimate occasion for a report against them. Such a course of action was wholly unjustified under the law and could be nothing but an abuse of the process of the court. The High Court could therefore direct that the later portion of the order shall be deemed to be non-existent though it could not order the removal of the words complained of from the order itself which was a part of the record of the Court.

(Paras 3, 4)

Anno:Cr. P. C., S. 561A, N. 7.

1949 Mitra: S. 561A, P. 1689, N. "Or.....remarks" (6 Pts. extra in N. 7 to S. 561A in AIR Com. — 2 Pts. extra in Mitra).

Cr. P. C., S. 119, N. 2.

1953 Mitra: S. 119, P. 303, N. 295B "Discharge" (3 Pts. extra in N. 2 to S. 119 in AIR Com.).

R. K. Rai, for Applicants; Govt. Advocate, for the State.

ORDER : This is an application under S. 561A, Criminal P. C. for expunging certain remarks contained in the judgment of the City Magistrate of Lucknow. A proceeding was going on against the applicants under Ss. 107/117, Criminal P. C. On 15th May 1953 the learned City Magistrate passed the following order :

"As per S. O.'s report and the A. P. P. endorsement thereon of 15-5-1953 suggesting that there is no apprehension of breach of the peace now, the case is filed and the notices withdrawn with a warning to the accused that they shall not give any chance to the police to report danger to breach of the peace at any time in future. Should such an occasion, however, arise the S. O. shall take immediate N. A. Copy to S. O".

(2) It appears from a perusal of this order that an apprehension at one time existed of a breach of the peace and proceedings were, therefore, started under Ss. 107/117. These proceedings continued for some time and written statements were filed on behalf of the accused persons. Thereafter a report was made by the police that there was no longer any apprehension of a breach of the peace. The learned City Magistrate then passed the order in question.

(3) It appears from a perusal of the order that without going into the matter at all the learned Magistrate was inclined to the view that at one time there had in fact been an occasion for a proper report under Ss. 107 and 117, Criminal P. C. He had no justification whatsoever for arriving at any such conclusion without allowing an opportunity to the applicants to show that at no time was there any apprehension of a breach of the peace from them. When he was finally withdrawing the notice, he had no business to issue any warning. He had no reason to anticipate that the accused would give legitimate occasion for a report against them.

(4) It is always up to the police to make any report that it likes and it is for the Magistrate to judge the validity of any such report and not merely to place the accused persons at the mercy of the police surely as is done by the last sentence of this order since the police is directed to take immediate action should an occasion arise when the police may have any complaint. The police have large powers under the law. They can always take action that the law justifies but there is no justification for the Magistrate, who is not a police officer and who should be as interested in safeguarding the interest of innocent persons accused of the crime as he should be in the prevention of the crime, to go out of his way to issue such warnings.

Such a course of action is wholly unjustified under the law and can be nothing but an abuse of the process of the Court. I accordingly direct that the later portion of the order shall be deemed to be non-existent though I cannot order the removal of the words complained of from the order itself which is a part of the record of the Court.

B/D.H.Z. Order accordingly.

A.I.R. 1954 ALLAHABAD 592 (Vol. 41, C.N. 231)

MALIK C. J. AND SAPRU J. (10-2-1954)

Raja Ram, Plaintiff-Appellant v. Madho Prasad, Defendant-Respondent.

F. A. F. O. No. 142 of 1950, from Order of 2nd Addl. Civil J. of Banaras, D/- 17-4-1950.

(a) Civil P. C. (1908), O. 41, R. 23; O. 43 R. 1(u) — Appeal against order of remand.

Issue framed by the Munsif was divisible into two parts. The first part raised the question, whether the defendant was in possession of the entire premises or only a part of it; and the second part was that if the defendant was in possession of only a part of the premises, was he entitled to claim reduction in the rent, and if so, how much. The Munsiff was of the opinion that if the defendant was in possession of only a part of the premises, he could not claim reduction in the rent without having recourse to a suit under S. 5(4), Control of Rent and Eviction Act for fixation of proper rent and on that finding he decreed the suit for the entire claim. The trial court, therefore, did not decide what would be the proper rent payable by the defendant to the plaintiff in case it was held that the defendant was not liable to pay the whole rent by reason of his having been given possession over only a part of the premises.

The lower appellate Court took the view that S. 5(4) of the Act had no application and the defendant, having been given possession over only a part of the premises, was entitled to claim proportionate reduction in the rent and remanded the case for determination of the question of reduction.

Held that the order of remand was under O. 41, R. 23 and the appeal lay under O. 43, R. (1)(u). (Para 11)

Anno: C. P. C., O. 41, R. 23, N. 21.

1953 Mulla: O. 41, R. 23, P. 1213, N. "Appeal" (5 Pts. extra in N. 21 to O. 41, R. 23 in AIR Com. — Lahore, Nagpur, Oudh, Rangoon and Madras views on Pt. (t) not noticed in Mulla — AIR 1929 Cal 689 (FB) criticising the previous views in 32 Cal 1023 (1029) (DB) not noticed in N. 21 to O. 41, R. 23 in AIR Com.).

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) — Amending Act 44 of 1948 — Retrospective Operation — (Interpretation of Statutes — Retrospective effect) — (Civil P. C. (1908), Pre.).

It is not necessary that it should be expressly stated that the provisions of a statute are restrospective in their operation if the intention can be gathered by necessary implication. AIR 1949 All 225 (FB), Rel. on. (Para 20)

In examining the scheme of the Act (3 of 1947) the High Court has in several cases pointed out that the Act was intended to apply to cases in which the decree was passed before the commencement of the Act, to cases pending on the date when the Act came into force and to cases instituted after the Act came into force. On the date when the suit was filed the defendant was liable to be ejected in accordance with the provisions of S. 106, T. P. Act (Act IV of 1882), but during the pendency of the suit in the trial Court the U. P. (Temporary) Control of Rent and Eviction Act, 1947, was made applicable to these premises also, by the Amending Act 44 of 1948 so that a defendant could be ejected only in accordance with the provisions of S. 3.

Held that though the amendment was not retrospective, the whole scheme of the Act being such that it not only affected future suits but also pending proceedings and decrees already passed, it must be held that the amendment which came into effect during the pendency of the suit in the trial Court had to be taken into consideration. Case law discussed. (Paras 13, 14, 19)

Anno: C. P. C., Pre. N. 3.

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 111: 1953 All LJ 555 14
(B) (V39) AIR 1952 All 584: 1952 All LJ 3 15
(C) (V40) AIR 1953 All 686: 1953 All LJ 288 16
(D) (V37) AIR 1950 All 396: 1950 All LJ 642 17
(E) ('51) 1951 All LJ 256: 1951 All WR HC 167 18
(F) (1853) 1 Macq 658 20
(G) (V36) AIR 1949 All 225: ILR (1949) All 703 (FB) 20

S. K. Verma, for Appellant; Ambika Prasad, G. P. Tandon, and Krishna Sahai, for Respondent.

MALIK C. J.:

This is a plaintiff's appeal against an order of remand passed by the lower appellate court.

(2) The plaintiff is the landlord and the defendant is his tenant. On 1st February 1947, the premises were let out to the defendant on a monthly rental of Rs. 65/-, the tenancy being from month to month in accordance with the Gregorian Calendar. On 29th May 1948, the plaintiff gave to the defendant notice to quit by 30th June 1948, and on 26th July 1948, filed the suit for ejectment, arrears of rent for two months from 1st May 1948, to 30th June 1948; for Rs. 104/- mesne profits from 1st July 1948, on which date according to the plaintiff the tenancy terminated, to 26th July 1948, when the suit was filed; and for 'pendente lite' and future mesne profits.

(3) The defendant admitted that he was a month to month tenant on a monthly rental of Rs. 65/-, but pleaded that he had paid Rs. 65/- one month's rent in advance, that when he had occupied the premises on 1st February 1947, the premises had been only partially constructed and that he had advanced to the plaintiff Rs. 910/- at the end of February, 1947, for completion of

the house, and that he had never been given possession over five rooms so that the plaintiff was entitled to rent at the rate of Rs. 40/- per month only and not at the rate of Rs. 65/- per month. It was further pleaded that the U. P. (Temporary) Control of Rent and Eviction Act, 1947 (Act 3 of 1947) applied and the defendant was not liable to be ejected.

(4) The learned Munsif framed the following issues:

"(1) Whether the defendant advanced Rs. 975/- to the plaintiff and whether it was agreed that the amount would be adjusted against the future rent?

(2) Whether the plaintiff did not give the defendant possession of a portion of the premises as agreed upon? If so, to what rent is the plaintiff entitled?

(3) Whether the suit is bad for S. 3 of Act 3 of 1947 and there is no wilful default in payment of rent on defendant's side?

(4) Whether the house was not completed when the defendant took it up? If so, to what effect?

(5) To what relief, if any, is the plaintiff entitled?

(5) The learned Munsif decreed the plaintiff's suit on 28th October 1949. On issue No. (4) his finding was that the house was complete when the defendant took it except for certain minor constructions; and issue No. (3) was decided in plaintiff's favour on the ground that the Control of Rent and Eviction Act did not apply to the premises as they were constructed after 1st July 1946, and the plaintiff could, therefore, claim to eject the defendant. It is not necessary for us to deal with the other issues which related to the cash decree claimed by the plaintiff.

(6) On appeal by the defendant the lower appellate court came to the conclusion that the U. P. (Temporary) Control of Rent & Eviction Act applied and the plaintiff was not entitled to eject the defendant unless he was able to bring his case within the purview of S. 3 of the Act. As regards the cash amount claimed, the lower appellate court disagreed with the decision of the trial court and remanded the case for determination of the correct amount in accordance with the directions given in the judgment. It is against that decision that this First Appeal from Order has been filed.

(7) Learned counsel for the plaintiff-appellant has urged that the U. P. (Temporary) Control of Rent and Eviction Act did not apply to the case and the view of the lower court that the plaintiff was not entitled to claim ejectment was wrong.

(8) A preliminary objection has been raised by learned counsel for the respondent that no appeal lies.

(9) These are the only two points for decision by us.

(10) As regards the preliminary objection, we are not satisfied that it has any substance. Issue No. 2 framed by the learned Munsif was divisible into two parts. The first part raised the question, whether the defendant was in possession of the entire premises or only a part of it; and the second part was that if the defendant was in possession of only a part of the premises, was he entitled to claim reduction in the rent, and if so, how much. The learned Munsif was of the opinion that if the defendant was in possession of only a part of the premises, he could not claim reduction in the rent without having recourse to a suit under S. 5(4), Control of Rent and Eviction Act for fixation of proper rent and on that finding he decreed the suit for the entire claim.

The trial court, therefore, did not decide what would be the proper rent payable by the defendant to the plaintiff in case it was held that the defendant was not liable to pay the whole rent by reason of his having been given possession over only a part of the premises. The lower appellate court took the view that S. 5(4) of the Act had no application and the defendant, having been given possession over only a part of the premises, was not (sic.) entitled to claim proportionate reduction in the rent & remanded the case for determination of the question of reduction.

(11) Order 41, R. 23, Civil P. C. as amended by this Court provides that—

"Where an appellate court has reversed a decree and all questions arising in the case have not been decided, the appellate court may, if it thinks fit, by order remand the case,....."

Order 43, R. 1 (u) provides that an order under R. 23 of Order 41 remanding a case, where an appeal would lie from the decree of the appellate court, is appealable. There can, therefore, be no doubt that the order of remand was under O. 41, R. 23 and the appeal lies under Order 43, R. 1(u), Civil P. C.

(12) As regards the point raised by the appellant, we have already given some dates. The lower courts have held that the premises were incomplete on 1st July 1946. The said premises were let out to the defendant on 1st February, 1947. On 29th May, 1948, the plaintiff gave to the defendant notice to quit by 30th June 1948, and on the expiry of the period filed the suit on 26th July 1948. The suit was decreed on 28th October 1949. On 1st March 1947, however, the U. P. (Temporary) Control of Rent and Eviction Act, 1947 (Act 3 of 1947) was passed. Under S. 1(3) the Act was to be deemed to have come into force on 1st October 1946. The Act, however, when passed, made an exception as regards premises which were incomplete on 1st July 1946, or were constructed thereafter.

'Accommodation' in S. 2(a)(iii) did not "include any newly constructed building or part of a building which was incomplete on the 1st July, 1946". The lower courts have found that the premises were incomplete on 1st July 1946. So the Act did not apply to these premises. On 15th December 1948, however, the Act was amended by the U. P. Act No. 44 of 1948, and the words quoted above that the Act will not apply to any newly constructed building or part of a building which was incomplete on 1st July 1946, were omitted. A section — S. 3A — was added as to how reasonable annual rent of accommodation constructed after 30th June 1946, was to be fixed and other consequential amendments were made in the Act.

(13) The position, therefore, is that on the date when the suit was filed the defendant was liable to be ejected in accordance with the provisions of S. 106, T. P. Act (Act 4 of 1882), but during the pendency of the suit in the trial court the U. P. (Temporary) Control of Rent and Eviction Act, 1947 was made applicable to these premises also, so that a defendant could be ejected only in accordance with the provisions of S. 3. The point, therefore, arises, whether this amendment, which was made during the pendency of the suit, should govern the decision. There can be no doubt that if the plaintiff had withdrawn the suit and filed a fresh suit for ejectment, the Act

would have applied having already been amended. It is, however, urged that though the amendment would apply if a fresh suit had been filed, but the Act would not apply to an already pending suit as the amendment was not made expressly retrospective.

(14) In examining the scheme of the Act this Court has in several cases pointed out that the Act was intended to apply to cases in which the decree was passed before the commencement of the Act, to cases pending on the date when the Act came into force and to cases instituted after the Act came into force. See — 'Sunder Lal v. Mohammad Ishaq', AIR 1954 All 111 (A), where it was pointed out that :

"Sections 3, 14 and 15 were intended to cover all possible cases. Section 14 as confined to cases where decrees had been obtained before 1st October 1946, and the decree was put into execution for ejectment of the tenant after 1st October, 1946; Section 15 was intended to cover all pending cases, that is, all suits or appeals pending at the time when the Act came into force, i.e., 1st October 1946; and Section 3 covers all suits which were to be filed after the commencement of the Act."

(15) In — 'L Raj Narain v. Sita Ram', AIR 1952 All 584 (B), it was held by a Bench of this Court that S. 15 was intended to apply not only to suits pending in the trial court but also to a suit in its later stages right up to the court of final appeal.

(16) The same view was taken by another Bench in — 'Hazari Lal v. Kanhaiya Lal', AIR 1953 All 686 (C).

(17) In — 'Niranjan Lal Bhargava v. Mt. Ram Kali Devi', AIR 1950 All 396 (D), Wanchoo and Seth, JJ. held that a court of appeal is entitled to take into consideration an Act passed during the pendency of the appeal which prohibited the passing of a decree.

(18) The same point arose before another Bench in — 'Har Sarup v. Lokeshwar Prasad', 1951 All LJ 256 (E), where it was held that :

"an appeal was merely a continuation of a suit and Courts of Appeal in India were not merely courts of error and the hearing of an appeal was in the nature of a re-hearing of the suit so that the Courts of appeal must pass decrees in accordance with law that exists on the day when the case comes up for hearing."

(19) In the case before us, though it is true that the amendment was not retrospective, the whole scheme of the Act being such that it not only affected future suits but also pending proceedings and decrees already passed, it must be held that the amendment which came into effect during the pendency of the suit in the trial court had to be taken into consideration.

(20) It is no doubt true, as has been pointed out in — 'Urquhart v. Urquhart', (1853) 1 Macq 658 at p. 736 (F), that :

"any Court will be slow to construe an enactment as retrospective and thereby as disturbing existing rights, unless Parliament has clearly said that the enactment is to be construed retrospectively"

but it is not necessary that it should be expressly stated that the provisions of a statute are retrospective in their operation if the intention can be gathered by necessary implication. See — 'Dila Ram v. Atma Ram', AIR 1949 All 225 at p. 227 (G).

(21) Taking into consideration, therefore, the whole scheme of the Act, we are inclined to accept the view of the lower court that the amendment must be interpreted to apply not only to future suits but also to pending proceedings.

(22) The appeal, therefore, has no force and is dismissed with costs.

B/D.H.Z. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 594 (Vol. 41, C.N. 232)

(LUCKNOW BENCH) RANDHIR SINGH J. (7-1-1954).

Salig Ram and another, Applicants v. Smt. Tarawati, Opposite Party.

Criminal Revn. No. 32 of 1953 against order of S. J., Lucknow, D/-10-1-1953.

(a) Criminal P. C. (1898), Ss. 369, 517 — Review of order under S. 517.

Once a Magistrate has passed an order under S. 517 and the parties have gone up in appeal, it is not open to him to revise his order or to set it aside on the motion of any of the parties to the dispute. The Magistrate before whom the application for revision of the order has been made is therefore perfectly justified in refusing to interfere with his earlier order passed under S. 517 which had become final. (Para 4)

Anno: Cr. P. C. S. 369 N. 4.

1949 Mitra : S. 369, P. 1140, N. 1054. "Alteration of judgment" P. 1141N "Proper procedure" (2 Pts. extra in N. 4 to S. 369 in AIR Com. — 4 Pts. extra in Mitra).

Cr. P. C. S. 517 N. 1.

1949 Mitra: S. 517 P. 1503 N 1342 "Scope..... section"(Position under Code of 1882 indicated in Mitra).

(b) Criminal P. C. (1898), Ss. 369, 517 — Review of Order under S. 517.

Where the order of the High Court clearly shows that the High Court was of opinion that the case in respect of which reference had been made was full of doubts and improbabilities and as such it refused to interfere with the order of acquittal passed by the Magistrate, any observations of this kind would not amount to a finding on any question of fact such as to justify the Magistrate who had passed the order under S. 517 following the acquittal to reverse his order passed regarding the disposal of property. (Para 4)

Anno: Cr. P. C. S. 369 N. 2.

1949 Mitra: S. 369, P. 1138, N. 1053 "Scope ..... Judgment" (8 Pts. extra in N. 2 to S. 369 in AIR Com. — 3 Pts. extra in Mitra).

Cr. P. C. S. 369 N. 4.

1949 Mitra: S. 369 P. 1140 N. 1054 "Alteration of judgment" P. 1141 N. "Proper procedure" (2 Pts. extra in N. 4 to S. 369 in AIR Com. — 4 Pts extra in Mitra).

Cr. P. C. S. 517 N. 1

1949 Mitra: S. 517 P. 1563 N. 1342 "Scope..... section" (Position under Code of 1882, indicated in Mitra).

K. B. Shukla and R. K. Rai, for Applicants; Manik Chand Jain, for Opposite Party.

ORDER: These are two applications in revision against the order of the Sessions Judge of Lucknow dated 10th January 1953, refusing to interfere with an order dated 25th October 1952, passed by a

Magistrate, first class, on an application made by Smt. Bitia.

(2) As the facts of this case are a trifle complicated it would be useful to make a brief reference to them before entering into a discussion of the points raised on behalf of the applicants.

(3) A complaint under S. 406 of the Indian Penal Code was made by one Smt. Taravati on the allegations that certain ornaments and a box had been entrusted by her in the company of her adoptive mother Smt. Jamna Devi sometime in 1948, to Salig Ram and Smt. Bitia for safe custody and that they failed to return the property to her and therefore committed criminal breach of trust. The defence of Salig Ram and Smt. Bitia was that the entrustment of the articles had been made by Smt. Jamna Devi and not by Smt. Taravati. It was also contended on behalf of Salig Ram that Jamna Devi in fact pawned the ornaments and that they were not deposited in trust. The learned Magistrate who tried the case came to the conclusion that the ornaments had been entrusted to the care of Salig Ram by Smt. Jamna Devi, but the box, which was a separate item, had been entrusted by Smt. Taravati. Salig Ram was acquitted and Smt. Bitia was discharged.

This order of acquittal was followed by an order made under S. 517, Criminal P. C. directing the return of the ornaments which had been taken possession of by the police to Salig Ram and the box to Smt. Taravati. Taravati then went in revision against the order of acquittal while Salig Ram and Smt. Bitia went in appeal against the order passed by the Magistrate under S. 517, Criminal P. C. Both these cases were transferred to Sri Gopal Chand Sinha, Temporary Civil and Sessions Judge. He dismissed the appeal but made a reference to the High Court for the setting aside of the acquittal. The reference made by the Sessions Judge came up for hearing before a learned Judge of this Court on 16th May 1952, and it was rejected.

Certain observations had been made in the judgment of the High Court and on the basis of these observations an application was made by Smt. Bitia to the Magistrate, who had passed the order under S. 517, Criminal P. C. for a revision of the order on the ground that the High Court had held that the box had also been entrusted by Jamna Devi and not by Taravati. The learned Magistrate to whom the application was made dismissed it on 25th October 1952, and a copy of the order has been filed. In this order the learned Magistrate referred to his earlier order for the disposal of the articles which were the subject-matter of the dispute under S. 406, Penal Code, and he refused to amend his order unless an order of the High Court was brought. The applicants Smt. Bitia and Salig Ram then went in revision to the Sessions Judge of Lucknow. The learned Sessions Judge dismissed the application for revision and she has now come up in revision to this Court.

(4) It appears that no revision was filed against the order of the Sessions Judge dated 22nd December 1951, dismissing the appeal filed against the order under S. 517, Criminal P. C. The order passed by the Magistrate therefore became final. It was only after that, that the judgment of the High Court was delivered in the reference made by the Sessions Judge on 16th May 1952. Smt. Bitia then made an application to the Magistrate for revising the order. Once a Magistrate has passed an order under S. 517, Criminal P. C., and the parties have gone up in appeal, it is not open to him to revise his order or to set it aside on the motion of any of the parties to the dispute. The learned Magistrate before whom the application for revision of the order had been made by Smt. Bitia was therefore, perfectly justified in refusing to interfere with his earlier order passed under S. 517, Criminal P. C. which had become final.

The learned counsel for the applicant has not been able to point out any provision of law under which a Magistrate was empowered or entitled to vary his order passed earlier under S. 517, Criminal P. C. at the request of either party unless it be on the basis of a clerical mistake. The learned counsel for the applicant has also read out the judgment of the High Court and it has been argued that the observations made by the learned Judge who heard the reference amounted almost to a decision of certain points of fact. I am unable to agree with this contention. A perusal of this order clearly shows that the learned Judge was of opinion that the case in respect of which reference had been made was full of doubts and improbabilities and as such he refused to interfere with the order of acquittal passed by the Magistrate. Any observations of this kind would not amount to a finding on any question of fact such as to justify the Magistrate who had passed the order under S. 517, Criminal P. C., following the acquittal to reverse his order passed regarding the disposal of property.

(5) A revision has also been filed on behalf of Smt. Taravati. She made an application before the Sessions Judge in the application for revision filed by Smt. Bitia and Salig Ram. This application of Taravati was also dismissed by the Sessions Judge. The learned counsel for the applicant Smt. Taravati in the other revision application has also not been able to point out that the order passed by the Sessions Judge on 10th January 1953, was wrong. Both the applications in revision must, therefore, fail and are dismissed.

B/D.H.Z. Revisions dismissed.

A.I.R. 1954 ALLAHABAD 595 (Vol. 41, C.N. 233)

(LUCKNOW BENCH) RANDHIR SINGH J. (19-8-1953)

Union Bank Ltd., Utraula, Defendant-Appellant v. Mst. Ram Rati and others, Plaintiffs-Respondents.

Second Appeal No. 438 of 1947 from Order of Civil Judge, Gonda, D/- 28-2-1947.

(a) Transfer of Property Act (1882), S. 122 — Essentials.

Gift is not complete unless it is accepted by the donee. (Para 5)

Anno: T. P. Act, S. 122 N. 7.

(b) Transfer of Property Act, (1882), S. 126 — Revocation of gift — Registration — Subsequent sale deed — Effect — (Registration Act (1908), S. 47).

A gift would be a valid gift if the gift has been accepted even though the document may not have been registered at the time of the execution of the document, and it cannot be revoked subsequently, if the document has been registered. A completed gift takes effect from the date of the execution and not from the date of registration.

Thus a completed gift which has been subsequently registered cannot be revoked by a registered sale deed executed after the gift but before its registration. AIR 1928 PC 86, Rel. on. (Paras 6, 8)

Anno: T. P. Act, S. 126 N. 1; Regis. Act, S. 47 N. 6.

(c) Transfer of Property Act (1882), S. 41 — Bona fide purchaser without notice.

Property originally belonging to deceased A — Partition between two sons of A and their mother, each getting one third share — Separate possessions — Partition registered — Death of one of sons — His widow re-marrying other son on condition of his gifting his property to her — Gift executed — Sale of entire property in favour of third person — Vendee who had knowledge of partition and separate possession held could not get protection under S. 41.

(Para 9)

Anno: T. P. Act, S. 41 N. 21.

(d) Hindu Widow's Remarriage Act (1856), S. 2 — Re-marriage — Forfeiture of right in husband's property — Re-marriage under custom — Effect.

Upon re-marriage under the Act the widow forfeits her right in her deceased husband's property.

If there was a custom in existence permitting re-marriage in a particular class of Hindu Society before the passing of the Hindu Widow's Remarriage Act, the re-marriage would not entail a forfeiture of her husband's property unless the custom itself has, as one of its incidents, a forfeiture of the rights inherited from her husband in the property.

If a widow sets up a custom under which she was remarried, but fails to establish it, she cannot escape the operation of S. 2, Hindu Widow's Remarriage Act. It would, therefore, not be enough for a widow merely to declare that she did not contract her marriage under the provisions of the Hindu Widow's Remarriage Act, but something more will have to be shown.

It is no doubt possible that a widow may contract a re-marriage under the practice prevailing in some other class of society or faith and may not take advantage of the provisions of the Hindu Widow's Remarriage Act for validating her re-marriage. But if she definitely pleads a custom and fails to establish that custom, the operation of S. 2, Hindu Widow's Remarriage Act cannot be resisted.

(Para 11)

In such a case she forfeits her rights to her deceased husband's property. (Para 11)

Anno: Hindu W. R. Act, S. 2 N. 3.

CASES REFERRED: Paras

(A) (V15) AIR 1928 PC 86: 52 Bom 313 (PC) 6
(B) (V22) AIR 1935 All 924: 160 Ind Cas 321 11
(C) (V24) AIR 1937 All 230: 58 All 1034 11
(D) (V37) AIR 1950 All 700: 1950 All LJ 477 11

Mohd. Ayub, for Appellant; S. N. Srivastava, for Respondent (No. 1).

JUDGMENT: These two second appeals arise out of a single judgment and decree.

(2) Sallar had two sons, Ram Harakh and Raghubar Dayal. Ram Harakh died leaving the plaintiff as his widow. Sallar was possessed of some immoveable property and it was alleged on behalf of the plaintiff that this property had been settled by a family settlement or partition in three equal shares in favour of Gangajali wife of Sallar, and the two sons of Sallar, Ram Harakh and Raghubar Dayal. Each of these three persons became owner of a third of the property of Sallar. On the death of Ram Harakh, his widow, the plaintiff, it was so alleged, agreed to marry Raghubar Dayal on the condition that he executed a gift deed of his property in her favour. The gift deed was executed on 20th February 1946 by Raghubar Dayal in favour of Ramrati in respect of his entire interest in the property. This deed was, however, not registered till 28th March 1946. In the meantime, on 26th February 1946, Raghubar Dayal executed a sale deed not only in respect of the one-third share in the property of the entire property of Sallar in favour of the Sallar which belonged to him, but in respect of Union Bank, Utraula.

After this sale deed had been executed the plaintiff Ramrati brought a suit for cancellation of the sale deed executed by Raghubar Dayal in favour of the Union Bank of Utraula against her. This suit was resisted by the Union Bank on various grounds. The contesting defendant denied that the plaintiff was the owner of the property in respect of which she had sued, or that the gift deed relied upon by the plaintiff had been executed on the 20th February 1946, and it was alleged that the gift had been acquired subsequently to defraud the defendant. The lower Court originally framed four issues in this case which are reproduced below:

1. Did defendant No. 2 execute any deed of gift in favour of the plaintiff as alleged?
2. Was there any family settlement according to which the plaintiff and defendant No. 3 are entitled to any and what share?
3. Is the sale deed in favour of defendant No. 1 by defendant No. 2 valid? Is the deed invalid for want of consideration?
4. To what relief, if any, is the plaintiff entitled?

During the course of the evidence, however, the plaintiff's Counsel admitted the execution of the sale deed obtained by the defendant as also that it was for consideration and after this statement had been made issue No. 3 was struck off by the trial Court and the remaining three issues were tried.

The trial Court came to the conclusion that the gift deed dated 20th February 1946, had been executed on that date and although it was registered on 28th March 1946, after the sale deed had been obtained by the defendant the gift deed took priority over the sale deed obtained by the defendant, and that the plaintiff became owner of a one-third share of the property under the gift deed.

(3) The finding of the trial Court on issue No. 2 was that there had been a partition between Ram Harakh and Raghubar Dayal and that one-third share in the property of Sallar was given to each of them and the remaining one-third to their mother Smt. Ganajali defendant No. 3. He also found that as it had not been pleaded on behalf of the defendant that the plaintiff forfeited her right in her husband's property on re-marriage, she continued to hold the property inherited by her from her husband even after the re-marriage. No finding, however, was given by the trial Court with regard to the remaining one-third share of the property which had passed to Smt. Gangajali, mother of Ram Harakh and Raghubar Dayal, under the partition, but a decree was passed in favour of the plaintiff for the cancellation of sale deed dated 26th February 1946.

The defendant went in appeal and it was contended that so far as the share of Gangajali was concerned, the plaintiff could not maintain a suit for the cancellation of the sale deed relating to that part of the property. It was also urged before the lower appellate Court that the plaintiff had lost her rights in the property of her husband on her re-marriage. The lower appellate Court

agreed with the view taken by the trial Court in respect of one-third of the property which had been conveyed to the plaintiff under the gift deed but accepted the defendant's contention in respect of the remaining two-thirds of the property. It, therefore, allowed the appeal partly and setting aside the judgment and decree of the trial Court declared that the sale deed executed by Raghubar Dayal, in favour of the Union Bank, Utraula, was invalid and inoperative to the extent of one-third share in the property covered by the saledeed and held the sale deed to be good against the plaintiff in respect of the remaining two-thirds of the property. Dissatisfied by the judgment and decree of the lower appellate Court both the plaintiff and the Union Bank, Utraula, have come up in second appeal.

(4) As the points involved in the two cases are more or less common and the appeals arise out of the same suit, it would be convenient to dispose of both the appeals together.

(5) The first point which has been pressed in arguments on behalf of the appellant, the Union Bank, Utraula, is that the deed of gift relied upon by the plaintiff should not have been given preference over the sale deed obtained by the Bank. The reasons put forward are that the plaintiff had failed to establish that there was a completed gift in existence before the sale deed was executed by Raghubar Dayal in favour of Union Bank, Utraula. It has been found by the trial Court, and this finding has also been accepted by the lower appellate Court, that the deed of gift was in fact executed on 20th February 1946, and this finding of fact cannot be challenged in second appeal.

It has, however, been argued that the plaintiff had failed to prove that delivery of possession had also been made to the donee, or that the donee had accepted the gift made by Raghubar Dayal.

Section 122, Transfer of Property Act defines "gift".

> 'Gift is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee."

This shows that in order to create a valid gift there should be acceptence on behalf of the donee and this proposition of law has not been disputed by the respondent. It remains, therefore, to be seen if there was evidence to prove that there had been acceptance of the deed of gift by the donee, that is, by Ramrati, bofore the sale deed had been obtained by the appellant in appeal No. 438. The point raised in appeal by the learned Counsel for the appellant that there had been no acceptance of the gift was not taken up in any of the two Courts below and was raised for the first time in this appeal. It was also not mentioned in the written statement that the gift had not been accepted by the donee.

Apart from this, there is intrinsic evidence in the deed itself which shows that the gift had been accepted by Ramrati. It is clearly mentioned in the gift deed that the gift had been accepted by Ramrati. It has also to be noted that this gift was made to Ramrati as a condition precedent to her remarriage with Raghubar Dayal and the deed of gift shows that Ramrati had agreed to marry Raghubar Dayal only if he agreed to make a gift of the property held by him and that the gift deed was executed under that agreement. It would thus appear that the acceptance of the gift by the donee is proved by the document itself as also by the peculiar circumstances under which the gift was made by Raghubar Dayal to Ramrati. That Ramrati re-married Raghubar Dayal is not now disputed. It is, therefore, abundantly clear that the gift deed dated 20th February 1946, was executed on 20th February 1946, and that the gift had been accepted by the donee.

(6) A further point arises whether the gift deed executed and accepted by the donee but not registered would take preference over the later registered document. This point was considered in — 'Venkat Subba Srinivas v. Subba Rama', AIR 1928 PC 86 (A) and it has been held that a gift would be a valid gift if the gift has been accepted even though the document may not have been registered at the time of the execution of the document, and it cannot be revoked subsequently, if the document has been registered.

(7) It was urged on behalf of the appellant that the execution of the sale deed before the registration of the deed of gift was tantamount to a revocation of the gift deed. It has been held in the Privy Council case referred to above that after the gift had been completed it cannot be revoked even though the document may not have been registered. The execution of the subsequent sale deed in favour of the Union Bank, Utraula, would not, therefore, amount to a revocation of the gift made by Raghubar Dayal in favour of Ramrati.

(8) As there had been a completed gift in favour of the plaintiff, the gift would take effect from the date of the execution and not from the date of registration. Section 47, Registration Act is clear on the point and lays down that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. The deed of gift was executed on 20th February 1946, and was registered on 28th March 1946. It, therefore, became operative on 20th February 1946.

(9) The last point which has been canvassed on behalf of the appellant is that S. 41, Transfer of Property Act protected the appellant. Section 41, Transfer of Property Act has hardly any application to this case. The appellant claims to be a bona fide transferee for value without notice of the earlier gift deed. It is in evidence that Raghubar Dayal was the owner of a third of the property left by Sallar and the partition of the property was made by a registered document in 1927. In spite of this deed, the Union Bank, Utraula, obtained a transfer in respect of the entire property held by Sallar from Raghubar Dayal.

The defendant appellant examined only one witness Mohammad Jafar who was the general agent of the Bank. He admitted that he knew that the property originally belonged to Sallar and that he had two sons, Ram Harakh and Raghubar Dayal. He also admitted that the plaintiff and her mother Gangajali lived in different houses. Even then no inquiry was made as to how Raghubar Dayal happened to claim his ownership against the whole of the property. No mention was made in the written statement also that any inquiry, such as should have been made by a prudent person, was made in the present case, about the title of Raghubar Dayal to the property in dispute.

It would not, therefore, be open to the appellant to take advantage of the provisions of S. 41, Transfer of Property Act. Moreover the plaintiff did not in any way by any conduct of hers lead

the appellant to believe that Raghubar Dayal was the owner of the property. The property which she had obtained by gift was the undivided shares in houses and shops and there could, therefore, be no separate possession over the gifted property. The plaintiff had after the gift become the wife of Raghubar Dayal and even if the property gifted to her had been separate property no severance of possession could be contemplated as both husband and wife would normally continue to live in the house even after the gift deed. The respondent is, therefore, not protected under S. 41, Transfer of Property Act. The sale deed obtained by the appellant, the Union Bank, Utraula would not, therefore, affect the rights of Ramrati in the gifted property and the finding of the lower appellate court on this point cannot be assailed.

(10) The other appeal is on behalf of the plaintiff Ramrati whose suit for cancellation of the sale deed against two-third share of the property has been dismissed. Learned counsel for the appellant has conceded that so far as the share of Gangajali goes, she has no title to maintain a suit in the life time of Gangajali. Smt. Gangajali became owner of one-third of the property on a partition between Ram Harakh, Ramrati and herself and the plaintiff could lay no claim to this part of the property. Whether Raghubar Dayal had or had not any right to make a transfer of the share held by Gangajali in favour of the Union Bank, Utraula, does not arise in this case. The plaintiff has not established any right to that property and as such she could not maintain a claim in respect of that property.

(11) Turning now to the remaining one-third share of the property comprised in the sale deed & in the suit the plaintiff inherited this property on the death of her husband Ram Harakh who was the owner of this one-third share under the deed of partition. The plaintiff had mentioned in her plaint that she had married Raghubar Dayal in the 'sagai' form according to the family custom. No issue was framed by the trial Court on this point. After the passing of the Hindu Widows' Remarriage Act, 1856, Hindu widows were entitled to remarry regardless of the existence or non-existence of a custom sanctioning remarriage. There was, however, a restriction imposed on the rights of widows on such a remarriage.

A widow was to forfeit her rights in her husband's property on remarriage. The question as to whether a widow who was permitted to remarry under custom even prior to the passing of the Widows' Remarriage Act, 1856, would or would not forfeit her rights in the property inherited from her husband, arose for consideration in a number of cases in this Court and it has been consistently held that if there was a custom in existence permitting remarriage in a particular class of Hindu Society before the passing of the Act, the remarriage would not entail a forfeiture of her husband's property unless the custom itself has, as one of its incidents, a forfeiture of the rights inherited from her husband in the property. In the present case, therefore, if the marriage of the plaintiff with Raghubar Dayal was contracted under a custom which had been in existence prior to 1856, she could not and would not lose her rights in the property inherited by her from her previous husband Ram Harakh, as it was not pleaded, much less proved, on behalf of the contesting defendant that the custom set up on behalf of the plaintiff entailed a forfeiture in the inherited property.

As remarked above, no specific issue was framed on this point; but as Ramrati had come to Court in the capacity of a plaintiff seeking relief in respect of certain property, it was incumbent upon her to establish not only title to the property claimed but also a subsisting title to the property. The plaintiff led no evidence to prove that the custom relied upon by her had been in existence since before 1856. In fact, no evidence of the existence of the custom, has been led by the plaintiff.

There is some conflict of authority on the point as to whether a person can escape the restriction imposed by S. 2, Hindu Widows' Remarriage Act, 1856, merely by pleading a custom under which a remarriage was performed. Reliance has been placed on behalf of the plaintiff on a Division Bench ruling of this Court in — 'Ganga Saran Singh v. Mt. Sirtaji Kuer', AIR 1935 All 924 (B), in which this point came up for consideration and it was held that it was open to a Hindu widow not to take advantage of the Hindu Widows' Remarriage Act and to contract a remarriage under a custom or under the tenets of a particular class of Hindu society. A perusal of this ruling leads to the conclusion that if a person setting up a custom under which re-marriage was said to have been performed fails to establish the custom, the remarriage may be a nullity and the widow contracting such a remarriage would be deemed to be living as an unchaste woman.

The view taken in two other cases of this Court, both of which are Division Bench cases, is, however, slightly different. In — 'Bhola Umar v. Mt. Kausilla', AIR 1937 All 230 (C), it was held that while S. 2 would not be applicable to the case of remarriage which is permitted under a custom it would apply to all other cases in which a person fails to establish the custom or any other law or practice under which the remarriage was performed. This view was affirmed in a later case, vide, — 'Mt. Jileba v. Mt. Parmesra', AIR 1950 All 700 (D). The observation of the learned Judges may be quoted with approval:

> "A widow wishing to escape the operation of S. 2 of the Act must establish the existence of an ancient custom."

It would mean, therefore, that if a widow sets up a custom under which she was remarried, but fails to establish it, she cannot escape the operation of S. 2, Hindu Widows' Remarriage Act. It would, therefore, not be enough for a widow merely to declare that she did not contract her marriage under the provisions of the Hindu Widows' Remarriage Act, but something more will have to be shown. It is no doubt possible that a widow may contract a remarriage under the practice prevailing in some other class of society or faith and may not take advantage of the provisions of the Hindu Widows' Remarriage Act for validating her remarriage. But if she definitely pleads a custom and fails to establish that custom, the operation of S. 2 of the Hindu Widows' Remarriage Act cannot be resisted.

(12) The plaintiff in the present case did not lead any evidence to prove that there was a custom prevailing in the class or community to which she belonged under which remarriage was permitted or sanctioned. It has been argued on behalf of the plaintiff appellant that she had mentioned in her plaint that she had contracted the marriage according to the family custom and as no issue was framed on this point the case may be remanded to the trial Court for framing a definite issue on this point and deciding the case afresh. I would have acceded to this request, but it appears to me that a very wide issue was framed in this case under which the plaintiff could

have adduced evidence in proof of the allegations made by her.

Some cases have been cited on behalf of the plaintiff appellant, but it is unnecessary to refer to these cases as in all these cases it was the widow who was the defendant and the suit had been brought by a person who claimed the property which was already in the possession of the widow. In the present case, however, it is the widow who has come to Court to seek relief and it was the duty of the plaintiff to establish her own subsisting rights to the property before she can claim a decree in her favour. She should have, therefore, led evidence to establish that she had a right to the property in respect of which she claimed a decree. No evidence having been led by the plaintiff to prove that she had a subsisting title to the property, it would not be proper to remand the case to the trial Court for a rehearing after framing a definite issue.

(13) In view of my findings above, the plaintiff appellant has not been able to establish her rights to the two-thirds share of the property in dispute and her claim for cancellation of the sale deed executed by Raghubar Dayal in favour of the Union Bank, Utraula in respect of this two-thirds share in the property has been rightly rejected.

(14) It may be noted that the relief claimed by the plaintiff was not properly worded or expressed. The plaintiff was no party to the sale deed and she was, therefore, entitled only to a declaration that the sale deed executed by Raghubar Dayal in favour of the Union Bank, Utraula was not binding on her in respect of the property owned by her. The prayer in the plaint, however, was that the sale deed executed in favour of the Union Bank by Raghubar Dayal be cancelled. The intention evidently was that the sale deed may be declared ineffectual and null and void as against the plaintiff.

(15) As a result both the appeals are dismissed. I make no order as to costs in this Court.

B/R.G.D. Appeals dismissed.

A.I.R. 1954 ALLAHABAD 599 (Vol. 41, C.N. 234)

(LUCKNOW BENCH) RANDHIR SINGH J. (5-1-1954)

Brij Kishore Lal, Plaintiff-Appellant v. Satnarain Lal and others, Defendants-Respondents.

Second Appeal No. 144 of 1948 against decree of Addl. Civil Judge, Sultanpur, D/- 31-10-1947.

Civil P. C. (1908), O. 32, R. 3 — Absence of formal order of appointment of guardian.

If some formalities for the appointment of a guardian have not been observed, but if the guardian has agreed to act as guardian and has done something in the suit to show that he accepted his appointment as a guardian, the mere fact that some formalities were overlooked or not observed, or there was no formal order of appointment, would not vitiate the proceedings or would not affect the result of the suit, provided there has been no prejudice to the minor. (Para 4)

Anno: C. P. C., O. 32, R. 3 N. 6 Pt. 1.

1953 Mulla: O. 3, R. 3 P. 1040 N. "Substantial representation" (4 Pts extra in Mulla).

CASES REFERRED: Paras

(A) (V27) AIR 1940 All 256: ILR (1940) All 344 6
(B) ('41) 1941 R D (All) 658 6
(C) (V11) AIR 1924 All 892: 46 All 744 6
(D) (V29) AIR 1942 Lah 129: 201 Ind Cas 311 6

B. K. Dhaon, for Appellant; H. D. Srivastava, for Respondent No. 1.

JUDGMENT: This is a plaintiff's second appeal against the judgment and decree of the Additional Civil Judge of Sultanpur dismissing the suit which had been decreed by the trial court.

(2) The facts of the case are simple. Sat Narain Lal respondent No. 1 brought a suit in the year 1941 for the partition of some tenancy holding and groves standing thereon, against the appellant and some others who are respondents in this case. He claimed a half share in the land and grove. The plaintiff was a minor and is said to have been represented by his elder brother Newal Kishore as guardian in that suit. The suit was contested and was ultimately decreed. The unsuccessful party went in appeal and the decree passed by the trial Court was affirmed in appeal. On 23rd March, 1946, the appellant instituted the suit, which has given rise to this appeal, for a declaration that the decree passed in the earlier suit instituted by Sat Narain Lal against him was not binding on him and that it was null and void against him on the ground that he was a minor all along during the pendency of the suit and that there was no properly constituted guardian and further that Newal Kishore, who is said to have acted as guardian acted negligently and did not look to the interest of the minor.

The suit was contested by Sat Narain Lal and it was contended on his behalf that the plaintiff appellant had been duly represented by his elder brother Newal Kishore who was appointed guardian and that the guardian did not act negligently. It was also contended that no prejudice had been caused to the plaintiff appellant and that he was not entitled to the declaration asked for. The learned Munsif who tried the case came to the conclusion that there was no proper appointment of a guardian of the plaintiff who was a minor and that the guardian did not contest the suit properly. The defendant Sat Narain Lal then went in appeal and the learned Additional Civil Judge who heard the appeal reversed the finding of the trial Court and dismissed the suit. The plaintiff has now come up in second appeal.

(3) The first point which has been pressed on behalf of the appellant is that there was no proper appointment of a guardian of the plaintiff who was a minor at the time when the suit was instituted as also during the pendency of the suit. The original record of the suit instituted by Sat Narain Lal was, it appears, summoned by the trial Court and the trial Court has observed that there was no proper appointment of a guardian. There is, however, on the record of the present suit copies of the vakalatnama and the written statement filed by Newal Kishore on his own behalf and as guardian of his minor brother Brij Kishore Lal. A perusal of the copy of the vakalatnama shows that Newal Kishore appointed a vakil, along with the other defendants of that suit and in the body of vakalatnama it was mentioned that Newal Kishore made the appointment on his own behalf and as guardian of his minor brother Brij Kishore.

In the signatures which are made on this vakalatnama, however, it is not mentioned that he signed the vakalatnama on behalf of his own self and as guardian of the minor. If it is definitely mentioned in the vakalatnama that the appointment was being made by Newal Kishore on his own behalf and on behalf of the minor, it was not necessary for him to describe himself as guardian also in the signatures which he affixed

to this vakalatnama. The appointment of a counsel by Newal Kishore would, therefore, be deemed to have been made on his own behalf and on behalf of the minor. The written statement was also filed on behalf of the minor as is mentioned at the bottom of it, but it appears that Newal Kishore did not affix his signatures.

(4) It has been held in a number of reported cases that if some formalities for the appointment of a guardian have not been observed, but if the guardian has agreed to act as guardian and has done something in the suit to show that he accepted his appointment as a guardian, the mere fact that some formalities were overlooked or not observed, or there was no formal order of appointment, would not vitiate the proceedings or would not affect the result of the suit, provided there has been no prejudice to the minor.

(5) It appears from the copy of the plaint filed by Sat Narain Lal as also from the other documentary evidence produced in this case that besides Newal Kishore and Brij Kishore, the grandfather of Brij Kishore and other members of the family were also arrayed as defendants in the suit instituted by Sat Narain Lal. Ganga Lal the grand-father of Brij Kishore was the patwari of the village where the property was situate, for a number of years and he did actually contest the suit. Not only that the suit was hotly contested but Newal Kishore and Ganga Lal and some others went in appeal against the judgment of the trial Court in the suit instituted by Sat Narain Lal. All this clearly shows that Newal Kishore took steps not only to safeguard his own interest but also the interest of the plaintiff which were identical.

It is also evident that the defence of Ganga Lal, Newal Kishore, Brij Kishore as also of other members of the family was common and there was nothing specially to be pleaded on behalf of Brij Kishore Lal. It is difficult, therefore, to believe that the plaintiff Brij Kishore Lal was in any manner prejudiced by the non-observance of the due formalities for the appointment of a guardian. The learned Civil Judge has in a very exhaustive judgment dealt with all the points reiterated on behalf of the appellant before me and has come to a finding that no prejudice had been caused to the appellant and that he had in fact no good defence to put up in the suit instituted by Sat Narain Lal.

(6) The learned counsel for the appellant has relied on certain rulings in support of the contention that if a minor is not properly represented by a guardian the decree would be void 'ab initio'. In — 'Dwarka Halwai v. Sitla Prasad', AIR 1940 All 256 (A), a vakil was appointed guardian of a minor, but the vakil did not enter appearance nor did he contest the suit. It was held that there was no proper representation and the decree was not binding. In — 'Shah Udey Ram v. Kanchan Singh', 1941 R. D. (All) 658 (B), there was no formal appointment of a guardian and nobody appeared for the minor at all. It was held that the procedure was wholly irregular and the decree was not binding on the minor.

In — 'Mt. Chambi v. Tara Chand', AIR 1924 All 892 (C), there was no appointment of a guardian of a minor & the minor was, it appears, impleaded as a major. It was held that the decree passed against the minor was not binding on him. In — 'Mahbub Husain Shah v. Anjuman Imdad Qarza', AIR 1942 Lah 129 (D), the matter was referred to an arbitrator and there were some minors who were defendants. No appointment of a guardian of these minors had been made and the arbitrator stated that the brother of the minor neither agreed nor was asked to act as their guardian 'ad litem' for the purposes of the award and it was held that the award was not binding on the minors.

(7) It would thus appear that in all the reported cases mentioned above there was either no formal appointment of a guardian or, even if there was one the guardian did not enter appearance on behalf of the minor nor did he contest the suit. In the present case, however, it is in evidence that though Newal Kishore was not formally appointed a guardian of the minor, he accepted the guardianship and entered appearance as the guardian of the minor. He filed a vakalatnama as also a written statement. He also went in appeal against the decree passed by the trial Court against the minor. The guardian did not, therefore, act negligently and did put up a proper defence.

There is one other circumstance in this case and it is that there were other members of the family, including the own elder brother of the minor, Brij Kishore Lal parties to the suit. Ganga Lal the grand-father of the minor was also a party and the defence was common to all. The case was hotly contested both in the trial Court as also in appeal. There can, therefore, be no question of any prejudice to the interest of the minor and it would be difficult to say that the minor was not properly represented. I, therefore, agree with the view taken by the lower appellate Court that the appellant was properly represented and that the decree passed in the suit instituted by Sat Narain Lal could not be held to be not binding upon the plaintiff.

(8) The other point as to whether Brij Kishore Lal was or was not a minor on the date of the suit, or during the pendency of the suit, does not arise as it is not now disputed that Brij Kishore Lal was a minor during the pendency of the suit instituted by Sat Narain Lal.

(9) No other point has been pressed in arguments.

(10) As a result the appeal fails and is dismissed with costs to the respondent No. 1.

B/V.R.B. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 600 (Vol. 41, C.N. 235)

HARISH CHANDRA J. (14-12-1953)

Nata, Applicant v. The State.

Criminal Revn. No. 2033 of 1953 against order of 2nd Sessions J., Gorakhpur, D/- 30-9-1953.

U. P. Panchayat Raj Act (26 of 1947), S. 59(a) — Interpretation of.

Section 59(a) means that the offence of which the accused person has been previously convicted should be one punishable with imprisonment of either description for a term of three years or more irrespective of the actual sentence that may have been passed upon him. (Para 2)

Sadiq Ali and Haidar Shaukat Abidi, for Applicant.

ORDER: The question that arises in this case is whether the case has or has not been properly tried by a Magistrate. It is said that it should have been tried by the Panchayati Adalat inasmuch as the value of the property which is said to have been the subject-matter of the alleged theft was below Rs. 50. It appears that the question was raised before the Magistrate. But he found

that the applicant had been previously convicted under Ss. 148, 332 and 326, Penal Code which offences are punishable with imprisonment up to a maximum period of three years or more. He thought that in view of S. 59(a), U. P. Panchayat Raj Act, 1947 (No. 26 of 1947), the Panchayati Adalat had no jurisdiction to try the offence. Section 59(a) runs as follows:

"59. No Panchayati Adalat shall take cognizance of any offence in which the accused.

(a) has been previously convicted of an offence with imprisonment of either description for a term of three years or more."

(2) The contention of learned counsel for the applicant is that it is only when a person has not only been previously convicted of such an offence but has also been sentenced to imprisonment of either description for a term of three years or more, that the Panchayati Adalat is deprived of the power to take cognizance of a case in which that person may have charged of an offence afterwards. The learned Magistrate interpreted the section to mean that the offence of which the accused person has been previously convicted should be one punishable with imprisonment of either description for a term of three years or more irrespective of the actual sentence that may have been passed upon him. No doubt, cl. (a) of S. 59 is not very happily worded. But the interpretation adopted by the learned Magistrate seems to be the correct one. The section is not open to any other interpretation. For it would be absurd to read the word 'convicted' as meaning 'sentenced'.

(3) In my view the learned Magistrate was quite right in holding that the Panchayati Adalat had no jurisdiction to try the case and in trying it himself. It is said that the sentence of six months' rigorous imprisonment and a fine of Rs. 50/- passed upon the applicant is too severe. According to the findings of the courts below the applicant was found stealing potatoes from the field of the complainant and had actually dug out one maund of them from the field. There were other associates of the applicant with him at the time doing the same act. But they ran away when the servants of the complainant arrived on the scene. Whatever may be the price of one maund of potatoes, in my opinion a light view cannot be taken of the offence.

(4) The application is accordingly rejected.

B/V.S.B. Application rejected.

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*A.I.R. 1954 ALLAHABAD 601 (Vol. 41, C.N. 236)

MUKERJI AND ROY JJ. (24-3-1954).

Swami Hariharanand Saraswati and others, Applicants v. The Jailor I/C Dist. Jail, Banaras, Opposite Party.

Misc. Writ No. 17 of 1954.

***(a) U. P. Removal of Social Disabilities Act (14 of 1947), S. 1 — Act is not ultra vires. AIR 1949 Bom 168, Dissented from.**

The U. P. Removal of Social Disabilities Act (14 of 1947) falls under the Government of India Act, 1935, Sch. 7, List 2, item 34; for such a piece of legislation is covered by the word "charities" in that item which is a word of very wide scope and meaning. And hence the U. P. Removal of Social Disabilities Act is not ultra vires the State legislature. AIR 1947 FC 1, Rel. on. AIR 1949 Bom 168, Dissented from. AIR 1953 All 483, Ref. (Para 20)

(b) Constitution of India, Art. 25 — Freedom of religion — U. P. Act 14 of 1947 is saved by Art. 25(2) — (U. P. Removal of Social Disabilities Act (14 of 1947), S. 1).

By the U. P. Removal of Social Disabilities Act the freedom guaranteed under Art. 25(1) of the Constitution has in no manner been affected. The U. P. Act falls within the definition of "existing law" given in Art. 366(10) and is thus protected by cl. (2) of Art. 25. The Act only provides for the removal of those distinctions which caste Hindus enforced on the Harijans in respect of, among other matters, entry of Harijans in temples on the same footing as caste Hindus. (Para 21)

Anno: Const. Ind., Art. 25 N. 9.

(c) Constitution of India, Art. 226 — Habeas corpus application — Validity of Act challenged — Competency of.

The true position in regard to the scope and nature of a petition of habeas corpus excludes the possibility of a challenge in regard to the constitutionality of an enactment. (Para 23)

(d) Constitution of India, Art. 22(2) — Art. 22(2) and Criminal P. C. (1898), S. 61 — (Criminal P. C. (1898), S. 61).

Article 22(2) of the Constitution in effect not only gives constitutional protection to the provision contained in S. 61, Criminal P. C., but further liberalizes it by making the provision applicable in those cases also where the arrest is made in pursuance of a warrant. (Para 29)

Anno: Const. Ind., Art. 22 N. 4; Cr. P. C., S. 61 N. 1.

(e) Criminal P. C. (1898), S. 167 — Policy of law stated.

The provisions of S. 167(1), Criminal P. C., indicate that the policy of the law is to bring an independent judgment to bear on the matter for, it is provided in that section that the Magistrate before whom an arrested person is produced is also to have before him "a copy of the entries in the diary". That means that the Magistrate before whom the production has to be made has to scrutinize the act of others and to see whether the act was legal and proper and further whether the formalities required by law had been complied with. (Para 32)

Anno: Cr. P. C., S. 167 N. 6.

***(f) Constitution of India, Art. 22(2) — Production before Magistrate.**

On 17th February 1954, the petitioners were arrested by a Magistrate acting under S. 64, Criminal P. C. for having obstructed the entry of the Harijans into the temple of Shri Vishwanathji of Banaras through the main gate and thereby having committed an offence punishable under S. 6, U. P. Removal of Social Disabilities Act, 1947. On the same day the Magistrate remanded the petitioners into jail custody. It was contended for the petitioners that they were not produced before the Magistrate within 24 hours of their arrest as required by Art. 22(2), Constitution of India.

Held (i) that the Magistrate in directing the arrest of the petitioners did not, as contemplated by S. 167, Criminal P. C., act as a Court nor had he an opportunity of applying a judicial mind to the facts of the case; and (Para 32)

(ii) that in the circumstances of the case there was no proper production of the petitioners before a competent Magistrate within

24 hours of their arrest without warrants and consequently their further detention in jail was illegal and unconstitutional. AIR 1953 SC 10, Rel. on. (Para 34)

Anno: Const. Ind., Art. 22 N. 4.

(g) **Constitution of India, Art. 226 — Disclosure of facts in return to writ of habeas corpus — (Criminal P. C. (1898), S. 491).**

It is well established that a return to a writ of habeas corpus has to be unambiguous and it has got to set forth clearly and directly and with sufficient particularity the facts and the cause for the petitioner's detention. The return has to state all the facts and all the grounds which constitute valid and sufficient grounds for the detention of the persons alleged to be detained. There is no scope of any presumptions being pressed into service by a Court to make up deficiencies in the return which the opposite party was in law bound to make. (Para 35)

(h) **Constitution of India, Art. 226 — Habeas corpus — Effect of release.**

Where a person, arrested for having committed an offence punishable under an Act, is released on a writ of habeas corpus, on the ground that there was a contravention of the provision contained in Art. 22(2), Constitution of India, he can still be tried in respect of the same accusation. (Para 36)

CASES REFERRED: Paras

(A) (V40) AIR 1953 All 433: 1953 Cri LJ 1103 20
(B) (V34) AIR 1947 FC 1: ILR (1946) Kar FC 27 20
(C) (V36) AIR 1949 Bom 168: 50 Cri LJ 635 20
(D) (V40) AIR 1953 SC 10: 1953 Cri LJ 180 (SC) 29, 31

J. Swaroop, A. P. Pandey, Rajeshwari Prasad, B. D. Pande and Santosh Kumar Srivastava, for Applicants; D. P. Uniyal and Sri Ram, Dy. Govt. Advocates, for the State.

MUKERJI, J.:

This is a petition by 26 persons under Art. 226 of the Constitution for a writ in the nature of 'habeas corpus'. The petitioners also founded their application under Ss. 491 and 561A, Criminal P. C.

(2) On 16th March 1954, we pronounced the operative portion of our judgment directing release of the petitioners for we were of the opinion that the petitioners' detention in jail was illegal.

(3) The petitioners before us belong to what is known as the Savarna Sanatan Dharmis of the Hindu fold and they are the residents of Banaras and are believers in the strict and the orthodox tenets of the Sanatan Dharma. There is, as is well known, an ancient and a very holy temple of the deity of Sri Vishwanath at Banaras. This temple undoubtedly is ancient and the deity enshrined therein is held in the highest esteem by the Hindus and it attracts pilgrims from far and wide. The worship in the temple is carried on according to strict Shastric precepts and it is the belief of the Hindu community that the image which is enshrined in this temple is a self-revealed image of Lord Shiva. Entry to this temple was confined to Savarna Sanatan Dharmis only, that is to say, the caste Hindus alone had the privilage of entering this temple and worshipping therein. The Avarna Sanatan Dharmis, who are now called Harijans, had, under a long established custom, no right to enter this temple, but they could have Darshan of the holy image through an aperture which be approached by an outer passage adjacent to and separate from the main sanctuary.

(4) It appears that the Harijans smarted under the discrimination that was made between them and the Savarna Sanatanists in regard to having access to the temple of Sri Vishwanath. About 12th or 13th February, 1954 the Harijans decided to enforce their right of entry into this temple and they expressed their desire to do so by means of leaflets which were broadcast by some leaders of their community as also by sticking posters. These leaflets & the posters declared that the Harijans would march in procession to the temple of Sri Vishwanath on the afternoon of 17th February 1954, and effect an entry into it. It appears further to us that the Harijans took their stand on the provisions of the U. P. Removal of Social Disabilities Act, (14 of 1947), for, according to S. 3 (d) of that Act, no person could prevent another from having access to any public temple or enjoying the advantages, facilities and privileges of any such temple to the extent the same were available to other Hindus.

When this desire of the Harijans became known to the Savarna Sanatanists of Banaras, they convened a meeting and it was resolved therein that the aperture which existed in the Eastern wall of the temple and through which the Harijans used to have a glimpse of the sacred deity should be substantially enlarged in order that the Harijans could have greater facility in having Darshan. It was further resolved to meet the Harijans at the main door, called the 'Singhadwar', of the temple and to conduct them to the window, now enlarged, and to let them have 'Darshan' of the scared deity from that place in accordance with the old custom.

(5) On the afternoon of 17th February 1954, a batch of Harijans arrived at the temple door headed by Sri Bechan Ram, M. L. A. These Harijans were met by the petitioners and they were garlanded and, according to the petitioners, invited to have Darshan of the deity from the window or aperture now enlarged for them. So far there appears no controversy in regard to the facts or the sequence of events: There is, however, a controversy as to what followed subsequently. According to the petitioners, the Harijans were not stopped from entering through the main gate by the petitioners while on behalf of the State it was stated that Harijans were refused entrance into the temple through the 'Singhadwar' through which caste Hindus alone could have access to the temple. The executive authorities of Banaras, those authorities which had the responsibility of preserving law and order in the town, apprehended breaches of peace on this occasion and consequently there were a large number of police officials and at least one Magistrate, namely, the City Magistrate, in attendance at the main gate of the temple at the time when the Harijans came in procession and wished to make their entry into the temple.

(6) It is clear to us from the affidavits that have been filed in this case that the Harijans could not, uninterrupted, have access to the temple through the main gate, the 'Singhadwar'. This was so because the Santainsts, in particular the petitiners, were at the scene to obstruct their entry.

The City Magistrate, who was there, told the petitioners that not allowing the Harijans to have access to the temple through the main gate would be an offence. It appears that this warning of the City Magistrate had no deterrent effect on the petitioners, for, that did not smoothen the way of the Harijans in getting entry into the temple.

The City Magistrate, therefore, ordered the petitioners to clear out of the temple and ordered the police to take them in custody, as in the opinion of the City Magistrate they had violated the provisions of the U. P. Removal of Social Disabilities Act and further that they had committed certain other offences, namely, offences under Ss. 143 and 341, Penal Code.

(7-17) The petitioners were thereafter taken into police custody and taken to police station Chowk. The petitioners were told that they could be enlarged on bail in the event of their furnishing such bail, but they refused to give bail with the result that they were sent to jail custody by an order of the City Magistrate, sometime on the night of 17th February 1954.

(18) The petitioners have contended before us that their detention in jail is illegal, first, because their alleged infringement of S. 3 (d), U. P. Removal of Social Disabilities Act could not amount to an offence, as, that Act itself was 'ultra vires' and unconstitutional. It was further contended that if the petitioners could not be held guilty under S. 3 (d) of the aforesaid Act then they could not be held guilty under Ss. 141 and 341 Penal Code also.

(19) It was also contended that their detention was illegal because the petitioners had been arrested without warrant and had not been informed of the grounds of their arrest. Further, the petitioners had not been produced before the nearest Magistrate within 24 hours of their arrest.

(20) Mr. Pande on behalf of the petitioners first, contended that the U. P. Removal of Social Disabilities Act was 'ultra vires' the State Legislature because, it was a piece of legislation that did not fall within any specified legislative field of the State Legislature. This legislation was forged when the Government of India Act of 1935 was in force. A Bench of this Court in the case of — 'State v. Gulab Singh', AIR 1953 All 483 (A), held that the U. P. Removal of Social Disabilities Act, 1947 was not 'ultra vires' the State Legislature. We may, however, point out that the precise point which was raised by Mr. Pandey was not canvassed in the aforementioned case.

A similar piece of legislation, namely, the Madras Temple Entry Act, was the subject of Judicial scrutiny on the ground of 'vires' and it was held by the Federal Court in — 'Manikkasundara Bhattar v. R. S. Nayudu', AIR 1947 F. C. 1 (B), that legislative measures of the kind under which comes the impugned Act, namely, U. P. Act 14 of 1947, could appropriately fall under Entry 34, List II of Schedule VII of the Government of India Act of 1935. In Bombay, 'the Removal of Social Disabilities Act of 1946, a Bombay Act, was challenged as unconstitutional and the Bombay High Court in the case of — 'Kalidas Amtharam v. Emperor', AIR 1949 Bom 168 (C), held that the Act, which is a similar piece of legislation to the Act that is now being impugned before us, was not ultra vires the State Legislature. According to the Bombay view, the Bombay Act was covered by item 1, List III of Schedule VII of the Government of India Act of 1935. This item relates to legislation on criminal law.

It was pointed out by the learned Judges of the Bombay High Court that since the scheme of the Government of India Act was to make the three lists exhaustive, all legislative activities, whether of the State or of the Centre had to be brought under one or the other of the items in the lists. They pointed out that S. 104, Government of India Act, was not to be invoked in aid for such legislation as could possibly be brought under any of the three lists. They were further of the view that any legislation that prescribed any punishment would and could appropriately come under item 1 of List III. The attention of the Bombay High Court does not seem to have been drawn to the decision of the Federal Court referred to by us earlier.

In our judgment the impugned piece of legislation falls more appropriately under List II, item 34 of Schedule VII, for, as held by the Federal Court, the word "charities" is a word of very wide scope and meaning and a legislation of the character with which we have to deal with could very well come under that item. It is a well known principle of interpretation that every attempt should be made to uphold the constitutionality of an Act rather than to oppose it and to that end it is permissible to interpret entries of the nature contained in the various lists of the 7th Schedule of the Government of India Act liberally. We are of the opinion, as we have said before, that the U. P. Removal of Social Disabilities Act was not ultra vires the State Legislature.

(21) This legislation was further attacked on the ground that the petitioners were denied by it their fundamental right guaranteed to them under Article 25(1) of the Constitution. Reliance was also placed on the provisions of Article 26 of the Constitution. We may point out that by the impugned legislation the freedom guaranteed to the petitioners under Article 25(1) of the Constitution has in no manner been affected. As a matter of fact Article 25(2) of the Constitution provides as follows:

> "Nothing in this article shall affect the operation of any existing law or prevent the State from making any law
>
> (a) .....
>
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

It would be noticed from what has been quoted above of Art. 25(2) that a piece of legislation which could appropriately come within the definition of 'existing law' contained in Article 366(10) — and we may say that the present legislation does fall within the definition of 'existing law' — was protected inasmuch as, this law only provided for the removal of these distinctions which caste Hindus enforced on the Harijans in respect of, among other matters, entry of Harijans in temples on the same footing as caste Hindus.

(22) Mr. Pandey on behalf of the petitioners also contended that the impugned legislation, apart from removing disabilities, conferred certain privileges on the Harijans. We are of the view that the argument of learned counsel is not sound for, as we read the Act, we do not find the Act conferring any privileges, as such, on the Harijans.

(23) When Mr. Pandey challenged the validity of the U. P. Removal of Social Disabilities Act we wished him to satisfy us as to whether the constitutionality of an Act could be challenged by a writ of the nature of Habeas Corpus. Mr. Pandey conceded that there was no direct authority which he could cite where any court had permitted a challenge to the constitutionality of an Act in Habeas Corpus proceedings. We may point out that Scott in his book at page 16 has opined that a law's constitutionality cannot be raised by a petition in Habeas Corpus; similarly, Bailey in his book — Volume I, page 52 — has stated that whatever can be achieved by a 'writ error' cannot be challenged or achieved by a

petition in Habeas Corpus. We are also of the opinion that the true position in regard to the scope and nature of a petition of Habeas Corpus excludes the possibility of a challenge in regard to the constitutionality of an enactment. It is clear that the petitioners can challenge the validity of the impugned Act in proceedings which have been initiated under the Act against them. They have, therefore, another and a more appropriate remedy open to them for that purpose.

(24) The petitioners next contended that they had not been told the grounds of their arrest by anyone after they had been arrested. Affidavits have been filed in answer to this assertion made by the petitioners in their affidavit. We have examined the affidavits filed in these proceedings and we are satisfied that although there was a slight and an apparent conflict between the affidavit of Sri Bhagwat Singh, the Station Officer of Police Station Chowk, and Sri Gauri Shankar Singh, City Magistrate, Banaras, yet it is clear on these affidavits that the petitioners were informed of the grounds for their arrest. In paragraph 7 of his affidavit Sri Gauri Shankar Singh has stated thus:

> "That the petitioners were told by the Dy. S. P. City in the presence of the deponent that they were being arrested for having obstructed the entry of the Harijans into the Temple of Sri Viswanathji through the main gate."

(25) Sri Bhagwat Singh in his affidavit has also averred that the petitioners were told the grounds of their arrest. We are, therefore, of the opinion that there is no substance in the assertion of the petitioners that they were not informed of the grounds for their arrest after they had been arrested.

(26) The last contention which was raised on behalf of the petitioners was that they were not produced before a Magistrate within a period of 24 hours of their arrest. This assertion of the petitioners has also been denied on behalf of the opposite party. The affidavit of Sri Bhagwat Singh indicates that the petitioners were produced before the City Magistrate, Sri Gauri Shankar Singh, immediately after they were arrested, as Sri Gauri Shankar Singh was present at the scene of their arrest. Paragraph 5 of Sri Bhagwat Singh's affidavit is in these words:

> "That the City Magistrate, Sri Gauri Shankar Singh, was present at the time when the petitioners were arrested by the police and they were immediately produced before him & thereafter taken to P. S. Chowk under his orders."

Sri Bhagwat Singh further says this in paragraph 7 of his affidavit:

> "That as the petitioners had been sent to the District Jail under the orders of the City Magistrate, it was not necessary to produce the accused again before a Magistrate as the accused were no longer in police custody."

(27) Sri Gauri Shankar Singh, however, states as follows in paragraph 11 of his affidavit:

> "That the petitioners were then produced before the deponent by Sri Bhagwat Singh, Station Officer, P. S. Chowk, in his capacity as City Magistrate in the office of the Dy. S. P. at the Kotwali at about 10 the same night and the deponent thereafter on a request made by the police made an order for their remand to jail custody after having told them that they would be prosecuted for having unlawfully obstructed the entry of the Harijans into the Temple through the 'Singh Dwar' and the petitioners then left the Kotwali for the District Jail at about 11-30 the same night."

In paragraph 9 of his affidavit, Sri Gauri Shankar Singh stated that he reached the Kotwali at about 8-30 p.m. and asked the Dy. S. P. City to produce the arrested persons before him.

To us, there appears to be an inconsistency between the averments made by Sri Bhagwat Singh and those made by Sri Gauri Shankar Singh in regard to the production of the petitioners before a Magistrate after their arrest. According to Sri Bhagwat Singh, the production of the petitioners was made immediately after they had been arrested and that the production was at the scene of occurrence while on the affidavit of Sri Gauri Shankar Singh the petitioners were, "called for", by him for production and they were produced before him at the Kotwali at 10 p.m. On the two aforequoted versions, it becomes difficult for us to hold with certainty as to where and when the petitioners were produced before a Magistrate. According to Sri Gauri Shankar Singh, the production of the petitioners before him was made by Sri Bhagwat Singh at police station Kotwali, but according to Bhagwat Singh himself the production had been made by him at the scene of occurrence. It will be noticed that Sri Bhagwat Singh is almost emphatic in maintaining the position that he has taken in regard to the production of the petitioners before a Magistrate — that appears to us from what he has stated in paragraph 7 of his affidavit, a paragraph which we have quoted earlier.

(28) Whether there was in fact "a physical" production of the petitioners before Sri Gauri Shankar Singh or not loses its importance in view of what was submitted by learned counsel for the petitioners—a submission which we will now consider. It was contended by Mr. Pandey that the production which is contemplated by Art. 22(2) of the Constitution must be before a Magistrate other than the one who has acted, along with the police, in arresting the petitioners. Section 61 of the Code of Criminal Procedure provides this:

> "No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order by a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."

(29) Article 22(2) of the Constitution in effect not only gives constitutional protection to this provision but further liberalizes it by making the provision applicable in those cases also where the arrest is made in pursuance of a warrant. It was, however, pointed out by the Supreme Court in — 'the State of Punjab v. Ajaib Singh', AIR 1953 SC 10 (D), as follows:

> "Broadly speaking, arrests may be classified into two categories, namely, arrests under warrants issued by a Court and arrests otherwise than under such warrants. There can be no manner of doubt that arrests without warrants issued by a Court call for greater protection than do arrests under such warrants."

(30) In the case with which we are dealing, it may be pointed out that the arrests made were without warrants. The arrests of the petitioners were made in substance by the City Magistrate Sri Gauri Shankar Singh because the petitioners were taken into custody under his orders and under his direct supervision. Section 64, Cr. P. C., says this:

> "When any offence is committed in the presence of a Magistrate within the local limits of his

jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody."

(31) In our view Sri Gauri Shankar Singh acted under the provisions quoted above. The question that arises for determination, therefore, is whether Sri Gauri Shankar Singh would be a Magistrate competent to act under the provisions of S. 167(1), Cr. P. C., further, whether a production before Sri Gauri Shankar Singh of the petitioners, under the circumstances of the case, would be a proper production within the meaning of Art. 22(2) of the Constitution. In determining this question, we have to bear in mind what their Lordships of the Supreme Court have said in the case of — 'the State of Punjab v. Ajaib Singh (D)', in particular the following passage:

"There can be no manner of doubt that arrests without warrants issued by a 'Court' call for greater production than do arrests under 'such warrants'. The provision that the arrested person should within 24 hours be produced before the nearest Magistrate is particularly desirable in the case of arrest otherwise than under a warrant issued by the Court, for it ensures the immediate application of a judicial mind to the legal authority of the person making the arrest and the regularity of the procedure adopted by him. In the case of arrest under a warrant issued by a Court, the judicial mind had already been applied to the case when the warrant was issued and, therefore, there is less reason for making such production in that case a matter of a substantive fundamental right."

(32) As we have pointed out in this case, Sri Gauri Shankar Singh in directing the arrest of the petitioners did not act as a court nor had he an opportunity of applying a 'judicial mind' to the facts of the case. It can also not be said that Sri Gauri Shankar Singh could properly judge whether the procedure which he adopted was regular, for a person can never be deemed to be a "competent judge of his own cause". The provisions of Section 167(1), Cr. P. C., also indicate to us that the policy of the law is to bring an independent judgment to bear on the matter for, it is provided in that section that the Magistrate before whom an arrested person is produced is also to have before him "a copy of the entries in the diary". That means that the Magistrate before whom the production has to be made has to scrutinize the act of others and to see whether the act was legal and proper and further whether the formalities required by law had been complied with.

In this case Sri Gauri Shankar Singh had remanded the petitioners into jail custody by an order signed by him on 17-2-1954. Whether the order was signed at the place of occurrence or at police station Chowk or at Kotwali is immaterial because on the affidavits we are of the opinion that the order was signed more or less as a matter of course by Sri Gauri Shankar Singh without his scrutinizing as to the legality and propriety of the procedure adopted by himself. At any rate, it is impossible for us to hold that under the circumstances of the case Sri Gauri Shankar Singh could apply a "judicial mind" in regard to these arrests. In paragraph 13 of his affidavit Sri Gauri Shankar Singh has stated as follows:

"That on the following day (this would be February 18, 1954) the police submitted a report asking for a further remand before the deponent, but as the deponent was just leaving for some important executive work, he directed the police to take the report to his Link Officer Sri Chitrangad Singh, the Additional City Magistrate of Banaras, for necessary orders."

(33) On behalf of the State, a copy of the order made by Sri Chitrangad Singh, the Additional City Magistrate, was produced before us. On an examination of this order we discovered that it was dated "17/18. 2". We have been unable to discover how and why Sri Chitrangad Singh dated his order "17/18". No affidavit by Sri Chitrangad Singh was produced before us explaining this matter. It was, however, admitted on behalf of the State that the petitioners were not produced before Sri Chitrangad Singh when he passed the aforementioned order.

(34) On the circumstances stated above, we are of the opinion that there was no proper production of the petitioners before a competent Magistrate within 24 hours of their arrest without warrants and consequently their further detention in jail was illegal and unconstitutional.

(35) On behalf of the State, it was contended that even if the incarceration of the petitioners in its inception was illegal yet, their present detention in jail was not so because the trial of the petitioners had commenced before a proper court and we were, therefore, asked to presume that they were in jail custody by virtue of an order made by the trying Magistrate for such custody. We are unable to make the presumption which we were asked to make. We may point out that no such assertion was made by the opposite party in the return that he made to the writ 'nisi' issued to him. The opposite party, who is the Jailor of the District Jail Banaras, has not taken his stand for detaining the petitioners on an order by a court directing him to detain the petitioners. It was incumbent upon the opposite party in return to the writ 'nisi' issued by this Court to disclose the authority on which he was detaining the petitioners in his custody.

No such return has been made and we are unable to presume anything against the petitioners. It is well established that a return to a writ of Habeas Corpus has to be unambiguous and it has got to set forth clearly and directly and with sufficient particularity the facts and the cause for the petitioners' detention. The return has to state all the facts and all the grounds which constitute valid and sufficient grounds for the detention of the persons alleged to be detained. There is no scope, in our view, of any presumptions being pressed into service by a court to make up deficiencies in the return which the opposite party was in law bound to make. We are, therefore, of the view that on the materials before us, we cannot hold that the present detention of the petitioners in jail is legal or constitutional, even though we have expressed the opinion earlier that the charge against them under S. 3(d)/6 of the Removal of Social Diabilities Act (Act XIV of 1947) was not void for want of the Act being unconstitutional.

(36) We should like to point out that although we have held that the petitioners' detention at the present moment in jail by the opposite party is illegal and unconstitutional yet this does not mean our holding that the charges which have been levelled against them are unfounded or illegal. The order which we have already made on 16-3-1954, will not entitle the petitioners to escape their trial. We have thought it proper to state this clearly because we are aware of certain cases in which courts have expressed the view that once a prisoner is released on a writ of Habeas Corpus, he cannot be tried again in respect of the same accusation.

(37) In the result we allow the petition and direct that the petitioners be set at liberty forthwith. The petitioners will have the costs of this petition from the opposite party.

A/V.S.B. Petition allowed.

A.I.R. 1954 ALLAHABAD 606 (Vol. 41, C.N. 237)

V. BHARGAVA J. (11-3-1954)

Ram Lakhan Lal, Petitioner v. Addl. Commr. Gorakhpur and another, Opposite Party.

Misc. Writ No. 120 of 1954.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7 — Order under — Petition under Art. 226 to quash — When lies — (Constitution of India, Art. 226).

A finding of a District Magistrate or Additional District Magistrate that the accommodation should be let out to a particular person is not an order under S. 7 of the U. P. (Temporary) Control of Rent and Eviction Act. It is actually an order directing the owner of the accommodation to let it out to the allottee that is an order under S. 7 of the Act. (Para 4)

Thus, where an Additional District Magistrate passes an order that a certain shop will be allotted to A, the order cannot be treated as one under S. 7 of the Act as it amounts only to an expression of the opinion of the Magistrate giving his reasons why he would in future pass an order under S. 7 in favour of A. Such an order has no statutory force and, if it is set aside by the Commissioner in revision, the latter's order has also no statutory force and can be ignored. No petition under Art. 226 can lie to quash such an order. (Para 4)

Further, so long as no order under S. 7 is passed in favour of an allottee, he has no interest in the allotted shop and hence cannot file an application for a writ under Art. 226 as an allottee. (Para 5)

Narain Sahai, S. N. Kasker and Hirday Nath Seth, for Petitioner; Standing Counsel, for Opposite Party.

ORDER: By this petition under Art. 226 of the Constitution the petitioner seeks the issue of a writ of certiorari quashing the order passed by the Additional Commissioner, Gorakhpur on 22-12-1953.

(2) According to the petitioner, one Hari Saran Rastogi was the tenant of a shop owned by the petitioner and the tenant was carrying on a business in that shop under the name and style of "Golden Biscuit Factory". Hari Saran on 1-7-1953 intimated to the Rent Control and Eviction Officer, Gorakhpur that he had sold the entire goods of the shop along with its goodwill to opposite party No. 2, Hanuman Prasad. Even before this intimation was sent by Hari Saran, an application had been made on behalf of a firm, Mata Prasad Ajodhya Prasad, for allotment of this shop in their favour. The petitioner also applied for its allotment and a third application for allotment was made by Hanuman Prasad, the purchaser of the Golden Biscuit Factory.

While these applications were pending, Hari Saran Rastogi actually left the premises and, before any allotment order could be passed, opposite party No. 3 filed a suit in the court of the Munsif, Gorakhpur for an injunction restraining the petitioner from ejecting him from the premises and from obstructing him from carrying on business in that shop. In connection with this suit, the learned Munsif passed an 'ad interim' injunction restraining the petitioner from ejecting opposite party No. 3. That 'ad interim' injunction was confirmed by the learned Munsif to remain in force during the pendency of the suit and has been challenged in appeal by the petitioner. On 21-9-1953, the Additional District Magistrate heard the various applications for allotment and recorded an order in which he said:

"The shop will therefore be allotted to Sri Ram Lakhan. Another applicant Sri Ram Swarath could have been allotted this shop because he is on the priority list but as remarked above the needs of the owner carry more weight than Ram Swarath's claim. The file is returned to R. C. & E. O. for taking further action according to law."

Against this order opposite party No. 3 filed a revision before the Commissioner and the Additional Commissioner on 22-12-1953 vacated that order of the Additional District Magistrate dated 21-9-1953. By this petition the petitioner seeks the vacation of the order of the Additional Commissioner dated 22-12-1953 on the ground that he had no jurisdiction to pass such an order.

(3) When this petition came up for hearing, the petitioner was given time to file a supplementary affidavit to indicate which officer could exercise the powers of a District Magistrate under the U. P. (Temporary) Control of Rent and Eviction Act of 1947 in respect of this shop. He has filed a supplementary affidavit indicating that the powers can be exercised by the Additional District Magistrate who has been authorised by the District Magistrate and not by the District Supply Officer, Gorakhpur who is also known as the Rent Control and Eviction Officer there. In addition, learned counsel for the petitioner has put up before me today an order issued under S. 7(1) of the U. P. (Temporary) Control of Rent and Eviction Act, 1947 allotting this shop to the petitioner.

(4) On going through all these documents, it is perfectly clear that so far as the order of the Additional Commissioner is concerned, it has not been passed in exercise of any statutory powers, nor does it interfere with any statutory order passed by the Additional District Magistrate. The order of the Additional District Magistrate dated 21-9-1953 is not an order under S. 7, U. P. (Temporary) Control of Rent and Eviction Act. The order under that section is the order dated 24-9-1953 which was presented before me today by learned counsel for the petitioner.

It has been clearly held by a Division Bench of this Court that a finding of a District Magistrate or Additional District Magistrate that the accommodation should be let out to a particular person is not an order under S. 7 of the U. P. (Temporary) Control of Rent and Eviction Act. It is actually an order directing the owner of the accommodation to let it out to the allottee that is an order under S. 7 of the Act. The order of 21-9-1953 which did not contain any such direction to the landlord to let out the shop to the petitioner was not, therefore, an order under S. 7. That can only be treated as an expression of opinion of the Additional District Magistrate giving his reasons why he would, in future, pass an order under S. 7 in favour of the petitioner. That is also precisely why in that order all that the Additional District Magistrate said was that "the shop will be allotted to Sri Ram Lakhan". That order not having any statutory force, no order by the Additional Commissioner setting it aside has statutory force either and consequently there is no question of any petition being entertained for a writ to

quash that order. The order having no statutory force can be ignored.

(5) It appears in fact, that in this case there has yet been no valid order under S. 7 directing the landlord to let out this shop to the petitioner. The order of 21-9-1953, as I have said earlier, is not the order contemplated by S. 7 of the Act. The order on the paper presented to me today, purporting to be dated 24-9-1953, is an order signed by the Rent Control and Eviction Officer, Gorakhpur for the Additional District Magistrate. According to the supplementary affidavit, filed by the petitioner himself, the power under S. 7 in respect of this shop can be exercised by the Additional District Magistrate and not by the Rent Control and Eviction Officer. The principal order under S. 7 itself should, therefore, have been signed by the Additional District Magistrate himself. The Rent Control and Eviction Officer could not sign that order on behalf of the Additional District Magistrate as that would indicate that the order was passed by him under the direction given to him by the Additional District Magistrate in his order dated 21-9-1953 and such an order by the Rent Control and Eviction Officer would not be valid as he was not authorised to exercise the powers of a District Magistrate in respect of this shop. The petition has, therefore, been filed by the petitioner without any right whatsoever. There is no order in his favour under S. 7 of the U. P. (Temporary) Control of Rent and Eviction Act so far and, while there is no such order, he has no interest in this shop at all in his capacity as an allottee. This is another reason why this petition is not entertainable.

(6) The question whether a petition would have lain if a valid order under S. 7 of the Act had already been passed need not be discussed in detail. But it appears that in this case a civil suit is pending in connection with which there is an injunction by the civil court restraining the petitioner from disturbing the possession of opposite party No. 3. Whether it would, in these circumstances be advisable for the Additional District Magistrate at all to pass an order of allotment under S. 7 when that order may not prove of any value at all until the decision of those civil proceedings is a matter to be considered by the Additional District Magistrate. This petition does not lie and it is rejected.

(7) The order dated 24-9-1953 which was produced by learned counsel before me today may be returned to him as prayed by him.

A/D.R.R. Petition rejected.

A.I.R. 1954 ALLAHABAD 607 (Vol. 41, C.N. 238)

(FULL BENCH)

MALIK C. J.; V. BHARGAVA AND GURTU JJ.

(1-4-1954)

Nabi Bakhsh; Defendant-Appellant v. Chaubey Puttu Lal; Plaintiff-Respondent.

Letters Patent Appeal No. 47 of 1941; against decision of Yorke J.; D/- 18-8-1941.

†Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), Ss. 12, 16, 25 — Suit for redemption and damages — (Civil P. C. (1908), S. 9.)

A suit, where the plaintiff seeks not only redemption of the mortgage but also damages for destruction and permanent injury to the mortgaged property, cannot be said to be barred by the provisions of S. 25, Agriculturists' Relief Act. As the Act confers a special jurisdiction it must be limited to the scope of the enquiry provided for under S. 16. It is, therefore, not within the jurisdiction of the Collector to enter into the question of a claim for waste, nor has he any jurisdiction to give a decree in favour of the mortgagor for recovery of any amount from the mortgagee. An order under S. 16 is not analogous to a decree for redemption under O. 34, Civil P. C. It is not possible for the plaintiff to split up the reliefs claimed by him into two separate and distinct reliefs one for redemption and another for damages one of which could be claimed by an application under S. 12, Agriculturists' Relief Act, and the other by a suit under S. 60 read with S. 76, T. P. Act. In the circumstances, it cannot be said that any relief claimed by the plaintiff could have been obtained by an application under S. 12, Agriculturists' Relief Act. (Paras 7, 8)

Anno: C. P. C., S. 9 N. 50, 53.

Mukhtar Ahmad; for Appellant; S. N. Katju; for Respondent.

MALIK, C. J.:

A suit was filed in the court of the learned Munsif of Etawah for redemption of a possessory mortgage dated 9-7-1878, for a sum of Rs. 150/- executed by Jai Kishan Das in favour of Lachhman Das and Govind Das and for recovery of Rs. 700/-. The plaintiff claimed that during the continuance of the mortgage the mortgagees had committed acts of destruction and permanent injury to the mortgaged property inasmuch as they had cut down and removed seven trees and were, therefore, liable to pay Rs. 850/- as damages. After having given credit for the mortgage money, i. e., Rs. 150/-, he claimed that a sum of Rs. 700/- was payable to him.

(2) The learned Munsif decreed the suit on payment of Rs. 9/-.

(3) There was an appeal and the lower appellate court held that the mortgagees had cut down and removed certain trees and had thus caused damage to the extent of Rs. 344/-. After deducting the mortgage debt a decree for Rs. 194/- was passed in plaintiff's favour and the suit for redemption was also decreed.

(4) There was a second appeal in this Court and before the learned single Judge a point was raised that by reason of the provisions of S. 25 of the U. P. Agriculturists' Relief Act no suit lay in the Civil Court and the plaintiff should have applied for redemption of the mortgage under S. 12 of that Act, and, as the principal sum secured was only Rs. 150/-, under S. 10 the application was cognizable by the Collector. The learned Judge, however, overruled the contention and dismissed the appeal. He, however, granted leave and a Letters Patent Appeal was filed which was referred to a Full Bench for decision.

(5) The point for decision is a very short one, whether a suit of this kind, where the plaintiff seeks not only redemption of the mortgage but also damages for destruction and permanent injury to the mortgaged property can be said to be barred by the provisions of S. 25 of the Agriculturists' Relief Act. That section is as follows:

> "No suit shall be brought in any court for any relief which can be obtained by an application under this chapter".

The question, therefore, is whether the suit brought in the court of the learned Munsif in this case was for any relief which could be obtained by an application under S. 12 of the Agriculturists' Relief Act.

(6) It must be conceded that the Act does not provide for a decree for money being passed in favour of the plaintiff at the time of passing a decree for redemption. A reference to the various sections of this Act will make this abundantly clear. Section 12 provides for an application for redemption. Under S. 12 the applicant is required to deposit in court, at the time when he applies, the sum which he considers is due to the mortgagee. It was at one time held that S. 12 would apply only to cases where the applicant admitted that some money was due from him & the section did not apply to a case where the mortgagor claimed that the whole of the mortgage money had been paid off and nothing was due. This view, however, was ultimately not accepted and at present the law, as administered by this Court, is that an application for redemption can be filed under S. 12 by a mortgagor even if he does not admit that anything is due from him.

Section 13 then provides that, after the application had been duly presented and the deposit made, notice has to be issued to the mortgagee to show cause why redemption should not be allowed; section 14 deals with a case where a mortgagee appears and accepts the money deposited in court; S. 15 with a case where on the date fixed the applicant does not appear and the mortgagee does not accept the money; and S. 16 applies to the large majority of cases where there is a dispute whether the applicant has a right to redeem and whether the amount deposited by him is sufficient or not.

In S. 16 it is provided that if the court finds that —

> "..... the applicant is entitled to redeem, but must pay a larger amount than that deposited by him, the court shall order the applicant to deposit the balance within a fixed period. If the applicant fails to deposit the said balance, the Court shall reject his application. If the court finds that the applicant is entitled to redeem and that the amount deposited by him was sufficient or if it was not sufficient, the applicant has deposited the balance within the time fixed, it shall order that the mortgage be redeemed, that the money deposited be paid to the mortgagee and that the title-deeds, if any, in possession or power of the mortgagee shall be deposited in court and shall be delivered to the mortgagor."

From the above quotation, it would appear that all that the court has to see is whether the applicant has a right to redeem and whether the amount deposited by him is sufficient or not and, if sufficient amount is forthcoming for payment to the mortgagee, the application is granted and redemption is allowed. An order provided for in S. 16 of the Agriculturists' Relief Act is materially different from a decree for redemption passed under O. 24 of the Code of Civil Procedure. Section 16, of the Agriculturists' Relief Act, does not empower the court to pass a decree for money in favour of the applicant who has applied for redemption under S. 12. The section is applicable only to a case where the mortgagor wants redemption of the mortgage on payment of the amount due to the mortgagee. Under S. 16 no decree for redemption as provided for in Order 34 Civil P. C. is passed though S. 27 of the Act provides that such an order shall be executed in the manner prescribed for execution of civil court decrees.

(7) Section 76 of the Transfer of Property Act (Act No. IV of 1882) deals with the liabilities of a mortgagee in possession. The mortgagee in possession must not do any act which is destructive or permanently injurious to the mortgaged property. (Section 76 (e)). If the mortgagee fails to perform any of the duties imposed upon him by the section, the mortgagee, when accounts are taken in pursuance of a decree under Chapter IV of the Transfer of Property Act, can be debited with loss occasioned by his failure. Section 76 makes it clear that the accounting between the mortgagor and the mortgagee has to be done at the time of redemption of the mortgage. Not only does a redemption decree passed under Order 34 of the Code provide for redemption of the mortgage but it also directs the mortgagee to pay to the mortgagor any loss caused to him for failure of any of the duties imposed on him under S. 76. The decree for redemption cannot be split up into separate and distinct reliefs passed by two courts, one for redemption and another for damages.

It cannot be said therefore that under S. 12 of the Agriculturists' Relief Act the plaintiff should have obtained an order for redemption and then filed a separate suit for damages for destruction or permanent injury to the mortgaged property. The question of accounting between the mortgagor and the mortgagee and after accounting what sum is payable by one to the other is an intimate and inseparable part of a decree for redemption under the Code of Civil Procedure. The Agriculturists' Relief Act, on the other hand, deals, as we have already said, with that simple type of case where there is no question of any breach of duty by the mortgagee and no loss is claimed to have been caused to the mortgagor for which he has to be compensated and where the only question is, what part of the mortgage debt has remained unpaid and whether the applicant can get an order for redemption of the mortgagè.

As the Act confers a special jurisdiction it must be limited to the scope of the enquiry provided for under S. 16. It is, therefore, not within the jurisdiction of the Collector to enter into the question of a claim for waste, nor has he any jurisdiction to give a decree in favour of the mortgagor for recovery of any amount from the mortgagee. An order under S. 16 is not analogous to a decree for redemption under Order 34 of the Code of Civil Procedure.

(8) We are, therefore, of the opinion that it was not possible for the plaintiff to split up the reliefs claimed by him into two separate and distinct reliefs one for redemption and another for damages one of which could be claimed by an application under S. 12 of the Agriculturists' Relief Act and the other by a suit under S. 60 read with S. 76, Transfer of Property Act. In the circumstances, it cannot be said that any relief claimed by the plaintiff could have been obtained by an application under S. 12 of the Agriculturists' Relief Act.

(9) The appeal has no force and is dismissed with costs.

A/D.H.Z. Appeal dismissed.

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(LUCKNOW BENCH) KIDWAI AND RANDHIR SINGH JJ. (30-3-1954)

Rani Raj Rajeshwari Devi, Applicant v. The State of U. P. and others, Opposite Party.

Civil Misc. Appln. No. 102 of 1953.

(a) Constitution of India, Arts. 13 (1), 226 and 367 — Court of Wards assuming superintendence of Ward's estate by virtue of declaration made by

Government under S. 8 (1) (b), U. P. Court of Wards Act long before Constitution — Validity — (U. P. Court of Wards Act (4 of 1912), S. 8 (1) (b) — (General Clauses Act (1897), S. 6).

On 11-5-1934 the Court of Wards U. P. assumed superintendence of the estate of the petitioner who was a Rani, by virtue of a declaration made under S. 8 (1) (b), U. P. Court of Wards Act. The Court of Wards continued in possession of the estate without any objection when the Constitution came into force. In 1952, S. 8 (1) (b) of the Act was declared void under Art. 13 (1) as being in derogation of Arts. 14, 15 and 19 (1) (f) of the Constitution, by the High Court decision in AIR 1952 All 746. When this decision came to be known, the U. P. Government issued orders that all estates held by the Court of Wards under S. 8 (1) (b) of the Court of Wards Act should be released unless their proprietors applied under S. 10 of the Court of Wards Act and some estates were released in pursuance of this order. The Rani's estate was, however, not released in spite of her application. The Rani thereupon moved the High Court under Art. 226 for the issue of appropriate writs and orders on the ground that the possession of the Court of Wards had become unlawful since the midnight of 25-1-50:

Held that (i) assuming that Arts. 14, 15 or 19 (1) (f) have been infringed, the declaration or order of the Government under which the Court of Wards assumed superintendence of the petitioner's estate must be declared void as from the date of the enforcement of the Constitution though whatsoever was done by the Court of Wards or whatever liabilities were imposed by the Court of Wards before that date could not be set aside. Hence, after the enforcement of the Constitution, that is to say, as from 26-1-1950, the possession of the Court of Wards over the property of the petitioner has been illegal and that possession should be restored to her and the accounts of the petitioner's property and all the dealings of the Court of Wards with it and with its income should be explained to her.

(Paras 44 and 87)

(ii) There was no acquiescence of the petitioner in the continued possession of the Court of Wards. Nor was there any undue delay in filing the petition so as to disentitle her to the relief prayed. Even if there had been any acquiescence, the Court of Wards, which held the estate for the benefit of the petitioner and was no better than her agent having certain statutory powers could not be allowed to continue in possession as against the petitioner.

(Paras 82, 83)

(iii) The Constitution of India has admittedly no retrospective operation. Indeed in so far as fundamental rights are concerned they were created, and not merely recognised by the Constitution. Consequently, citizens had no fundamental rights in the sense in which they are now understood. If these fundamental rights came into existence, as such, on the enforcement of the Constitution, nothing done before 26-1-1950 can be said to have infringed any fundamental rights. (Para 12)

(iv) The effect of an amendment declaring a law void is to repeal that law as from the date on which the declaration is made. It does not render the law void from the date of its inception as happens when the law is ultra vires of the authority which enacted it: AIR 1951 SC 128 and AIR 1951 SC 217, Rel. on.

(Para 14)

(v) The contention that the disability incurred by the petitioner by reason of the declaration duly made under S. 8 (1) (b), U. P. Court of Wards Act would not be affected by declaring that provision void at a much later period of time, ignores a distinction between two classes of cases: (a) cases in which the action has been completed and has become final or there is a "closed transaction" and in which the liability or obligation or penalty is imposed or incurred once for all as a result of that action; and (b) cases in which the penalty or liability or disability is a continuing one and though it started before the Constitution came into operation it continues even afterwards. In the former case, the right to prosecute any legal proceedings for enforcement of the penalty or for obtaining the remedy continues even after the repeal of the enactment as if the repealing enactment had not been passed. In the latter case, although no completed action can be abrogated by reason of the repeal (or declaration that Act is void) the disability imposed by the repealed Act (or the Act declared void) cannot continue after its repeal because this would be giving to the Statute declared void prospective operation even after it has actually become void: Case law discussed. (Paras 14, 15)

Anno: Const. of India, Art. 13 N. 3 and 6.

(b) Constitution of India, Arts. 12, 13, 14 and 15 — Scope — Protection of fundamental rights.

The contention that the Ordinance, Order, bye-law etc. referred to in Art. 13 (3) (a) must be issued in pursuance of a legislating power delegated by the Legislature is unwarranted. The fundamental rights are to be safeguarded not only against legislative encroachments but against all possible encroachments at the hands of any public authority whatever and even from customs and usages. A reference to Art. 12 will show that 'the State' includes not only the Government and Parliament of India but also "the Government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India". In Arts. 14 and 15 (1), the State is prohibited from denying "equality before the law or the equal protection of the laws" and is forbidden to discriminate against citizens on any of the grounds mentioned. Since the word 'State' used in these articles includes the Government even executive orders passed by the Government which militate against fundamental rights must be held to be void by reason of Art. 13 (1): AIR 1952 SC 75 (79), Rel. on.

(Para 38)

Anno: Const. of India, Art. 12 N. 1; Art. 13 N. 2.

(c) Constitution of India, Pre. and Art. 13 — Unconstitutionality of legislation — Presumption — Scope and extent.

No doubt the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the Constitutional principles.

(Para 46)

But this principle only means that if certain facts have to be proved to establish the fact that there is discrimination or that the law is unreasonable, it is for the person alleg-

ing this to establish it. Further, if there is any doubt as to the meaning of a Statute, that is to say, if there is any scope of interpretation, that interpretation will if possible be adopted which will make the Statute constitutional. It does not mean that a Statute should be misconstrued or that established facts should be ignored in order to hold a law to be of constitutional validity. (Para 47)

While the Courts cannot go out of their way to invalidate a law on the ground that it is in conflict with the constitution, they must be vigilant to protect fundamental rights and they cannot allow those rights to be whittled down and the same injustices, inequalities and discriminations to continue as existed before the enforcement of the Constitution. If then the Court comes to conclusion that a particular enactment derogates from the fundamental rights conferred by the Constitution it cannot allow any bias in favour of the constitutional validity of a law to uphold the law. (Para 49)

Anno: Const. of India, Pre. N. 6, Art. 13, N. 9.

(d) U. P. Court of Wards Act (4 of 1912), S. 8(1)(b) — If discriminatory against females — (Constitution of India, Art. 15).

A comparison between the provisions of Ss. 8(1)(b) and 8(1)(d) of the U. P. Court of Wards Act will clearly reveal that the discrimination is against the woman. While it is left to the absolute discretion of the Government-subjective and non-justiciable to declare a female proprietor unfit to manage her estate without any rules being laid down to determine what constitutes incapacity to manage, and she is not even allowed to represent her case before the declaration is made, in the case of a male not only must certain conditions be fulfilled before he can be declared unfit to manage his estate but he must be given the fullest opportunity to have his objections heard. Even though the law may be a benign one, there can be no doubt that the discrimination is 'against' the female. Thus the denial to women of the right of representation and the absence in S. 8(1)(b) of any rules similar to those in S. 8(1)(d) cannot but be regarded as "hostile" to women and consequently the discrimination is 'against' women. AIR 1952 All 746, Considered and followed. (Paras 53, 54)

Anno: Const. of India, Art. 15, N. 13.

(e) U. P. Court of Wards Act (4 of 1912), S. 8(1)(b) — Validity — If discriminatory only on ground of sex — (Constitution of India, Arts. 12, 15, 16).

Section 8(1)(d) of the U. P. Court of Wards Act applies to estates of males as well as females. It lays down certain standards which are to guide the Government in determining whether the person concerned is incapable of managing his or her property and it allows to the person concerned a full opportunity of being heard. If the necessary conditions exist the estate of a female as well as that of a male may be placed in charge of the Court of Wards, but in the case of females something more is provided: it is, by S. 8(1)(b) of the Act, left at the absolute discretion of the Government, even if the conditions imposed by Cl. (d) of the same sub-section do not exist, to declare the proprietor incapable of managing her estate. This differentiation is based solely on the sex of the proprietor and the fact that the differentiation is to be made by the Government and not by the Legislature is immaterial because the word "state" in Art. 15 includes, by reason of Art. 12, a Government also and differentiation by the Government is as much hit by Art. 15 as differentiation by the Legislature. The fact that Government chooses to proceed in respect of an estate under S. 8(1)(b) of the Court of Wards Act and not under S. 8(1)(d) is based 'only' on the sex of the proprietor, since no action can be taken under S. 8(1)(b) against males. (Para 58)

While classification is permissible it cannot be classification based on any of the factors mentioned in Arts. 15 and 16. In the present case, it is based on sex which is a factor on which discrimination is forbidden by Art. 15. It is, therefore, bad without anything more having to be proved. (Para 71)

A classification which the constitution forbids cannot possibly be said to be reasonable. Moreover, it has been held that a provision which leaves the choice to subjective discretion not justiciable of any executive authority is not reasonable. (Para 73)

The provisions of S. 8(1)(b) of the Court of Wards Act confer an uncontrolled and arbitrary power, not open to challenge in a Civil Court, of declaring any proprietor — provided she is a female — unfit to manage her property. Even if it be considered that this is a permissible classification and discrimination, it is unreasonable and must be declared to be void. (Para 77)

(f) U. P. Court of Wards Act (4 of 1912), S. 8(1)(b) — Validity — (Constitution of India, Art. 19(1)(f)).

The provisions of S. 8(1)(b) abridge the fundamental right of a ward under Art. 19(1)(f) when a Court of Wards assumes superintendence of her estate and as such they are invalid. The contention that the word 'holds' in Art. 19(1)(f) means 'own' and not 'possess' and, therefore, when a person is deprived of possession of her property Art. 19(1)(f) is not infringed, cannot be accepted. AIR 1952 All 746, considered and foll.; AIR 1953 SC 373, Rel. on. (Para 78)

In this case, it was held that since the petitioner had already been deprived of the management and possession of her estate before the Constitution came into force, she did not by reason of Art. 19(1)(f) become entitled to be restored to possession. (Para 79)

(g) U. P. Court of Wards Act (4 of 1912), Ss. 3, 44 — Person ceasing to be ward if legally entitled to obtain possession from Court of Wards.

The Court of Wards Act only authorises the Court of Wards to deal with properties of 'Wards' or in certain eventualities of those who succeed to, or are heirs of Wards. In order to constitute a person a ward within the meaning of S. 3 two conditions are necessary; (i) he must be a disqualified proprietor and (ii) his property must be under the superintendence of Court of Wards. If the declaration by the Government that the petitioner is unfit to manage her estate has become void, the petitioner has ceased to be a disqualified proprietor and can no longer be deemed to be a ward. The Court of Wards can thus no longer, under the very provisions of the Court of Wards Act, deal with her property nor do any of the limitation on the powers of 'wards'

apply to her so that she becomes free to manage and enjoy her property as she pleases and this she can only do if the wrongful possessor restores the property to her.
(Para 84)

(h) Constitution of India, Art. 226 — Other remedy open.

The non-availability of a remedy is not a 'sine qua non' of the exercise by the High Court of powers under Art. 226 though it is generally agreed that if an 'equally efficacious remedy' is available, the petitioner must have recourse to that remedy and not invoke the extraordinary powers of the High Court.
(Para 85)

Where the remedy by way of a suit for declaration and mandatory injunction would not be equally efficacious and undue delay would result, the High Court has power to grant appropriate reliefs including one of possession under Art. 226. AIR 1952 All 746 and AIR 1953 SC 373, Ref. (Para 86)

CASES REFERRED : Paras

(A) (V39) AIR 1952 All 746: ILR (1953) 1 All 29 3, 5, 8, 10, 45, 49, 56, 78, 79, 80, 82, 86
(B) (V38) AIR 1951 SC 128: 52 Cri LJ 860 (SC) 12, 14, 17, 36, 40
(C) (V38) AIR 1951 SC 217: 52 Cri LJ 736 (SC) 12, 22, 36, 40
(D) (V38) AIR 1951 Mysore 72: 52 Cri LJ 992 (FB) 23
(E) (V38) AIR 1951 Pat 75: 52 Cri LJ 799 (SB) 24
(F) (V37) AIR 1950 SC 163: 1950 SCR 566 26
(G) (V37) AIR 1950 Cal 274: 51 Cri LJ 1110 (SB) 28, 32
(H) (V37) AIR 1950 Pat 265: 51 Cri LJ 1081 28, 31, 34
(I) (V37) AIR 1950 Pat 322: 52 Cri LJ 610 (FB) 28, 34, 74
(J) (V37) AIR 1950 Orissa 157: 51 Cri LJ 1189 (FB) 28, 33
(K) (V37) AIR 1950 Nag 203: 51 Cri LJ 1372 28, 30
(L) (V39) AIR 1952 SC 75: 1952 Cri LJ 510 (SC) 38, 54, 69
(M) (V39) AIR 1952 SC 235: 1952 Cri LJ 1167 (SC) 42
(N) (V40) AIR 1953 SC 156: 1953 Cri LJ 862 (SC) 42
(O) (V38) AIR 1951 SC 41: 1950 SCR 869 46, 68
(P) (V26) AIR 1939 FC 74: 1939 FCR 193 46
(Q) (V40) AIR 1953 SC 373: 1953 SCR 1049 52, 75, 78, 86
(R) (V38) AIR 1951 Bom 470: 1952 Cri LJ 23 60
(S) (V40) AIR 1953 Bom 311: ILR (1953) Bom 842 60
(T) (V40) AIR 1953 Madh B 147: 1953 Cri LJ 964 60, 63
(U) (V38) AIR 1951 Cal 563: 55 Cal WN 453 60
(V) (V38) AIR 1951 Mad 120: ILR (1951) Mad 149 (FB) 65
(W) (V38) AIR 1951 SC 226: 1951 SCR 525 66, 71
(X) (V39) AIR 1952 SC 123: 1952 Cri LJ 805 (SC) 69, 71
(Y) (V41) AIR 1954 SC 224: (Petn. No. 326 of 1953, D/- 11-1-1954 SC) 76

Niamatullah, Bishun Singh, Onkar Singh and Inayatullah, for Applicant; B. K. Dhaon and B. N. Roy, (for Nos. 1 and 2); Iqbal Ahmad and K. S. Verma, (for Nos. 3 to 6), for Opposite Party.

KIDWAI J. :

The petitioner, referred to in these proceedings as the Rani is the widow of Thakur Jai Inder Bahadur Singh, late Taluqdar of Maheŵa who died on 14-11-1949.

(2) On 1st July, 1923 Jai Inder Bahadur made a gift to the Rani of 8 villages assessed to a Government Revenue of Rs. 10,000/. Subsequently the Rani purchassed other properties also and was in possession of them till 11-5-1934 when the Court of Wards, U. P., assumed superintendence of her estate by virtue of declaration made by the Government under s. 8(1) (b) of the U. P. Court of Wards Act. When the new constitution of India came into operation, the Court of Wards was in possession and the Rani does not seem to have raised any legal objection to this continued possession, though after the death of her husband, she repeatedly petitioned the Government to release her estate on the ground that she could manage it herself.

(3) On 2-4-1952 a decision was pronounced by a Division Bench of this Court — vide Mrs. A. Cracknell v. State of Uttar Pradesh', AIR 1952 All 746 (A), in which it was held that the provisions of s. 8(1) (b), of the U. P. Court of Wards Act, being in derogation of Arts. 14, 15 and 19 (1) (f) of the Constitution are null and void under Art. 13 (1) of the Constitution.

(4) When this decision came to be known, the U. P. Government issued orders that all estates held by the Court of Wards under s. 8(1) (b) of the Court of Wards Act should be released unless their proprietors applied under s. 10, Court of Wards Act, and some estates were released in pursuance of this order. The Rani's estate was, however, not released in spite of her application and it seems that some modification was made in the original orders issued by the Government. The extent and effect of this modification was a matter of some dispute but this is immaterial for the purpose of these proceedings.

(5) The Rani, not having been granted the relief to which she considered herself entitled by reason of the law as declared by the Division Bench of this Court in — 'AIR 1952 All 746 (A)', has moved this Court to exercise its power under Art. 226 of the Constitution and to issue "writs in the nature of mandamus, prohibition, quo warranto and certiorari, or such of them as may be appropriate for granting the under-mentioned reliefs :

"(1) That the opposite party may be directed to release the petitioner's estate forthwith, handing over to her all cash, securities and other moveable properties appertaining to her estate :

"(2) The opposite parties may be directed to submit, for examination by this Hon'ble Court, all records, correspondence and other relevant papers disclosing the dealings by the opposite parties of the petitioner's estate and its belongings since the enactment of the Constitution;

"(3) That after an examination of the relevant materials this Hon'ble Court may be pleased to direct the opposite parties to reimburse the petitioner for any losses arising from any illegal and unwarranted action of the opposite parties or any of them, and to pass such other orders as the ends of justice may require :"

(6) An interim order was also prayed for and was issued by one of us by which the opposite parties concerned were directed

"not to dispose of the funds belonging to the petitioner or appertaining to her estate and not to create any liabilities either on the petitioner or on her estate pending the disposal of this application."

(7) The opposite parties were the State of the Uttar Pradesh, no doubt, as the authority having supervisory control over the Court of Wards, the Revenue Secretary U. P. Government, the U. P. Court of Wards, the President Court of Wards and the Deputy Commissioner who has control under the orders of the Court of Wards, over the Rani's estate. The Deputy Commissioner of Barabanki acting for the Court of Wards, Ganeshpur estate applied to be impleaded and that estate claiming to be a creditor of the Rani's estate would be seriously affected by the decision on this petition. This application was opposed but we considered it proper to grant it. Accordingly the Deputy Commissioner of Barabanki as representing the Ganeshpur estate, has also been impleaded as a party.

(8) The petitioner's learned Advocate contended that S. 8 (1) (b), U. P. Court of Wards Act, was discrimination based on sex and had consequently become void at midnight on the night between 25th and 26th January 1950. He relied upon — 'AIR 1952 All 746 (A)' in support of his contention. He further urged that, if it were held that the possession of the Court of Wards had not become unlawful she would have no remedy through the normal channel of a suit against the mala fide actions of the Court of Wards in flagrant disregard of her interests and that consequently this Court should issue such directions as appeared to it proper in order to restrain the highhandedness and arbitrary actions of the Court of Wards.

(9) The State and the Revenue Secretary were represented before us by the Standing Counsel, who addressed no arguments to us. The petition was however, vehemently opposed on numerous grounds by Sir Iqbal Ahmad who appeared on behalf of the other opposite parties. It is somewhat surprising that in spite of the serious conflict in the interests of the Ganeshpur estate, the petitioner's estate and the estate of her late husband (the Mahewa estate) which the arguments of Sir Iqbal Ahmad revealed the Court of Wards, which is at present in charge of all the estates did not consider it proper to appoint separate representatives for the three estates as required by S. 56 of the Court of Wards Act which applies not only to suits but also to "proceedings."

(10) Sir Iqbal Ahmad's contentions were:

(a) Assuming the decision in — 'AIR 1952 All 746 (A)', to be correct it has application only to cases in which a notification under S. 8 (1) (b) of the Court of Wards Act is issued after the Constitution of India came into force and does not apply to render void a declaration lawfully made under the section at a time when Arts. 13, 14, 15 and 19 (1) (f) of the Constitution were not in force. In the present case since the declaration was made by the Government as long ago as 1934, it continued to be valid, the Constitution not being retrospective in its operation, and the possession of the Court of Wards under it was lawful and must be maintained.

(b) The case in — 'AIR 1952 All 746 (A)' was wrongly decided because:

(i) There is a bias in favour of upholding a law and not declaring it void or ultra vires, a principle which has been ignored by the learned Judges in deciding the case;

(ii) Section 8 (1) (b) is not discriminatory 'against' females since the Court of Wards Act is a piece of benign legislation directed to preserve estates for their proprietors and facilities for the taking over of such estates by the Court of Wards are for the benefit of the proprietors:

(iii) Even if S. 8 (1) (b) of the Court of Wards Act be held to be discriminatory within the mischief of Article 15 (1) the discrimination is not based only on the ground of sex but also on other considerations;

(iv) Classification of citizens into various groups for the purposes of legislation is not forbidden and having regard to the state of affairs existing in India, the placing of women in a category by themselves in so far as the management of estate is concerned is a reasonable classification based on intelligent indicia and is not hit by Article 14 or 15 (1): and

(v) Article 19 (1) (f) does not apply because the word "hold" used in that Article means "to own" and not "to possess".

(c) In any case the jurisdiction under Art. 226 is essentially equitable and in the present case it would not be equitable to grant the relief claimed because the petitioner has acquiesced in the Court of Wards acting on her behalf and it would be inequitable to allow her to resile from that position; and

(d) Two conditions are requisite for the grant of relief under this Article, namely—

(a) The petitioner must have a legal right to the performance of a legal duty, the performance of which is claimed; and

(b) No other equally efficacious remedy is available to the petitioner:

In the present case both these requisites for the power of issuing writs are wanting.

(11) We have derived considerable assistance from the arguments of the learned Advocates for the parties who have placed before us numerous decisions from which the principles of law applicable to a case such as the present may be derived.

(12) The first point that requires consideration in the present case is whether the grant of this petition is dependent upon giving a retrospective operation to the Constitution, since it was frankly conceded by the petitioner's learned Advocate that the Constitution has no retrospective operation—vide also — 'Keshavan v. State of Bombay', AIR 1951 SC 128 (130) (B) and — 'Janardan Reddy v. State of Hyderabad', AIR 1951 SC 217 (C). Indeed in so far as fundamental rights are concerned they were created, and not merely recognised by the Constitution. Consequently, citizens had no fundamental rights in the sense in which they are now understood. If these fundamental rights came into existence, as such, on the enforcement of the Constitution, nothing done before 26-1-1950 can be said to have infringed any fundamental rights.

(13) Further Art. 367 of the Constitution makes the General Clauses Act of 1897 applicable for the purposes of interpreting the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. Section 6 of the latter Act provides:

"Where this Act or any (Central Act) or Regulation made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not

....

"(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed; or

"(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

"(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty forfeiture or punishment as aforesaid;

"and any such legal proceedings or remedy may be instituted, continued, or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

(14) It has been held in — 'AIR 1951 SC 128 (B)' that the effect of an amendment declaring a law void is to repeal that law as from the date on which the declaration is made. It does not render the law void from the date of its inception as happens when the law is ultra vires of the authority which enacted it. It was on this basis that Sir Iqbal Ahmad contended that the disability (which he treated as an obligation or liability) incurred by the petitioner by reason of the declaration duly made under S. 8 (1) (b) of the Court of Wards Act would not be affected by declaring that provision void at a much later period of time.

(15) This contention ignores a distinction between two classes of cases: (a) Cases in which the action has been completed and has become final or there is a "closed transaction" and in which the liability or obligation or penalty is imposed or incurred once for all as a result of that action; and (b) Cases in which the penalty or liability or disability is a continuing one and though it started before the Constitution came into operation, it continues even afterwards.

In the former case, the right to prosecute any legal proceedings for enforcement of the penalty or for obtaining the remedy continues even after the repeal of the enactment as if the repealing enactment had not been passed. In the latter case, although no completed action can be abrogated by reason of the repeal (or declaration that Act is void) the disability imposed by the repealed Act (or the Act declared void) cannot continue after its repeal because this would be giving to the Statute declared void prospective operation even after it has actually become void. This distinction will become clear when the decisions on which reliance has been placed are discussed.

(16) The series of cases upon which Sir Iqbal Ahmad relied related to Art. 14 of the Constitution and the Statutes impugned were challenged on the ground that they deprived particular individuals or classes of equality before the law and of the equal protection of the laws.

(17) In 'AIR 1951 S. C., 128 (B), the continued validity of the Press (Emergency Powers) Act of 1931 was challenged on the ground that it was repugnant to the provisions of Art. 19 (1) (a) of the Constitution and it was claimed that a prosecution under that Act which was pending at the date that the Constitution came into force could not be allowed to continue. This contention was not accepted and it was held by Das J. who delivered the judgment of the Chief Justice and of Patanjali Sastri and Chandrashekhara Aiyar JJ. that :

"Article 13(1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the Statute Book, for to do so would be to give them retrospective effect, which, as we have said they do not possess. Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution, because there is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. So far as the past acts are concerned, the law exists 'although it does not exist with respect to the future exercise of fundamental rights".

It was said by Das J. in the course of his judgment:

"In other words, 'on or after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights'."

(18) In the same case the judgment of Mahajan J. (now C. J.) makes it clear that it was principally because declaring a law "void" was really its repeal and that S. 6 of the General Clauses Act governed such a case that the penalty already incurred before the Constitution came into operation could be enforced even after that event.

(19) On the other hand, Fazl Ali J. (with whom Mukherjea J. agreed) did not accept the majority view and they held that the criminal prosecution could not be allowed to continue. At page 133 Fazl Ali J. says:

"There can be no doubt that Article 13 (1) will have no retrospective operation and transactions 'which are past and closed' and rights which have already vested will remain untouched. But with regard to inchoate matters which were still not determined when the Constitution came into force, and as regards proceedings whether not yet begun or pending at the time of the enforcement of the Constitution and not yet prosecuted to a final judgment, the very serious question arises as to whether a law which has been declared by Constitution to be completely ineffectual can yet be applied. On principle and on good authority, the answer to the question would appear to me to be that the law having ceased to be effectual can no longer be applied."

(20) In spite of the observations of Fazl Ali J. I may be permitted to point out with respect that the fundamental right to "freedom of speech and expression" after the enforcement of the Constitution, i.e., after it had first come into existence, remained wholly unaffected by the prosecution launched in respect of an action which was penal under a valid law existing at the time when the action took place and when there were no fundamental rights. It is for this reason that Das J., points out that

"there is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force."

(21) The decision under discussion thus unanimously adumbrates the following propositions:

(a) That Article 13 (1) has no retrospective operation with regard to transactions which are past and closed.

(b) that on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights;

(c) that in that particular there was no question of the infringement of any fundamental right after the date of the Constitution but only meting out of punishment for something which had been done before the Constitution came into force at which time there were no fundamental right and consequently there was no question of the law having become void by reason of Art. 13(1) at the time when the act was done. In the words of Mahajan J. (now C. J.)

"a citizen must be possessed of a fundamental right before he can ask the Court to declare a law which is inconsistent with it void, but if a citizen is not possessed of the right, he cannot claim the relief".

(22) In 'AIR 1951 S. C. 217 (C)', the trial of certain persons had taken place before Special Tribunals constituted under Regulations issued in May and July, 1949 and they had been convicted for murder and for other offences before the Constitution of India came into operation. It was held in a unanimous decision pronounced by Fazl Ali J. that the Constitution not having any retrospective effect and the appeal of the petitioners having been dismissed by the High Court before the Constitution came into force

"the conviction and the sentence of the petitioners had acquired finality in the fullest sense of terms before 26-1-1950 and by reason of this finality no one could question the validity of the convictions at the date when the Constitution came into force."

(23) In — 'Abdul Khader v. State of Mysore', AIR 1951 Mysore 72 (D), the question was whether trial by a Special Court infringed the provisions of Arts. 14 and 21 of the Constitution and was consequently vitiated. It was held by two out of three Judges composing the Full Bench that whatever view may have been open had the trial taken place after the Constitution came into force this view could not be taken when trial had already finished and the case had already been disposed of before that date. Some remarks of Mallapa, J. are instructive on the question of classification & reference will be made to them later.

(24) The last case upon which the learned Advocate for the opposite parties placed reliance in this connection is — 'Chanderdeo Sharma v. State of Bihar', AIR 1951 Pat 75 (SB) (E). In that case, a notification had been issued on 14-7-1949 under the Press (Emergency Powers) Act (23 of 1931) forfeiting a Hindi Booklet. Thus, the action of the forfeiture was complete and was a "closed transaction" before new rights came into existence under the Constitution and the learned Judges held:

"The Order of forfeiture had taken effect on a date before the Constitution of India came into force and it is difficult to say how the validity or otherwise of that order can be called in question with reference to a further right granted to every citizen of the Indian Union by the Constitution."

In this case also, the only fundamental right that could be infringed was that conferred by Art. 19(1)(a) of the Constitution, i.e., the right "to freedom of speech and expression." Since the forfeiture had already been completed before this fundamental right came into existence, there was nothing done which infringed the fundamental right created by the Constitution.

(25) It will be noticed that in none of the above mentioned cases was any question of 'continued infringement' of a fundamental right after the commencement of Constitution involved. It was, however, contended on the basis of some remarks made in them that, since in the present case, the declaration had been made by the Government in 1934, long before the new Constitution came into operation, nothing in Arts. 13(1), 14 and 15(1) of the Constitution could be allowed to affect the operation of that declaration. It was urged that in the same way as a person could still be detained in prison under a law which has become void in spite of Art. 19(1)(d) he must continue to suffer from every other kind of liability. It will be seen that reliance was not placed upon this Article in any of the cases to which reference has been made either by the eminent counsel who appeared or by the learned Judges who examined the relevant provisions with care. The reason for this is not far to seek: in the matter of individual liberty not only does clause (5) of Art. 19 provide an exception but the matter is in reality governed by Arts. 20 to 22 of the Constitution. If the law makes a reasonable provision for the curtailment of the liberty of a citizen to move about in India that provision will by reason of cl. (5) of Art. 19 be upheld. It cannot possibly be contended that a provision in the law that a person who had already been deprived of his personal liberty "according to the procedure established by law" as it existed at the time that he was so deprived, shall continue to be restricted so far as his movements were concerned is unreasonable.

(26) In this connection, I may mention the decision of the Supreme Court in — 'Rashid Ahmad v. The Municipal Board, Kahirana', AIR 1950 SC 163 (F), which escaped the notice of the learned Advocates for both the parties. In that case the validity of some by-laws framed by the Municipal Board of Kairana was challenged. The bye-laws provided that no one could carry on the business of a wholesale vegetable dealer within Municipal limits without a license and that he must carry on the business at the particular place or places fixed by the Board. They also provided that a monopoly could be granted to a Contractor to deal in wholesale transactions. There was no bye-law authorising the Board to grant licenses. It was held that the net result of those bye-laws was that the prohibition in the wholesale dealing with vegetables became absolute and there was a violation of the fundamental right conferred by Article 19 (1) (g) since the restriction imposed was much more than a reasonable restriction. It was, therefore, held that the bye-laws relating to this matter had become void under Art. 13(1) of the Constitution. In that case the bye-laws had been duly enforced from 1-1-1950 i.e., before the Constitution had come into force and it was contended on this basis that at the time when the Constitution came into force the petitioner had no longer any right to continue the business and that, therefore, his case was not governed by Art. 19(1) (g). This contention was repelled and it was said:

"There is no substance in this argument for, if it were sound, Article 19(1) (g) would only protect persons who were carrying on business before the Constitution came into force."

Their Lordships then proceeded to hold that in spite of the bye-law, the petitioner before them could after the enforcement of the Constitution carry on the business of wholesale dealer in vegetables at his house without a licence and that criminal proceedings instituted against him for infringement of the bye-law must be quashed.

(27) The above case is, therefore, a clear authority for the proposition that a bye-law duly

made and valid when it was enforced cannot be allowed to interfere with the exercise of fundamental rights after those rights have come into existence by the enforcement of the Constitution. An order or declaration made by the Government stands, in view of Art. 13(3) (a) on the same footing and that too cannot be allowed to stand in the way of the enforcement of fundamental rights. Fundamental rights are conferred not only by Art. 19 but also by Art. 15. If the right conferred by this Article is infringed by any law (which includes orders) made by the State (which includes the Government) that law is rendered void by Art. 13(1) and the discrimination against a citizen on the ground of sex cannot be allowed to continue after the Constitution comes into force in spite of such a law or order.

(28) The distinction between the two classes of cases to which I have referred in paragraph 15 is also made quite clear by reference to the cases upon which the petitioner's learned Advocate relied in connection with this part of the case. They are — 'Sunil Kumar v. Chief Secy to the Govt. of West Bengal', AIR 1950 Cal 274 (SB) (G); 'Brahmeshwar Prasad v. State of Bihar', AIR 1950 Pat 265 (H); 'Brajnandan Sharma v. State of Bihar', AIR 1950 Pat 322 (FB) (I); 'Prahlad Jona v. State', AIR 1950 Orissa, 157 (FB) (J). Reference was also made to the decision of a Division Bench in — 'Trimbak Shivrudra v. The State', AIR 1950 Nag 203 (K).

(29) All the above-mentioned cases arose under various Acts governing preventive detention. In all of them the orders of the authority empowered to order preventive detention had been passed and put into operation before the Constitution came into force. It was held in all of them that the orders already passed had become void by reason of being in conflict with the Constitution and continued action under them was illegal. Directions were, therefore, issued in each case declaring the orders to be void. In each of the cases, the provisions of Arts. 19(1)(d), 19(5), 21 and 22 were considered and because the orders were repugnant to them they were held to have become void under Art. 13 (1).

(30) The earliest case in point of time is the decision of a Division Bench in — 'AIR 1950 Nag 203 (K). In that case, a person had been detained under the C. P. and Berar Public Safety Act. It was held that the powers conferred upon the Provincial Government by the Act were to some extent wider than those permitted by the Constitution but that did not render the whole of the Act bad. It was remarked:

> "The power to detain a person, and the power to detain a person for an indefinite period are distinct and therefore, in our view the provision conferring the former is not rendered void because the provision conferring the latter is void."

The parts which were void were separable from those which were not and since the Act was still existent, it was a law which the President could in exercise of his powers under Art. 373 modify. By the President's modification the order for preventive detention was to be limited in its direction to three months from 26-1-1950. It was consequently held that the detenu could not be released before the expiry of three months from 26-1-50.

(31) The next case is the decision of a Division Bench of the Patna High Court reported in — 'AIR 1950 Pat 265 (H)'. In that case a person was detained under an order lawfully issued before the Constitution came into force under the provisions of the Bihar Maintenance of Public Order Act (3 of 1950). The learned Chief Justice summarised the various provisions of the Act and held that they were in conflict with Art. 22, Cls. (4) and (5) of the Constitution. He held that the void provisions could not be separated from the valid provisions remarking at page 270:

> "Put crudely, the argument comes to this. If a law provides for a detention of six months, but the Constitution says that no law can provide for detention for more than three months then that law is not wholly void, but can be regarded as a good law as regards detention upto three months. The fallaciousness of such an argument is at once apparent. It would mean not severing the bad portion from the good and leaving the latter, but substituting a new and different law in place of the old. In fact, it would mean legislation by the Court and the abolition of one law and the substitution for it of a new and different law."

It was accordingly held that the detenu could no longer be detained after 26-1-1950 and the order of the President issued under Art. 373 could not affect this matter, since there could be no resuscitation of a dead law by such an order.

(32) In — 'AIR 1950 Cal 274 (G)' a Special Bench of the Calcutta High Court considered the Bengal Criminal Law Amendment Act of 1930. Under S. 2 (1) of that Act, it was provided that a person could be detained or restrictions imposed upon his movements if in the opinion of the Provincial Government there were reasonable grounds for believing that he

> (i) is or was a member of an Association of which the objects and methods include the commission of any offence specified in schedule I of the Act;
>
> (ii) is doing or was at any time instigated or controlled by a member of any such Association; and
>
> (iii) is doing or did at any time any act to assist the operations of such an Association.

The powers were exercised according to the rules of business by a Deputy Secretary. Emphasis was laid upon the fact that the satisfaction had to be that of the Provincial Government and that the Courts could not investigate the grounds. It was remarked that "the opinion of Provincial Government was subjective and not justifiable" and that the provisions of the impugned Act were most preposterous and were neither reasonable nor in the public interest so as to fall within Art. 19 (5). It was also found that there was a conflict with the provisions of Art. 22 inasmuch as no limit was fixed to the period of detention. The same opinion was expressed as regards the severability of the various provisions and of the President's order issued under Art. 373 as in the Patna case to which reference has already been made.

(33) In — 'AIR 1950 Orissa 157 (FB) (J)', the same view was expressed with regard to the Orissa Maintenance of Public Order Act and the President's order under Art. 373 and had been expressed in the Patna case to which reference has been made in para. 29 and the detenus were ordered to be released at once.

(34) In — 'AIR 1950 Pat 322 (FB) (I)' two of the learned Judges composing the Full Bench reaffirmed the view taken by the Division Bench of their court in — 'AIR 1950 Patna 265 (H)',

Meredith, C. J. remarking at page 324 of the report:

"But when a Court is prevented from going into the merits it is for all practical purposes impossible to consider whether the order is in fact bona fide or mala fide. On the other hand, 'if the restrictive provisions in the Act are void, quite obviously the order made thereunder is void'."

(35) The above cases are direct authority for the proposition that nothing in any law or order could stand in the way of the exercise of fundamental rights unless the case fell within any of the exceptions engrafted on to fundamental rights by Part III of the Constitution.

(36) Sir Iqbal Ahmad contended that:

(a) the learned Judges deciding these cases did not go into the question whether the Constitution had retrospective effect or not; and

(b) having regard to the decision of the Supreme Court in — 'AIR 1951 SC 128 (B)' and — 'AIR 1951 SC 217 (C)', which definitely rule that the Constitution does not derogate from anything lawfully done under the then existing law, they must now be deemed to be bad law.

(c) In those cases, the continued detention of the persons concerned was a violation of the right conferred by Art. 22 (4) while in the present case by the continuance of the Superintendence of the estate by the Court of Wards no fundamental right is infringed.

(37) It is true that in none of the five cases upon which Mr. Niamatullah relied was there any discussion as to whether the Constitution had retrospective effect but that is immaterial because the learned Judge did not hold that the Constitution in any manner affected the validity of the various laws up to the date of its enforcement: they only held that they could not continue valid after that date in so far as they infringed fundamental rights.

(38) In the last mentioned case it was definitely laid down that an order stood or fell with the law under which it was passed. This is perfectly clear from the definition of "Law" in Art. 13 (3) (a) which is as follows:

" 'Law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."

Sir Iqbal Ahmad contended that the Ordinance, Order, bye-law etc. must be issued in pursuance of a legislating power delegated by the Legislature. There is, however, no warrant for the distinction because fundamental rights are to be safeguarded not only against legislative encroachments but against all possible encroachments at the hands of any public authority whatever and even from customs and usages. A reference to Art. 12 will show that 'the State' includes not only the Government and Parliament of India but also " 'the Government and Legislature of each of the States and all local or other authorities' within the territory of India or under the control of the Government of India." In Arts. 14 and 15 (1) with which we are primarily concerned, the State is prohibited from denying "equality before the law or the equal protection of the laws" and is forbidden to discriminate against citizens on any of the grounds mentioned. Since the word 'State' used in these articles includes the Government even executive orders passed by the Government which militate against fundamental rights must be held to be void by reason of Article 13 (1) — vide also the remarks of Patanjali Sastri C. J. in — 'The State of West Bengal v. Anwar Ali Sarkar', AIR 1952 SC 75 at p. 79 (L).

(39) Further, if Sir Iqbal Ahmad's contention that orders already issued by the Government under a law in force at the time can still stand in the way of the enjoyment of the fundamental rights conferred by Part III of the Constitution were accepted, it would lead to a most anamolous result. If before the enforcement of the Constitution, the appropriate legislature had enacted a law which had been duly assented to and promulgated, and which itself discriminated against a citizen on the ground of religion, sex or birth, e.g., by directing that no woman (or no Muslim woman) should appear in public without a veil or that persons born in a particular district should not be admitted to the Lucknow University, that law would automatically become void by reason of Art. 13 (1) and the disqualification imposed by it would come to an end. If, however, instead of the Act itself imposing the disqualification it authorised the Government of the State to prescribe the dress to be worn by women in public places or the persons who might be admitted to the Lucknow University and the Government had issued orders in the sense which I have mentioned earlier in this paragraph, before the Constitution came into force, the orders would still continue in force, although they militated against fundamental rights. In other words, a greater sanctity is sought to be attached to orders or notifications issued under an Act than attaches to the Act itself and it is sought to continue orders which are repugnant to fundamental rights, although it is agreed that the Act itself may be held to be void. Such a proposition has only to be stated to be rejected.

(40) With regard to the contention that these cases must be deemed not to be good law by reason of the decisions of their Lordships in the Supreme Court in — 'AIR 1951 SC 128 (B)' and — 'AIR 1951 SC 217 (C)'. I have pointed out more than once that the two classes of cases are different. In the cases upon which Sir Iqbal Ahmad relies there was no question of a continuation of the infringement of fundamental rights after the enforcement of the Constitution, i.e., after the time when fundamental rights first came into existence. The remarks of Das, J. while delivering the judgment of the majority in — 'AIR 1951 SC 128 (B)' clearly bring out the distinction. At page 130 of the report he says:

"In other words, on or after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights" and again "so far as past acts are concerned the law exists notwithstanding that it does not exist with regard to the future exercise of fundamental rights."

(41) As to the third contention of Sir Iqbal Ahmad on which he sought to differentiate the cases upon which Mr. Niamatullah relied in the present case, it is sufficient to say that fundamental rights are conferred not only by Art. 19 but also by Art. 15. Even if Art. 19 (1) (f) is not applicable (a point which will be considered later), Art. 15 is, and, by reason of that Article, no discrimination by the State (including the Government) on the ground of sex can be allowed to continue after the enforcement of the Constitution.

(42) Before taking leave of this part of the argument it is necessary to refer to two more

decisions, both of the Supreme Court, upon which Mr. Niamatulah relied. They are, — 'Lachmandas v. State of Bombay', AIR 1952 SC 235 (M) and — 'Syed Qasim Rizvi v. State of Hyderabad', AIR 1953 SC 156 (N). I have purposely left those decisions till the last because there is a point of distinction in them inasmuch as both of them related to a change in the law of procedure and emphasis was laid on the fact that a change of procedure must have immediate effect. It was accordingly held that, if the procedure adopted by the Special Tribunal concerned was not the same as that provided by the general law and was discriminatory to such an extent as to be a denial of the equal protection of the law, it could not be pursued after the enforcement of the Constitution since the law relating to it will have become void under Art. 13(1). It was further held that if such discriminatory procedure continued to be followed even after the enforcement of the Constitution it would vitiate the trial.

(43) Some remarks made in the judgment in the second of the cases do, however, throw some light on the matter under discussion. At page 162 of the report, Mukherjee, J. delivering his own judgment and the judgment of Patanjali Sastri, C. J. and Chandrasekhara Aiyar, J, says:

> "We may mention here that the impossibility of giving the accused the substance of a trial according to the normal procedure at the subsequent stage may arise not only from the fact that the discriminatory provisions were not severable from the rest of the act and that the Court consequently had no option to continue any other than the discriminatory procedure, or it may arise from something done at the previous stage which though not invalid at that time precludes the adoption of a different procedure subsequently. Thus, if the normal procedure is trial by jury or with the aid of assessors, and as a matter of fact there was no jury or assessor trial at the beginning, it would not be possible to introduce it at any subsequent stage. Similarly, having once adopted the summary procedure, it is not possible to pass on to a different procedure on later date. In such cases, the whole trial would have to be condemned as bad."

Again he says:

> "As regards the procedure to be followed by the Special Tribunal, the Regulation undoubtedly prescribes the procedure for summary trial by a Magistrate. If the tribuunal had adopted that procedure, we would have no other alternative but to declare the whole trial as invalid for although the summary procedure could not have been challenged as illegal prior to the coming in of the Constitution, it would not possibly have been changed to a different procedure after 26th January 1950. The entire procedure would then have to be held as invalid as conflicting with the equal protection clause'."

Bose and Ghulam Hassan, JJ. went still further.

(44) Thus according to all the Judges composing the Bench, discrimination cannot be allowed to continue after the Constitution has come into force even if, in order to prevent this, something which was done before the Constitution came into operation and was perfectly valid when it was done, has to be undone. Thus, if the contention of Sir Iqbal Ahmed that neither Arts. 14, 15 nor 19(1)(f) have been infringed, is rejected, the declaration or order of the Government under which the Court of Wards assumed superintendence of the petitioner's estate must be declared void as from the date of the enforcement of the Constitution though whatsoever was done by the Court of wards or whatever liabilities were imposed by the Court of wards before that date cannot be set aside.

(45) This brings us to Sir Iqbal Ahmad's contentions questioning the correctness of the decision in 'AIR 1952 All 746 (A)'.

(46) The first ground upon which that decision is attacked is that it has lost sight of the principle that, in the words of Fazl Ali, J., 'in — Charanjit Lal v. The Union of India', AIR 1951 S. C. 41 at p. 45 (O)',

> "the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles:"

It was, therefore, held in that case that it was for petitioners to show that the Act which had imposed restrictions upon the Sholapur Company was

> "arbitrary and unreasonable and that there were other companies in the country which should have been subjected to the same disabilities because the reasons which led the legislature to impose State Control upon the Sholapur Company are equally applicable to them."

See also — 'Shyamakant Lal v. Rambhajan Singh', AIR 1939 F. C. 74 (P).

(47) The above dicta only mean that if certain facts have to be proved to establish the fact that there is discrimination or that the law is unreasonable, it is for the person alleging this to establish it. Further, if there is any doubt as to the meaning of a Statute, that is to say, if there is any scope for interpretation, that interpretation will if possible be adopted which will make the Statute constitutional. It does not mean that a Statute should be misconstrued or that established facts should be ignored in order to hold a law to be of constitutional validity.

(48) On the other hand, it must be remembered that the constitution attaches the greatest importance to fundamental rights. In the past, when India was under autocratic rule or the rule of a foreign power, citizens had no fundamental rights as such. They were penalised and discriminated against on various grounds, including religion, race, caste and sex. The constitution makers determined that the possession of "Fundamental rights" by all citizens and, to some extent by all denizens of the country is inherent in the very conception of a democratic State which India is declared to be and that it is necessary to guarantee them in order

> "to secure to all its citizens;
>
> 'justice', social, economic and political;
>
> 'Liberty' of thought, expression, belief, faith and worship;
>
> 'Equality' of status and of opportunity, and to promote among them all;
>
> 'Fraternity' assuring the dignity of the individual and the unity of the Nation."

In order to achieve this object, the written Constitution distinctly and explicitly forbids both legislative and executive interference by every authority having jurisdiction over India or any part of it with what are termed Fundamental Rights and it solemnly entrusts the prevention of any interference to the Supreme Court (by Art. 32) and the various High Courts

(by Art. 226). It further forbids the suspension of the powers conferred upon the Supreme Court by Art. 32 (vide cl. 4 of the Article) except after an emergency has been proclaimed under Art. 352 (vide Art. 359).

(49) While, therefore, the courts cannot go out of their way to invalidate a law on the ground that it is in conflict with the constitution, they must be vigilant to protect fundamental rights and they cannot allow those rights to be whittled down and the same injustices, inequalities and discriminations to continue as existed before the enforcement of the Constitution. If then the court comes to conclusion that a particular enactment derogates from the fundamental rights conferred by the Constitution, as it did in AIR 1952 All 746 (A), it cannot allow any bias in favour of the constitutional validity of a law to uphold the law.

(50) The next contention was that the learned Judges did not give adequate consideration to the fact that the Court of Wards Act was a benign measure the object of which was to benefit Zamindars by preserving their estates from destruction. It was urged that any discrimination that there might be in enabling the Court of Wards to assume superintendence of a woman more easily than that of a man was discrimination not 'against' but in favour of the woman. The same argument was advanced before the learned Judges in the case under consideration and was, if I might say so with respect, rightly rejected.

(51) The benefit of the estate as such and the benefit of the proprietor for the time being of an estate are two different things. For instance, the proprietor of an estate may have no direct heir but only unknown distant collateral. He may, therefore, determine to enjoy his estate to the fullest possible extent even though this may lead to indebtedness or even to the sale of the estate. The taking away of the estate from him would not be a benign act so far as he is concerned though it may be a benign act from the point of view of the eventual successor.

(52) In considering the nature of the provisions of an enactment, we are not concerned with any one but the immediate proprietor. So far as the proprietor is concerned, the consequences of the Court of Wards assuming superintendence have been lucidly stated in the recent case of — 'Raghubir Singh v. Court of Wards, Ajmer', AIR 1953 SC 373 (Q) to which reference will have to be made again in dealing with the question whether the fundamental right guaranteed by Art. 19(1) (f) of the Constitution has been infringed. At p. 374 of the report Mahajan J. (now C. J.) states :

> "The petitioner's right to hold the istimrari estate and his power of disposal over it stand abridged by the act of the Court of Wards authorized by these provisions. His right to manage the estate and enjoy possession thereof stands suspended indefinitely and until the time that the Court of Wards chooses to withdraw its superintendence of the property of the petitioner. During this period, he can only receive such sums of money for his expenses as the Court of Wards decides in its discretion to allow."

It is clear that an enactment which has the above effects, as the U. P. Court of Wards Act has, on the rights of the proprietor cannot be said to be beneficial to the proprietor.

(53) Further, a comparison between the provisions of S. 8(1) (b) and 8(1) (d) of the U. P. Court of Wards Act will clearly reveal that the discrimination is 'against' the woman. Clause 8(1) (b) simply classes as "disqualified proprietors" "females declared by the Local Government to be incapable of managing their own property"; while clause 8(1) (d) is as follows :

> "persons declared by the Local Government to be incapable of managing or unfitted to manage their own property;
>
> (i) owing to any physical or mental defect or infirmity unfitting them for the management of their own property;
>
> (ii) owing to their having been convicted of a non-bailable offence and being unfitted by vicious habits or bad character for the management of their own property;
>
> (iii) owing to their having entered upon a course of extravagance;
>
> (iv) owing to their failure without sufficient reason to discharge the debts and liabilities due by them:
>
> Provided that no such declaration shall be made under sub-cl. (iii) or (iv) unless the Local Government is satisfied:
>
> (a) that the aggregate annual interest payable at the contractual rate on the debts and liabilities due by the proprietor exceeds one-third of the gross annual profits of the property, and
>
> (b) that such extravagance or such failure to discharge the said debts and liabilities is likely to lead to the dissipation of the property."

Thus, it will be seen that, while it is left to the absolute discretion of the Government — subjective and non-justiciable — to declare a female proprietor unfit to manage her estate without any rules being laid down to determine what constitutes incapacity to manage, and she is not even allowed to represent her case before the declaration is made, in the case of a male not only must certain conditions be fulfilled before he can be declared unfit to manage his estate but he must be given the fullest opportunity to have his objections heard. Even though the law may be a benign one, there can be no doubt that the discrimination is against the female.

(54) In this connection, the remarks of Mukherjea J. in AIR 1952 SC 75 (L) are very opposite. At page 89 the learned Judges says :

> "If a legislation is discriminatory and discriminates one person or class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter, it cannot but be regarded as "hostile" in the sense that it affects injuriously the interests of that person or class."

Thus the denial to women of the right of representation and the absence in S. 8(1) (b) of the Court of Wards Act of any rules similar to those in S. 8(1) (d) cannot but be regarded as "hostile" to women and consequently the discrimination is 'against' women.

(55) In the present case, one other factor exists which indicates that there has been a differentiation against a woman. According to the affidavit filed on behalf of the opposite parties, an enquiry was made under S. 9 of the Court of Wards Act into the indebtedness both of the petitioner and her husband. After the enquiry proceedings were taken against Jai Inder Singh under S. 8(1) (d) — they could not be taken against him under any other section — and he was given an opportunity of representing his case but, al-

though action could be taken under the same provision against the petitioner also if the necessary conditions existed, it was not done. The inference is either that the state of her indebtedness was not such as to justify action under S. 8(1) (d) or that the Government did not desire to allow the petitioner any opportunity to represent her case. It is thus clear that an opportunity was allowed to the male — which was deliberately denied to the female — to show cause why they should not be deprived of the management of their estates. Thus, whatever may be said to the position generally, in the present case, there was a discrimination by the Executive on the ground of sex.

(56) The next attack upon the decision in AIR 1952 All 746 (A) was that the learned Judges did not attach any significance to the use of the word "only" in Art. 15(1). It was urged that if they had considered S. 8(1) (b), Court of Wards Act, in the light of this word they would have come to the conclusion that the discrimination was not based 'only' on sex. According to his contention, the discrimination, even if it is found that there is a discriminaton, was based not only upon the sex of the person concerned but also upon the satisfaction of the Government that the person was incapable of managing her property.

(57) It will be convenient to consider this objection together with the fourth objection, namely that all differentiation is not discrimination and that it is open to the State to classify citizens into categories provided the classification is reasonable and is based upon intelligible indicia. It is urged that in the present case both the conditions exist since it is a well-known fact that women generally are not such competent managers of property as men and are much more liable to be led astray and, therefore, for the purposes of management of property, they may legitimately be put in a class by themselves.

(58) So far as the contention that the disqualification is based not only on sex but also on the satisfaction of the Government is concerned, that may be disposed of first. Section 8(1) (d) of the U. P. Court of Wards Act has already been quoted in extenso. It is clear that it applies to estates of males as well as females. It lays down certain standards which are to guide the Government in determining whether the person concerned is incapable of managing his or her property and it allows to the person concerned a full opportunity of being heard.

If the necessary conditions exist, the estate of a female as well as that of a male may be placed in charge of the Court of Wards, but in the case of females something more is provided: it is, by S. 8(1) (b) of the Act, left at the absolute discretion of the Government, even if the conditions imposed by clause (d) of the same subsection do not exist, to declare the proprietor incapable of managing her estate. This differentiation (to use a neutral term) is based solely on the sex of the proprietor and the fact that the differentiation is to be made by the Government and not by the Legislature is immaterial because the word "State" in Art. 15 includes, by reason of Art. 12, a Government also and differentiation by the Government is as much hit by Art. 15 as differentiation by the Legislature. The fact that Government chooses to proceed in respect of an estate under S. 8(1) (b) of the Court of Wards Act and not under S. 8(1) (d) is based 'only' on the sex of the proprietor, since no action can be taken under S. 8(1) (b) against males. The differentiation by the Government is based 'only' on sex and this is all the more so in the present case as I have already pointed out in para 54 ante.

(59) It now becomes necessary to consider whether the differentiation is "discrimination" or "classification" and whether the classification is reasonable or not. In this connection reliance has been placed upon certain decisions of the Supreme Court and of various High Courts relating to Article 14 of the Constitution and it has to be seen whether the same reasoning will apply.

(60) Reliance was placed in this connection upon — 'Yusuf Abdul Aziz v. State', AIR 1951 Bom 470 (R); — 'Dattatraya v. State of Bombay', AIR 1953 Bom 311 (S); — 'Girdhar Gopal v. State', AIR 1953 Madh-B 147 (T) and — 'Sri Mahadeb Jiew v. Dr. B. B. Sen', AIR 1951 Cal 563 (U).

(61) In the first mentioned case S. 497, I. P. C. was challenged as being discriminatory. The learned Judges took the view that owing to the fact that women were married at a very young age and that their husbands could have a plurality of wives, the Legislature took a lenient view, sympathetic and charitable view of the weakness of women in this particular case so that the discrimination was not based on sex only. They added :

> "In this connection we would like to add that it is possible to take the view that the alleged discrimination 'in favour of' woman is saved by the provisions of Art. 15(3)."

(62) In the second case, the question raised was whether the reservation of seats for women in local bodies was bad as discriminatory. The learned Judges no doubt made some general remarks but they proceeded :

> "But the clear answer to Art. 15(1) is Art. 15 (3) and that provides that nothing in this article shall prevent the State from making any special provision for women and children."

Thus in both the Bombay cases the decision proceeded on the basis that the discrimination was in favour of women and so it was saved by Art. 15(3).

(63) In AIR 1953 Madh-B 147 (T) the impugned law was S. 354, I. P. C., Dixit J. held :

> "If the discrimination is based not merely on any of the grounds stated in Art. 15(1) but also on considerations of propriety, public morals, decency, decorum and rectitude, the legislation containing such discrimination, would not be hit by the provisions of Art. 15 (1).
>
> "It cannot be denied that an assault or criminal force to a woman with intent to outrage her modesty is made punishable under S. 354 not merely because women are women, but because of the factors enumerated above."

I respectfully agree with the above observations but they are not applicable to the present case, unless it comes under the next objection.

(64) In 'AIR 1951 Cal 563 (U)', the discussion by the learned Judge does not reveal that there was a real reason why the discrimination was not against women though such a reason exists. It is that, while a man can be arrested in execution of a decree, a woman cannot be so arrested. It was, therefore, necessary for the law to provide some other method by which the decree-holder could eventually realise the money from a woman. Hence, O. 25, R. 1, Civil P. C. is confined to women.

(65) A very important decision on the significance of the word "only" (as used in Art. 29 (2) also relating to fundamental rights) is that of the Full Bench in — 'Smt. Champakam Dorairajan v. State of Madras', AIR 1951 Mad 120 (V). In that case the Madras Government, finding that there were not sufficient vacancies for admission of students to Medical College, issued a circular making, what it considered, an equitable division of the vacancies available among the various classes of citizens of the State. Out of every 14 seats, 6 were to be filled by non-Brahmin Hindus, 2 to backward Hindu communities, 2 to Brahmins, 2 to Harijans, 1 to Anglo-Indians and Indian Christians and 1 to Muslims.

The circular was challenged by various persons on the ground that it decided admission to persons only on the ground of religion or caste. It was sought to support the circular on the ground that the denial was not only on the ground of religion or caste, but as a matter of public policy based upon the provisions of Article 46 together with the paucity of the vacancies. It was held that much significance could not be attached to the word 'only' because even reading the Article without that word, the result would be the same. It was further held that the circular was bad because it infringed the clear and unambiguous terms of Article 15(1) since it discriminated against citizens only on the ground of religion, race, caste, sex, place of birth or any of them. The judgment states :

> "'Discriminate against' means 'make an adverse distinction with regard to'; 'distinguish unfavourably from others' (Oxford Dictionary). What the article says is that no person of a particular religion or caste shall be treated unfavourably when compared with persons of other religions and castes merely on the ground that they belong to a particular religion or caste. Now what does the Communal G. O. purport to do? It says that a limited number of seats only are allotted to persons of a particular caste, namely Brahmins. The qualifications which would enable a candidate to secure one of those seats would necessarily be higher than the qualifications which would enable a person of another caste or religion, say, Harijan or Muslim to secure admission."

It was, therefore, held that the Communal G. O. was void.

(66) This decision was upheld by the Supreme Court on appeal in — 'State of Madras v. Champakam Dorairajan', AIR 1951 SC 226 (W). Their Lordships say :

> "It is argued that the petitioners are not denied admission only because they are Brahmins but for a variety of reasons, e.g. (a) they are Brahmins, (b) Brahmins have an allotment of only two seats out of 14 and (c) the two seats have already been filled up by more meritorious Brahmin candidates. This may be true so far as these two seats reserved for the Brahmins are concerned, but this line of argument can have no force when we come to consider the seats reserved for candidates of other communities, for so far as those seats are concerned, the petitioners are denied admission into any of them not on any ground other than the sole ground of their being Brahmins and not being members of the community for whom these reservations have been made. 'The classification in the Communal G. O. proceeds on the basis of religion, race and caste'. In our view, the classification made in the Communal G. O. is opposed to the Constitution and constitutes a clear violation of the fundamental rights guaranteed to the citizen under Art. 29 (2)."

(67) On the same principle, it must be held that S. 8(1)(b) of the U. P. Court of Wards Act enables the Government to declare a person to be unfit to manage her estate on the sole ground that she is a female. Further the decision provides an effective answer to the argument relating to reasonable classification which I will now proceed to consider.

(68) In AIR 1951 SC 41 (O), the proposition was laid down :

> "It is undeniable that equal protection of the laws cannot mean that all laws must be quite general in their character and application. A Legislature empowered to make laws on a wide range of subjects must of necessity have the power of making special laws to attain particular objects and must, for that purpose, possess large powers of distinguishing and classifying the persons or things to be brought under the operation of such laws, provided the basis of such classification 'has a just and reasonable, relation to the object which the Legislature has in view."

vide judgment of Patanjali Sastri J. (later C. J.) at page 49. The other learned Judges expressed the same view though they differed on the question of the validity of the impugned law — The Sholapur Spinning and Weaving Company (Emergency Provisions) Act (28 of 1950) — and as to the extent of the presumption as to Constitutional validity of an enactment.

(69) The same view has been expressed in AIR 1952 SC 75 (L), but in that case it was held — Patanjali Sastri (later C. J.) dissenting — that the fact that the impugned Act

> "gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoy under the criminal law of the country, is on the face of it discriminatory."

vide judgment of Mukherjea J. at page 92. It was consequently held that the law infringed Art. 14 of the Constitution and became void under Art. 13(1).

(70) Again in — 'Kathi Raning Rawat v. State of Saurashtra', AIR 1952 SC 123 (X), while the principle that classification was upheld under Art. 14, Patanjali Sastri C. J. expressed himself thus :

> "All legislative differentiation is not necessarily discriminatory. In fact, the word 'discrimination' does not occur in Art. 14. The expression 'discriminate against' is used in Art. 15(1) and Art. 16(2), and it means, according to the Oxford Dictionary, 'to make an adverse distinction with regard to; to distinguish unfavourably from others'. Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Arts. 15 and 16, 'it may well be that the statute will, without more, incur condemnation' as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Art. 14 is different."

(71) Thus the decisions of the Supreme Court in AIR 1951 SC 226 (W) and AIR 1953 SC 123

(X) establish the proposition that, while classification is permissible, it cannot be classification based on any of the factors mentioned in Articles 15 and 16. In the present case, it is based on sex which is a factor on which discrimination is forbidden by Article 15. It is, therefore, bad without anything more having to be proved.

(72) These decisions are based, if I might say so with respect, upon the language of the Constitution and are also in accordance with its spirit. The framers of the Constitution were citizens of India hailing from all parts of the country. They were fully aware of the difficulties, disabilities and prejudices which exist in various parts of the country. They decided that those difficulties should not operate against any one in the new India that is coming into being and that all prejudices which provide the basis for injustice to any class of citizens should be strictly suppressed. It was with this object that Articles 15 and 16 were given a place in the Part relating to Fundamental Rights. The framers of the Constitution knew full well that women were, in many parts of the country, still backward — that is why under Art. 15(3) legislation discriminating in their favour is permitted — and yet they forbade discrimination against them. No evasion of the Constitution can be permitted merely by calling an act classification and not discrimination.

(73) In this view of the matter, it is not really necessary to discuss the question whether the classification is reasonable or not. A classification which the Constitution forbids cannot possibly be said to be reasonable. Moreover, it has been held in several cases, of which I need refer to only two, that a provision which leaves the choice to subjective discretion — not justiciable — of any executive authority is not reasonable.

(74) In AIR 1950 Pat 322 (I), Meredith C. J. thus states the law:

"Turning now to the question of fact whether the impugned provision imposes only reasonable restrictions, the answer must, I think, be in the negative, for the power of restriction contained in the provision is based, not on any reasonable grounds, but upon the satisfaction of some individual who, so far as the wording of the Act is concerned, is completely amorphous; and the provision is in such terms that it is not open to the Court to examine the reasonableness or otherwise of orders passed. Upon the terms of the Act, all the Court can inquire into is the existence of the satisfaction. Quite clearly such a provision might conceivably be used merely to exclude political opponents, or, as is suggested in the present case, (I do not mean to say I accept the suggestion, I am not considering it.) to favour one of the two rival Trade Unions and suppress the other.

'A law which enables such things to be done is not, in my judgment, a reasonable law. There can be no presumption that an executive official will always act reasonably. There may be presumption that he will act bona fide; but that is a different thing. The test is, in my opinion, not what is actually done under the law, but what the law enables to be done. If the law enables orders to be passed which are unreasonable, and "yet are consistent with its terms, then that cannot be called a law operating to impose only reasonable restrictions. I used the word 'only' advisedly because it appears to me that if the law enables unreasonable action in any case, then it cannot be saved by Art. 19(5). In my opinion, a law to satisfy the criterion imposed by Art. 19(5) must be so framed as to leave it open to the Courts 'to apply the objective test of reasonableness to its operation'. This law is not so framed."

(75) In AIR 1953 SC 373 (Q) the question related to the validity of a provision by reason of which a landlord who habitually infringed the rights of his tenant could have his estate taken over by the Court of Wards, with the previous sanction of the Chief Commissioner. The exercise of discretion could not be called in question in any Civil Court and no machinery was provided by the enactment for determining whether a landlord habitually infringed the rights of his tenant. It was held that this was in conflict with Article 19(1)(f) of the Constitution unless it fell under the exception contained in Article 19(5) that is to say, it was a reasonable restriction on the right to hold property. Mahajan J. (later C. J.) in delivering the judgment of the Court says, at page 375 of the report:

"When a law deprives a person of possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, such a law can, on no construction of the word "reasonable" be described as coming within that expression, because it completely negatives the fundamental right by making its enjoyment depend on the mere pleasure and discretion of the executive, the citizen affected having no right to have recourse for establishing the contrary in a civil Court."

(76) In the still more recent case, as yet unreported, of — 'Dwarka Prasad Laxmi Narain v. State of U. P.', (since reported in AIR 1954 SC 224 (Y),) the same learned Judge says:

"A law or order, which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities cannot but be held to be unreasonable."

(77) The provisions of section 3(1)(b) of the Court of Wards Act similarly confer an uncontrolled and arbitrary power not open to challenge in a Civil Court, of declaring any proprietor — provided she is a female — unfit to manage her property. Even if it be considered that this is a permissible classification and discrimination, it is unreasonable and must be declared to be void.

(78) The next ground of attack on the decision in AIR 1952 All 74 (A) is that it has applied Article 19(1)(f), which is not applicable on the ground that in this Article the word 'holds' means own and not possess. If a person is, therefore, deprived of her property Art. 19(1)(f) is not infringed. The reply to this contention is provided by the decision of the Supreme Court in AIR 1953 SC 373 (Q), in which Mahajan J. (now C. J.) delivering the judgment of the Court says, at page 374:

"The contention that the provisions of section 118 of Act XLII of 1950 read with the provisions of Regulation I of 1888 infringe the fundamental right of the petitioner guaranteed by article 19(1)(f) of the Constitution, is, in our opinion, well founded and does not require any elaborate discussion. The petitioner's right to hold the istimrari estate and his power of disposal over it stand abridged by the act of the Court of Wards authorised by these provisions. 'His right to manage the estate and enjoy possession' thereof stands suspended indefinitely and until the time that the Court of Wards chooses to withdraw its superintendence

of the property of the petitioner. During this period, he can only receive such sums of money for his expenses as the Court of Wards decides in its discretion to allow. Thus, the provisions of S. 112 of Act XLII of 1950 clearly abridge the fundamental right of the petitioner under Art. 19 (1) (f) and are to that extent void."

(79) Thus the decision of the learned Judges in — 'AIR 1952 All 746 (A)', cannot be challenged on this ground either, though this ground is not available to the petitioner in the present case, since the petitioner, already having been deprived of the management and possession of her estate before the Constitution came into effect does not, by reason of Art. 19 (1) (f), though she does by reason of the other provisions to which I have referred, become entitled to be restored to possession any more than a person who has parted with proprietary rights become entitled to get back those rights merely by reason of the enforcement of the Constitution.

(80) Thus having considered all the objections taken to the correctness of the decision in — 'AIR 1952 All 746 (A)', I see no reason to doubt the correctness of the law there laid down and I respectfully agree with it.

(81) It was next contended that the petitioner having acquiesced in the continued possession of the Court of Wards even after the enforcement of the Constitution she cannot now resile from that position. There has in fact been no such acquiescence because the petitioner made repeated requests after the death of her husband on 14-11-1949, both to the Government and to the Court of Wards for the release of her estate though not on constitutional grounds. Nevertheless in view of those requests, it cannot be said that she acquiesced in the continued possession of the Court of Wards.

(82) Further the petitioner could not be expected to have become aware of the legal position under the Constitution immediately after the Constitution came into force and she could not have recourse to the remedy under Article 226 until she had been denied relief by the Government and the Court of Wards. Her petition to this Court on the 22-12-1953, coming only about eight months after the decision in — 'AIR 1952 All 746 (A)', a decision the correctness of which was hotly contested even in these proceedings was pronounced, cannot be said to have been unduly delayed.

(83) Even if there has been any acquiescence, the Court of Wards, which holds the estate for the benefit of the petitioner and is no better than her agent having certain statutory powers, cannot be allowed to continue in possession as against the petitioner. Of course, if any third party can claim the aid of the equitable doctrine of estoppel by reason of the petitioner's conduct, it will be open to it to do so in properly instituted proceedings against the petitioner, though the Court of Wards representing the petitioner's estate cannot refuse to deliver possession to her after its possession has become illegal.

(84) It was next urged that the petitioner had no legal right to obtain possession because, under the provisions of S. 44 of the Court of Wards Act the Court of Wards having taken possession cannot release the estate until all the debts have been liquidated and this has not happened in the present case. The contention is untenable. The Court of Wards Act only authorises the Court of Wards to deal with properties of 'wards' or in certain eventualities of those who succeed to or are heirs of wards.

The petitioner does not come within the last two categories in so far as her estate is concerned and the Court of Wards could only retain the property so long as the lady was a ward and no disqualification would attach to her once she has ceased to be a 'ward'. Section 3 defines a 'ward' as being a person who is a disqualified proprietor and whose property is under the superintendence of the Court of Wards. Thus the existence of two conditions is necessary in order to constitute a person a ward and in the present case only the second condition exists. If, as I have indicated above, the declaration by the Government that the petitioner is unfit to manage her estate has become void, the petitioner has ceased to be a disqualified proprietor. The first of the conditions requisite to constitute her a ward has, therefore, ceased and she can no longer be deemed to be a ward. The Court of Wards can thus no longer, under the very provisions of the Court of Wards Act, deal with her property nor do any of the limitations on the powers of 'wards' apply to her so that she becomes free to manage and enjoy her property as she pleases and this she can only do if the wrongful possessor restores the property to her.

(85) The non-availability of a remedy is not a 'sine qua non' of the exercise by the High Court of powers under Article 226 though it is generally agreed that if an equally efficacious remedy is available, the petitioner must have recourse to that remedy and not invoke the extraordinary powers of the High Court. In the present case, it is suggested that a suit for a declaration and a mandatory injunction should have been brought in a Civil Court. If such a suit had been brought no doubt the plea would have been taken that, under the provisions of the Court of Wards Act the petitioner cannot sue and that no Civil Court has jurisdiction to go into the validity of the exercise of discretion by the Government. In order to decide the continued constitutional validity of the declaration the matter would no doubt have to come before the High Court under Art. 226 of the Constitution, but it would come in this round about way. Thus the remedy available would not be equally efficacious and undue delay would result.

(86) It is to be noticed that the same objection could have been taken to grant of reliefs in — 'AIR 1952 All 746 (A)', and in — 'AIR 1953 SC 373 (Q)', but in both these cases the relief directing possession to be delivered to the petitioner was granted, in one case under Article 226 and in the other under Art. 32. In this case also the same relief must be granted.

(87) I, therefore, hold that after the enforcement of the Constitution, that is to say, as from 26-1-1950, the possession of the Court of Wards over the property of the petitioner has been illegal and that possession should be restored to her and the accounts of the petitioner's property and all the dealings of the Court of Wards with it and with its income should be explained to her.

(88) The learned Counsel intimated that he desired leave to appeal to the Supreme Court and since an important question relating to the interpretation of the Constitution is involved, a certificate under Art. 132 of the Constitution must be issued. The opposite parties are given one month's time within which to apply for stay of the execution of the order of delivery of posses-

sion. In the meanwhile, the Court of Wards will continue in possession but shall only continue the formal management of the estate and incur the minimum possible expenditure in this connection. It should keep the petitioner informed of all that is done in connection with the management and if any extraordinary expenditure is to be incurred in connection with the said management, it shall be done only with the concurrence in writing of the petitioner.

Similarly no portion of the property or the funds belonging to the petitioner or appertaining to the estate shall be transferred or burdened with any liability of any kind without the concurrence in writing of the petitioner. Should any litigation be pending against the petitioner's estate or should any suit be hereafter filed against the petitioner or her estate, the Court of Wards shall appoint such counsel to defend the said suit or suits as the petitioner nominates and shall pay their fee out of the petitioner's assets in its hand. It shall not be at liberty to compromise, refer to arbitration or leave undefended any such suit without the written concurrence of the petitioner.

(89) The petitioner shall receive her costs of this petition from the Court of Wards representing the Mahewa estate and the Ganeshpur estate since it is principally for the benefit of these two estates that this petition has been contested. The petitioner shall not be called to pay any costs. Since the case has lasted several days, the fees of the Counsel appearing for the State shall be taxed at Rs. 500/-.

(90) RANDHIR SINGH J.: I agree and have nothing to add.

A/K.S.B. Application allowed.

A. I. R. 1954 ALLAHABAD 623 (Vol. 41, C.N. 240)
(FULL BENCH)

MALIK C. J., V. BHARGAVA AND GURTU JJ.
(1-4-1954)

Sheo Mangal, Appellant v. Ram Charan, Respondent.

Civil Revn. No. 162 of 1949 and Civil Revn. No. 1357 of 1950, against order of Dist. J., Gorakhpur, D/- 20-1-1949.

†Debt Laws — U. P. Agriculturists Relief Act (27 of 1939), S. 22 — Power of Assistant Collector to transfer case to any other Assistant Collector. ILR (1951) All 581: 1950 All WR 103, Overruled.

An Assistant Collector who has been empowered by the Local Government to exercise all the powers of the Collector under Chapter 3, U. P. Agriculturists Relief Act, has the power in a proper case to transfer a case to the Court of another Assistant Collector empowered under sub-s. (1) of S. 22. ILR (1951) All 581: 1950 All WR 103, Overruled. (Para 5)

CASE REFERRED: Paras

(A) ('50) 1950 All WR 103: ILR (1951) All 581 1, 7

S. C. Khare, B. N. Mehrotra and D. L. Misra, for Appellant; R. B. Misra and Ambika Pd., for Respondent.

MALIK C. J.:

The following question was referred for decision by this Full Bench.

"Whether an Assistant Collector of the first class who is empowered by the Local Government to exercise all the powers of a Collector under Chapter III of the U. P. Agriculturists' Relief Act can transfer a case from his court to the court of any other Assistant Collector empowered under sub-section (1) of section 22?"

This reference became necessary as a Bench of this Court had taken the view in — 'Sampat Kumar v. Moti', 1950 All WR 103 (A), that the power of transfer given to a Collector under sub-s. (2), S. 22, did not empower the Assistant Collector to transfer a case pending in his court to another Assistant Collector empowered under sub-s. (1), of S. 22. The decision of this Court was given on November, 9, 1949, while the U. P. Agriculturists' Relief Act had remained in force from 1935, and during this period of more than 15 years a very large number of cases might have been transferred by Assistant Collectors purporting to act under S. 22(2) of the Act, and two of such cases were listed on the same date before the Court which made the reference.

(2) In sub-s. (4) of S. 2 of the U. P. Agriculturists Relief Act (U. P. Act No. XXVII of 1939), Collector is defined as meaning "the officer appointed as Collector of a district under the Land Revenue Act No. 3 of 1901." Section 22(1) is as follows:

"The Local Government may empower any Assistant Collector of the first class to exercise the powers of a Collector under this Chapter."

Section 22 is in Chapter III of the Act, and that Chapter begins from S. 9 and ends with S. 27, and only in three sections the word "Collector" is mentioned. Section 10 provides that "applications under this Chapter shall, if the principal money secured does not exceed Rs. 500, be brought before the Collector, and the word "Court" in this Chapter shall in such cases include the "Collector". It is not disputed that if a notification has been issued by the Government then an Assistant Collector can entertain an application under S. 10 of the Act. Section 23, the other section in which this word occurs, is as follows:

"An appeal shall lie to the District Judge from an order of a Collector or Assistant Collector passed under this Chapter."

The word 'Assistant Collector' being also mentioned, recourse need not be had to S. 22, and orders passed, whether by the Collector or by the Assistant Collector, are made appealable to the District Judge.

To come back to S. 22, sub-section (1) of that section provides that the Local Government may empower any Assistant Collector of the first class to exercise the powers of a Collector under that Chapter, and sub-s. (2) then provides that the Collector may transfer any proceedings under this Chapter — (a) from his own court to that of an Assistant Collector empowered under sub-S. (1); (b) from the court of an Assistant Collector subordinate to him either to his own court or to that of any other Assistant Collector empowered under sub-s. (1). If sub-s. (1), S. 22 does not govern sub-s. (2) of that section, then sub-section (1) would only be necessary for empowering an Assistant Collector to entertain an application under S. 10, and it was not necessary for the legislature to have said that the Local Government may empower any Assistant Collector of the first class to exercise "the powers of a Collector under this Chapter." Mention of S. 10 of the Act would have been quite sufficient.

(3) If the words "to exercise the powers of a Collector under this Chapter" are given their ordinary meaning, then wherever the word "Collector" occurs in Chapter 3, it would include an

'Assistant Collector' and, therefore, the word 'Collector' in sub-s. (2) will also include an Assistant Collector. On the other hand, the learned counsel for the applicants has pointed out that there may be some practical difficulties inasmuch as an Assistant Collector empowered under sub-s. (1) may not be subordinate to an Assistant Collector similarly empowered, and it will be anomalous that one Assistant Collector should transfer a case from his own court to a court of equal jurisdiction. He has pointed out that there is nothing in sub-s. (2) which empowers a Collector to transfer a case from his own court to the court of another Collector.

(4) In view of the plain language of the section it is not necessary for us to go into these practical difficulties and it may be that in case of any practical difficulty, the District Judge may be able, in an appeal from an order of a Collector or an Assistant Collector, to set things right. The fact, however, remains that sub-s. (1) provides that the Local Government may empower any Assistant Collector of the first class to exercise the powers of a Collector under Chapter III, and the power to transfer a case to the court of an Assistant Collector is a power exercisable by a Collector under Chapter III. There is no reason, therefore, why an Assistant Collector should not have the power to transfer a case. Sub-section (2) is a part of Chapter III and is governed by sub-section (1).

(5) The U. P. Agriculturists' Relief Act has now been repealed and it will not be desirable to unsettle a large number of decisions by courts of Assistant Collectors to whom cases might have been transferred by other Assistant Collectors purporting to act under sub-s. (2) of S. 22. Taking all these matters into consideration we consider that an Assistant Collector who has been empowered to exercise the powers of the Collector under Chapter 3 has the power in a proper case to transfer a case to the court of another Assistant Collector empowered under sub-s. (1).

(6) The Rules framed by the Local Government are in these words :

> "The powers of a Collector under Chapter III of the Act are under section 22(1) of the Act hereby conferred on all Assistant Collectors of the first class who are in charge of sub-divisions or who have exercised powers of the first class for more than five years."

There may be, therefore, more than one Assistant Collector in a district or a sub-division who is able to take cognizance of an application under S. 10, and, if for some reason one Assistant Collector of the first class has transferred the case to another Assistant Collector of the first class of more than five years standing, there is no reason to think that there will be any practical difficulty.

(7) We, therefore, answer the question in the affirmative and overrule the decision in 'Sampat Kumar v. Moti (A)' mentioned above.

(8) The answer may be sent to the Bench concerned

A/H.G.P. Reference answered.

A. I. R. 1954 ALLAHABAD 624 (Vol. 41, C.N. 241)

BRIJ MOHAN LALL J. (5-2-1954)

Mrs. Avril Ellen Smith, Petitioner v. Reginald Frank Smith, Respondent.

Matrimonial suit No. 2 of 1953.

(a) Divorce Act (1869), S. 2 (as amended by Act 25 of 1926) — Jurisdiction under — Effect of amendment; AIR 1928 Oudh 218(1), Dissented from.

After the amendment of S. 2 by Act 25 of 1926, the Indian Courts have no jurisdiction to grant decrees for dissolution of marriages of the parties domiciled outside India: AIR 1928 Oudh 218 (1), Dissented from. (Para 11)

Anno: Divorce Act, S. 2 N. 1.

(b) Indian and Colonial Divorce Jurisdiction Act (1926), S. 1 — Jurisdiction of Indian Courts — (Indian Independence Act (1947), S. 17(1)) — (Constitution of India, Art. 225) — (Interpretation of statutes — Repeal) — (General Clauses Act (1897), S. 6-A).

If the jurisdiction conferred on a court by a certain Act is sought to be taken away, not by amending that Act, but by passing a subsequent Act, and the subsequent Act is later on repealed, the ban so placed on jurisdiction by the subsequent Act is thereby removed and the jurisdiction of the Courts rebounds to its original size. (Para 12)

Thus, the jurisdiction conferred on the Indian Courts under S. 1 of the Indian and Colonial Divorce Jurisdiction Act (1926) but taken away by S. 17(1) of the Indian Independence Act would normally have revived after the repeal of the Independence Act by the Constitution of India, but since the same ban has been re-imposed by Art. 225 of the Constitution of India, the Indian Courts have now no jurisdiction to grant decrees for dissolution of marriages of couples domiciled outside India. (Para 13)

Anno: C. P. C., Pre. N. 7; Indian and Colonial Divorce Jurisdiction Act, S. 1 N. 1.

CASES REFERRED : Paras

(A) (V15) AIR 1928 Oudh 218(1): 106 Ind Cas 481 3
(B) (1895) 1895 AC 517: 64 LJ PC 97 5
(C) (1872) 2 P & D 435: 44 LJ Mat 74 7
(D) (1921) 1921 P 204: 90 LJP 242 8
(E) (V10) AIR 1923 Bom 321: 47 Bom 843 (FB) 9
(F) (V10) AIR 1923 Rang 223: 76 Rang 597 9

R. C. Sinha, for Petitioner.

ORDER : This is a wife's petition for dissolution of her marriage with her husband (hereinafter described as respondent) on the ground of alleged adultery, cruelty and desertion.

(2) The respondent pleads, inter alia, that he is a British subject domiciled in England and therefore this Court has no jurisdiction to pass a decree for dissolution of his marriage.

(3) The petitioner's counsel contended, in the first place, that it was not admitted by his client that the respondent was domiciled in England and, in the alternative, that even if it was proved that the respondent's domicile was in England, the Courts in this country could give the petitioner a decree for dissolution of marriage which would be operative in India, though not in England. In support of this contention, he relied on the case of — 'Mrs. Nan Greenwood v. L. V. Greenwood', AIR 1928 Oudh 218 (1) (A). In that case Pullan J. held that where neither party was proved to be domiciled in India, the Indian Courts could grant a petition for dissolution of marriage which would be valid for all purposes throughout India, although it might not be operative beyond the limits of this country.

(4) The first point that arises for decision is whether the respondent is domiciled in England.

If that is proved, the petitioner also will be deemed to be domiciled in that country, because the wife's domicile always follows that of her husband. The respondent came out to India about thirty years ago. He was formerly a Warrant Officer in the Army but later on he gave up that service and took up employment with the Railways. At the time of his marriage with the petitioner in 1950, he was a railway employee. The petitioner admits that the respondent "is registered as a British subject with the British High Commissioner". Further, she admits that he holds a British Passport. In 1948, i.e. before her marriage, the petitioner had taken a British Indian Passport. But when she got it renewed in 1953, i.e. after her marriage, her Passport was also renewed as a British Passport. She, however adds that her husband had told her that he had an intention to stay on in India and to make India his home.

I am not prepared to believe this portion of her statement. She had obviously made this statement with a view to prove the Indian domicile. On a consideration of the evidence on record, I have no hesitation in holding that the respondent, and consequently the petitioner, are both domiciled in England.

(5) In my opinion, the preliminary objection taken by the respondent is well founded. The question of Indian High Court's jurisdiction over Christian couples domiciled in England has been engaging the attention of the Courts in India for a long time and has a history of its own. In the Indian Divorce Act (4 of 1869), as originally passed, jurisdiction was conferred on Courts in India to grant petitions for dissolution of marriage provided the petitioner professed Christianity, resided in India at the time of the presentation of the petition and (1) either the marriage was solemnised in India or (2) adultery was committed in India. Since the statute conferred jurisdiction on Indian Courts to pass decrees for dissolution of marriage on the fulfilment of the aforesaid conditions, irrespective of the domicile of the parties, the said Courts began to exercise this jurisdiction even in respect of couples domiciled outside India.

The English Courts, however, were of the opinion that, under the principles of international law, it was only the tribunal situate in the country of domicile which could dissolve the marriage. An argument was sometimes advanced in Indian Courts that residence in India gave a "matrimonial domicile" to the parties and, therefore, the Indian Courts could exercise jurisdiction so as to pass decree for dissolution of marriage which would be operative in India only. But such decrees created a very anomalous situation in so far as the parties ceased to be husband and wife within the limits of India but continued to be tied in matrimonial bondage in their own country. The matter came up before the Privy Council in the case of — 'Le Mesurier v. Le Mesurier', 1895 AC 517 (B) wherein their Lordships remarked at p. 536 as follows:

> "When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that in either of these countries, there exists a recognised rule of general law to the effect that a so-called matrimonial domicile gives jurisdiction to dissolve marriage."

(6) It is true that that was a decision on appeal from Ceylon and there was no particular reference to the jurisdiction of Indian Courts. But, under S. 7, Indian Divorce Act, the Indian Courts are bound to follow principles and rules which are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. Therefore, if the English Courts could not act on the principle of matrimonial domicile, the Indian Courts also could not do so.

(7) On p. 540, their Lordships of the Privy Council in the aforesaid case came to the conclusion that

> "according to international law the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."

They concurred, without reservation, in the views expressed by — 'Lord Penzance in Wilson v. Wilson', (1872) 2 P & D 435 (C) and deprecated

> "the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

(8) The question came up again for decision before the President of the Probate Court in England in the case of — 'Keyes v. Keyes and Gray', (1921) P 204 (D). In that case the parties had obtained a decree nisi from the High Court at Lahore which decree had subsequently been made absolute. Still it was held by the aforesaid Court that the parties continued to be husband and wife and a fresh decree for divorce had to be granted. It was, further, held that the Courts in India had no jurisdiction to pass decrees for dissolution of marriage in respect of couples domiciled in England.

(9) This decision was followed by the Bombay High Court in — 'Alfred Wilkinson v. Grace Emily Norah Wilkinson', AIR 1923 Bom 321 (FB) (E) and by the Rangoon High Court in — 'Mr. A. H. D. Jones v. Mrs. K. Jones', AIR 1923 Rang 223 (F).

(10) The matter came up before the Lahore High Court also, but it refused to accept that decision as authority and adhered to the view that the Indian Courts had jurisdiction to pass decrees for dissolution of marriage in respect of couples domiciled in England.

(11) To put an end to this unsatisfactory state of affairs, the legislature intervened and passed the Indian Divorce (Amendment) Act (25 of 1926). The relevant clause of S. 2, as amended, runs as follows:

> "Nothing hereinafter contained shall authorise any Court ..... to make decrees for dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented."

After this amendment it became clear beyond doubt that the Indian Courts could not grant a decree for dissolution of marriage if the parties were domiciled outside India. The Indian Law was thus brought in conformity with the view expressed by the Privy Council and the Probate Court in England. But it was, at the same time, realised that, in some cases, a party might, because of poverty or other causes, find it difficult to take a journey to England simply to get his or her marriage dissolved. To provide facilities in such cases the British Parliament passed the Indian and Colonial Divorce Jurisdiction Act, 1926 (16 and 17 Geo V. C. 40). By means of this Act, the Indian Courts were given jurisdiction, subject to certain limitations to pass decrees for dissolution of marriage in cases where the parties were domiciled in England or Scotland.

The limitations were directed mainly to ensure that the practice and procedure to be followed in such cases would be in accordance with the law prevalent in England.

The result, therefore, was that, while the jurisdiction of Indian Courts to pass a decree for dissolution of marriage in the case of a couple domiciled in England was completely taken away under the Indian Divorce Act, the said jurisdiction was conferred on Indian Courts under the Indian and Colonial Divorce Jurisdiction Act. This state of affairs continued for about two decades till the grant of Independence to India. On 15-8-1947, the Indian Independence Act (10 and 11 Geo. VI C. 13) came into force. By S. 17 (1) of this Act the jurisdiction of Indian Courts to pass decree for dissolution of marriage under the Indian and Colonial Divorce Jurisdiction Act in petitions presented after the aforesaid date was completely taken away. The Indian Independence Act was repealed on 26-1-1950, when the Constitution came into force.

(12) If the jurisdiction conferred on a Court by a certain Act is sought to be taken away, not by amending that Act, but by passing a subsequent Act, and the subsequent Act is later on repealed, the ban so placed on jurisdiction by the subsequent Act is thereby removed and the jurisdiction of the Courts rebounds to its original size. This would have ordinarily been the effect of the repeal of the Indian Independence Act. But one finds that the same ban was re-imposed by Article 225 of the Constitution, of which the relevant portion runs, as follows:

> "Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution."

By this Article the power of the High Courts has been kept confined within the limits which existed immediately before the commencement of the Constitution. Since the Indian High Courts, by virtue of S. 17(1), Indian Independence Act, had ceased to exercise jurisdiction to grant decrees for dissolution of marriages of couples domiciled outside India, the same ban continued even after the coming into force of the Constitution. But for this provision, yet another question could have arisen, viz., how far the Indian Courts could after Independence, exercise jurisdiction conferred by the Parliament of another country. But this question does not now arise.

(13) The position, therefore, is that the Indian Courts have now jurisdiction neither under the Indian Divorce Act nor under the Indian and Colonial Divorce Jurisdiction Act to pass decrees for dissolution of marriages of couples domiciled outside India. In the circumstances, I am not prepared to follow the decision of the Oudh Chief Court, cited above, in which Pullan J. took the view that the Indian Courts could pass decrees which would be operative within the limits of India. This decision was given in 1927, i.e. after the amendment of the Indian Divorce Act which had taken place in 1926. Pullan J. remarks that

> "the Indian Courts are authorised under the Divorce Act to grant petition, which will be valid for all purposes throughout British India, in any case where the parties are resident within the jurisdiction of the Court and the adultery complained of has been committed in India."

The learned Judge has not referred to the provisions of the Indian Divorce Act which conferred such jurisdiction on the Indian Courts. He was obviously thinking of law as it stood before amendment. After the amendment the jurisdiction under the Indian Divorce Act had been completely taken away by the amendment introduced in section 2. Therefore, I am, with utmost respect to the learned Judge responsible for this decision, unable to follow it.

(14) Before bringing this discussion to a close, reference may also be made to the Indian Matrimonial Causes (War Marriages) Act (XL of 1948). Although the respondent, was, at one time, a Warrant Officer in the Army, this Act does not apply to the present case because (1) the respondent had ceased to belong to the Army before his marriage and (2) the marriage was not solemnised during the "war period" which term has been defined to mean the period commencing from 3-9-1939 and ending with 31-3-1946. Therefore, this Act also cannot be invoked in her favour by the petitioner.

(15) In the circumstances, I have come to the conclusion that this Court has no jurisdiction to entertain this petition. It is accordingly dismissed. The respondent was not represented by any counsel and was not present on the date of final hearing. I, therefore, make no order as to costs.

A/G.M.J. Petition dismissed.

A.I.R. 1954 ALLAHABAD 626 (Vol. 41, C.N. 242)

DESAI AND ASTHANA JJ. (19-2-1954)

Bijai Bahadur and others, Applicants v. State.

Criminal Revn. No. 1168 of 1951 against Order of Temporary Civil and Sessions J., Kanpur, D/-7-5-1951.

†**Prisons Act (1894), S. 52 — Prisoner — Person detained under S. 3, Preventive Detention Act, (Public Safety — Preventive Detention Act (1950), S. 3).**

A person detained in the custody of a superintendent of a jail under an order of the Governor under S. 3(1)(a)(ii) of the Preventive Detention Act, 1950, is not a prisoner within the meaning of S. 52 of the Prisons Act and therefore is not liable to be punished under that provision. AIR 1953 SC 325, Ref. (Paras 12, 14)

Anno: Prisons Act, S. 52 N. 1.

CASE REFERRED: Para

(A) (V40) AIR 1953 SC 325: 1953 Cri LJ 1432 (SC) 11

S. N. Dvivedi, for Applicants; D. P. Uniyal, Dy. Govt. Advocate, for Opposite Party.

DESAI, J.:

This is an application by four men against their conviction under S. 52, Prisons Act. There is no dispute about the facts which have been proved satisfactorily. Vijay Bahadur applicant was convicted on 8-2-1950 by a Magistrate under Ss. 147 and 332, I. P. C., and sentenced to imprisonment for six months. He was sent to the District Jail, Kanpur, to undergo the sentence of imprisonment. The other three applicants were detained since 1-3-1950 in the same District Jail in pursuance of an order issued by the Governor of Uttar Pradesh

under S. 3(1)(a)(ii) of the Preventive Detention Act (No. 4 of 1950). The applicants have been found guilty of having disobeyed orders of the Superintendent of Jail and the district authorities, committed acts of indiscipline and assaulted the jail and police authorities on 4-3-1950. They challenge their conviction on the sole ground that they were not prisoners and were not governed by S. 52, Prisons Act.

(2) Section 52 of the Prisons Act lays down that:

"If any prisoner is guilty of any offence against prison discipline which.....in the opinion of the Superintendent, is not adequately punished by the infliction of any punishment which he has power under this Act to award, the Superintendent may forward such prisoner to the Court of the District Magistrate or of any Magistrate of the first class having jurisdiction,..... and such Magistrate shall thereupon enquire into and try the charge so brought against the prisoner and, upon conviction, may sentence him to imprisonment which may extend to one year."

The only question is whether the applicants were prisoners on 4-3-50 within the meaning of this provision, it being beyond dispute that if they were, their conviction could not be challenged in revision.

(3) As regards Bijay Bahadur applicant there can be no doubt and it was also not disputed before us, that he was a prisoner on 4-3-50. He could, therefore, be convicted under S. 52 of the Act. Before his conviction under Ss. 147 and 332, I. P. C., he had been detained in the District Jail under an order passed on 29-7-1949 under S. 3, U. P. Maintenance of Public Order Act of 1947, but he had been released before 28-1-50 and consequently that fact was wholly irrelevant to the question of his status on 4-3-50. His application has absolutely no merit.

(4) The orders passed against the other three applicants on 1-3-50 by the Governor are in these words:

".....In exercise of the powers conferred by sub-clause (ii) of clause (a) of sub-section (1) of section 3 of the Preventive Detention Act, 1950, (Act No. IV of 1950), the Governor of Uttar Pradesh is hereby pleased to direct that the said.....shall be detained in the custody of Superintendent of any jail in Uttar Pradesh."

What we have to decide is whether this order made them "prisoners" within the meaning of S. 52. The word "prisoner" is not defined in the Act, but the word "prison" is defined in S. 3(1) to mean

"any jail or place used permanently or temporarily under the general or special orders of a Provincial Government for the detention of prisoners."

(5) The words "criminal prisoner", "convicted criminal prisoner" and "civil prisoner" are defined and the applicants did not come within any of those definitions. In every prison there must be a Superintendent (vide S. 6) whose duty it is to manage the prison in all matters relating to discipline, labour expenditure, punishment and control (vide S. 11). The Act does not lay down who will be detained inside a prison; it simply deals with how persons should be dealt with on being admitted into prison. The Prisoners Act (No. 3 of 1900) contains the law relating to prisoners confined by the order of a court. Section 3 provides that "the officer in charge of a prison shall receive and retain all persons duly committed to his custody.....by any court"; admittedly the three applicants were not detained in the jail under that provision because they were committed to the custody of the Superintendent not by any court but by the Governor. There is no other provision in the Act, so far as we are aware, empowering the Superintendent to confine in the jail other persons such as detainees e.g., persons detained under the Preventive Detention Act or the Maintenance of Public Order Act. Section 3(1)(a)(ii) of the Preventive Detention Act is as follows:

"The State Government may if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order.....it is necessary so to do, make an order directing that such person be detained."

(6) Section 3A provides that a detention order may be executed in India in the manner provided for warrants of arrest under the Code of Criminal Procedure, but that provision relates only to the execution of the order of detention or its service upon the person concerned and not with how he should be dealt with on being arrested. Section 4 is an important section and reads as follows:

"Every person in respect of whom a detention order has been made shall be liable,

(a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify."

(7) The State Government, which was the appropriate Government in the present case, made general rules in accordance with that provision on 13-3-1950. Those rules had no retrospective effect and could not, and did not, govern the maintenance, discipline and punishment for breaches of discipline of the applicants. There were previously in force Revised Security Prisoners Rules, 1949, but they were made under the U. P. Maintenance of Public Order Act, 1947, and did not govern persons detained under the Preventive Detention Act. The Act was passed on 25-2-1950, and only the rules made under its authority or the rules prescribed in the order of detention would govern the persons detained under it. There were no rules made under the authority of the Act and the detention orders also did not prescribe any rules to govern the detention of the applicants. The orders were completely silent about the maintenance, discipline and punishment of the applicants for breaches of discipline. In the absence of general or specific orders within the meaning of S. 4, the applicants could not be dealt with under S. 52 of the Prisons Act.

(8) The mere fact that the applicants were confined in a prison did not make them "prisoners" within the meaning of S. 52. A prisoner may be a person who is confined in a prison but every person who is confined in a prison may not be a prisoner; whether he is a prisoner or not would depend upon the authority under which he is confined. The detention orders here simply ordered the applicants to be detained in the custody of the Superintendent of any jail in Uttar Pradesh. I pass by the question whether they justified the detention in the custody of a particular Superintendent of jail. There is another defect in the orders and it is that the applicants are ordered to be detained in the custody of a Superintendent and not in any jail or prison. Under those orders, it is open to a Superintendent of a jail to confine the applicants in a place other than the jail. The orders do not require him, in so many words, to confine them in the jail of which he is the Super-

intendent. The words "of any jail" simply describe the word "superintendent" and do not at all prescribe the place of detention. As the orders are worded, so long as the applicants are detained in the custody of a Superintendent, they are carried out regardless of the place of detention.

It cannot, therefore, be argued that the orders themselves are the authority for the applicants' detention in any jail. If they are detained in a jail, it is not because the orders prescribe their detention in it, but because the jail has been chosen by the Superintendent as the place for their detention. The Superintendent was not required by any rule or order to detain them in the jail. It was simply his discretion that he selected the jail as the place of detention. If a person is detained in a prison by a superintendent, not because he is required by any law to detain him in it, but because in his own discretion he selects it as the place the person does not become a "prisoner". A Superintendent of jail has no power to confer the status of prisoner upon any person according to his sweet will. Under S. 15, Prisoners Act a Superintendent of jail outside the presidency towns may give effect to any order for the detention of any person passed by any court or tribunal, but the Governor of a State is neither a court nor a tribunal and therefore S. 15 would be no authority for a Superintendent's giving effect to an order of detention passed under the Preventive Detention Act by confining him in the jail. If a court commits a person to the custody of a Superintendent of jail, S. 3, Prisoners Act requires him to detain him in the jail but there is no such provision for his detaining in the jail any person committed to his custody by a Governor of State. If a Governor wants a person to be detained in a jail under the Preventive Detention Act, he has the power of ordering that he be so detained. If he passes such an order, the Superintendent will receive and detain him in the jail. But if he does not pass such an order, he is not required to detain him in the jail.

(8a) The Government of India Act of 1935 dealt separately with detainees and prisoners. Item 1 of List I of seventh schedule of the Government of India Act related to "preventive detention.... ....for reasons of State", item 1 of List II to "preventive detention for reasons connected with the maintenance of public order" and item 4 to "persons.....and persons detained therein" and item 3 of List III to "removal of prisoners and accused persons" and item 34 to "persons subjected to preventive detention under federal authority".

The Constitution also deals with them separately. Item 4 of List II relates to "persons.....and persons detained therein"; and item 3 of List III to "preventive detention for reasons connected with the security of a state" and item 4 to "removal.. ....of prisoners, accused persons and persons subjected to preventive detention". But it would be wrong to conclude from this separate treatment that detainees and prisoners are always distinct from each other. Detainees are dealt with separately from prisoners not because they are necessarily distinct from each other, but because in some instances detainees may not be prisoners, as for example, when they are detained in a place other than a prison. Under the various detention Acts, it is open to the detaining authority to prescribe the place of detention and he may prescribe a place other than a prison. It is because a detainee is not always a prisoner that separate provisions have been made for detainees and prisoners in the Constitutions. Similarly, the fact that detainees are exempted from the operation of clauses (1) and (2) of Article 22 does not lead to the conclusion that a detainee is distinct from a prisoner.

(9) The U. P. Maintenance of Public Order Act (No. 4 of 1947) S. 3, contained provisions similar to those of S. 4, Preventive Detention Act. The State Government in exercise of the powers conferred by S. 16, Maintenance of Public Order Act made the United Provinces Security Prisoners Rules, 1949. They were detailed rules and dealt with matters which are dealt with in the Prisons Act, suggesting that the provisions of the Prisons Act were not to apply to detainees. If detainees were prisoners and governed by the provisions of the Prisons Act, there would not have been any necessity for the State Government's framing rules in respect of the matters which were already provided for in the Prisons Act.

Rule 57 was to the effect that the Superintendent might inflict on a security prisoner any of the punishments that he might award to a convicted prisoner for any offence specified in S. 45 of the Prisons Act and that if any security prisoner was guilty of any offence against prison discipline, which was not adequately punishable by the infliction of any punishment which the Superintendent had power under the abovementioned provision to award to a security prisoner, he might forward him to a Magistrate who might try him on the charge brought against him and convict and sentence him. That provision was similar to that contained in S. 52, Prisons Act. The State Government made the provision in the rules because according to their interpretation of S. 52, Prisons Act, it did not apply to detainees. If a detainee were a prisoner, he would be governed not only by S. 52, Prisons Act but also by rule 57.

Though R. 57 was similar to S. 52, Prisons Act, it was not exactly identical in words and there were some differences between the two provisions. A Magistrate acting under S. 52, Prisons Act, may instead of sentencing the prisoner to imprisonment, sentence him to any of the punishments metioned in S. 46 of the Act, but a Magistrate acting under rule 57 had no such power. There was nothing in the Maintenance of Public Order Act to suggest that persons detained under it would be governed by the Prisons Act and that if any State Government made rules in exercise of the powers conferred by S. 16, they would supersede the provisions of the Prisons Act. It cannot be contended that if the State Government did not frame rules, S. 52, Prisons Act, would govern detainees and that if they made rules, the rules and not section 52 would govern them. No person can be governed by two rules which are inconsistent with each other.

On the coming into force of the Constitution, the Preventive Detention Act superseded the Maintenance of Public Order Act and in exercise of the powers conferred by section 4 of it, the U. P. Government framed the Uttar Pradesh Security Prisoners Rules, 1950. These Rules are almost a reproduction of the United Provinces Security Prisoners Rules, 1949. Rule 57 of the 1950 Rules is almost in the same words as rule 57 of the 1949 Rules discussed above. It is clear that the State Government continued to hold that persons detained under the Preventive Detention Act were not prisoners and would not be governed by S. 52, Prisons Act. Thus the interpretation that I have placed on the provisions of S. 52 of the Prisons Act is in conformity with the interpretation placed by the State Government themselves.

(10) It is laid down in S. 52, Prisons Act, that the Magistrate who tries a prisoner on the charge

levelled against him and convicts him, may sentence him to imprisonment which may extend to one year, "such term to be in addition to any term for which such prisoner was undergoing imprisonment when he committed such offence". This provision means that the section contemplates that the prisoner is a person who has already been sentenced to a term of imprisonment. A person detained under the Preventive Detention Act is not a person who has been sentenced to undergo imprisonment for any offence. The imprisonment inflicted under S. 52 of the Act has got to be in addition to the imprisonment which the prisoner was undergoing at the time when he committed the offence; this mandatory provision cannot be complied with in the case of a detainee. Obviously S. 52, Prisons Act, was not intended to apply to a person detained under any Preventive Detention Act.

(11) There is no direct authority on the question whether a detainee is a prisoner within the meaning of S. 52, Prisons Act but certain observations made by the Supreme Court in — 'Maqbool Husain v. State of Bombay', AIR 1953 S. C. 325 (A), support the view that he is not. In that case, J, V and P were detained in a jail in the Punjab under the Preventive Detention Act, 1950. They were governed by the Punjab Communist Detenus Rules, 1950, framed by the Government of Punjab under S. 4(a) of the Act. They committed some offences against the prison discipline on 6-2-50 and 7-2-50 and a complaint was made against them by the Superintendent of Jail under R. 41 (2) of the Punjab Communist Detenus Rules (the language of which is similar to that of S. 52 of the Prisons Act) in the court of a Magistrate. The detainees had been already punished by the Superintendent of Jail, departmentally by being separately confined & prevented from reading books & papers and receiving letters and visitors. It was contended on behalf of the detainees that the proceedings taken against them by the Superintendent previously amounted to judicial proceedings and that they could not be again tried and punished for the same offences. The Supreme Court repelled the contention that the Superintendent when he inflicted the departmental punishments acted judicially. They observed on page 332:

> "Their confinement in the prison was for the sake of administrative convenience and was also prescribed by the rules themselves and the provisions of the Prisons Act did not apply to them."

The Supreme Court obviously was of the view that a person detained under the Preventive Detention Act is not a prisoner and is not governed by the Prisons Act.

(12) I, therefore, hold that Mohan Lal Shukla, Mohammad Nasir and Chakrapani Awasthi were not prisoners within the meaning of S. 52 of the Prisons Act on 4-3-50 and were, therefore, not liable to be punished under that provision. Their application should be allowed and their conviction and sentences should be set aside.

(13) ASTHANA J.: I agree.

BY THE COURT

(14) Applicants Mohan Lal Shukla, Mohammad Nasir and Chakrapani Awasthi were not prisoners within the meaning of S. 52, Prisons Act on 4-3-50 and were not liable to be punished under that provision. Their application is allowed and their conviction and sentences set aside. Their bail bonds are discharged. The application of Bijai Bahadur is dismissed.

B/D.R.R. Order accordingly.

A.I.R. 1954 ALLAHABAD 629 (Vol. 41, C.N. 243)

MOOTHAM AND CHATURVEDI JJ. (22-3-1954)

Jagannath Prasad, Applicant v. State of U. P. and others. Opposite Party.

Civil Misc. (Writ) Nos. 7854 and 7717 of 1951.

(a) Police Act (1861), S. 7 — Governor's power to dismiss subordinate police officer — (Government of India Act, 1935, Ss. 243, 220(2) and 240(3) — (Constitution of India, Arts. 311(2) and 217(1)).

In India the paramount power of the Crown under the 1935 Act and of the President, Governor or Rajpramukh, as the case may be, under the Constitution, is subject, and subject only, to such exceptions as are expressly provided by the Act or the Constitution itself. (Para 11)

The plain meaning of S. 243 of the 1935 Act is, that if with regard to the conditions of service of the subordinate ranks of the police force (as determined by or under the Police Act) there is a conflict between such conditions and the provisions of Ss. 240, 241 or 242, the former will prevail. In other words, it is only to the extent to which the conditions of service of such police officers are inconsistent with the provisions of those sections that the operation of the latter will be excluded. (Para 15)

Section 7 of the Police Act provides that (subject to Art. 311 and to such rules as the State Government may make) certain specified officers may dismiss a police officer of the subordinate ranks. There is nothing in the Act which touches on the power of the Crown to dismiss a police officer and nothing which is inconsistent therewith; on the other hand, Rule 479(a) of the Police Regulations, which is a rule made under S. 7 of the Act, contains an express reservation of the Governor's powers of punishment with reference to all officers. The power vested by S. 7 in the Inspector-General and certain other officers to dismiss subordinate ranks of the police force is not a delegation to them of the Crown's power of dismissal at all but is a separate statutory power which is neither a substitute for nor restricts the constitutional power of the Crown to dismiss its servants at its pleasure. (Para 15)

Therefore the provisions of S. 243 did not affect the power of the Governor to dismiss a police officer of the subordinate ranks at pleasure, subject only to the requirements of S. 240(2). Putting on one side for the moment the question of the effect of Art. 320, under the Constitution the Governor has the power, subject to the provisions of Art. 311(2), to dismiss at pleasure a police officer of the subordinate ranks. (Para 16)

Anno: Police Act, S. 7 N. 1.

(b) U. P. Disciplinary Proceedings (Adminstrative Tribunal) Rules, 1947, Rule 10(1) — Discretion of Governor in dismissing servant — Disciplinary Rules are administrative rules — Conditions inducing Governor to dismiss servant are not justiciable — (Constitution of India, Arts. 311(2), 309, 310, 226).

Where the Governor did exercise his discretion and did not act on mere recommendation of the Tribunal appointed under U. P. Disciplinary Proceedings (Administrative Tribunal) Rules 1947, in ordering the dismissal of a police subordinate officer, and the officer had opportunity of showing cause against action proposed to be taken against him, it is

not material that the Governor purported to act under Rule 10(1) of the Disciplinary Rules. (Para 17)

Moreover, it makes no difference whether the Governor in arriving at his decision acted on the advice of the Tribunal or on an independent examination of the facts. Subject to the provisions of the Constitution the servant holds his office at the Governor's pleasure; when the Governor has signified his pleasure, the considerations which induced him to do so are not justiciable. (Para 18)

The Governor's power to dismiss at pleasure is subject only to the express provisions of the Constitution. Power is conferred upon the Governor by Art. 309 to make rules regulating the conditions of service of civil servants of the State Government, but such power is subject, 'inter alia', to the provisions of Art. 310, and no rules can be made which fetter or restrict his power to dismiss at pleasure. The Disciplinary Rules were made prior to the commencement of the Constitution, and assuming they were validly made, they can have no greater effect or stand on a higher footing than rules made by the Governor under Art. 309. These rules (except Rule 10(1)) are administrative rules, and the contravention of their provisions will not confer upon the dismissed servant a cause of action. (Para 19)

(c) U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, Rule 10(1) — Dismissal of Subordinate Police Officer — Governor need not consult Public Service Commission — (Government of India Act, 1935, S. 266) — (Constitution of India, Art. 320(3)).

Rule 10(1) of the Disciplinary Rules provides that the Governor "shall not be bound to consult the Public Service Commission on the Tribunal's recommendations". This provision was made under S. 266(3) of the Government of India Act, 1935, which is in substantially the same terms as cl. (3) of Art. 320. Rule 10(1) of the Disciplinary Rules was a valid and effective provision in the case of a civil servant who was not a police officer of the subordinate ranks and the provision continued to be valid and effective after the Constitution came into force. (Para 21)

The case of a police officer of the subordinate ranks stands upon a somewhat different footing; for Sub-s. (4) of S. 266 of the Government of India Act provides that nothing in that section shall require a Public Service Commission to be consulted in the case of the subordinate ranks of the various police forces in India as respects any of the matters mentioned in paragraphs (a), (b) and (c) of sub-s. (3) of that section. Paragraph (c) of sub-s. (3) is similar in terms of sub-clause (c) of Art. 320(3) of the Constitution. Rule 10(1) is, therefore, so far as the case of such officer is concerned, redundant and it assumed importance only upon the coming into force of the Constitution, for the latter contains no provision corresponding to S. 266(4) of the 1935 Act. (Para 22)

But the fact that the Rule was merely superfluous as regards the case of a particular class of Government servants prior to the commencement of the Constitution does not make it a Rule which is invalid as regards that class after the Constitution came into force. The position prior to the Constitution was that consultation with the Public Service Commission was made unnecessary by S. 266(4) and by the Rule. The Constitution repealed the section but it did not affect the validity of the rule; and it is not, therefore, necessary for the Governor to consult the State Public Service Commission prior to the dismissal of a subordinate police officer. (Para 22)

CASES REFERRED: Paras

(A) (1895) 1895 AC 229: 64 LJPC 119 9
(B) (1896) 1896 AC 575: 65 LJPC 82 9
(C) (1934) 1934 AC 176: 103 LJPC 41 9
(D) (V24) AIR 1937 PC 31: 64 Ind App 55 (PC) 10
(E) (V35) AIR 1948 PC 121: 75 Ind App 225 (PC) 12
(F) (V36) AIR 1949 PC 112: 75 Ind App 343: 50 Cri LJ 383 (PC) 15
(G) (V39) AIR 1952 Madh-B 105: ILR (1952) Madh-B 253 19

G. S. Pathak and Jagdish Behari, for Applicant; Sir G. Mehrotra, S. C., for Opposite Party.

MOOTHAM J.:

This is a petition under Art. 226 of the Constitution which gives rise to a question of some constitutional importance.

(2) The petitioner held the substantive rank of Inspector of Police. In 1946 he was appointed to the Anti-Corruption Department and in the following year he was promoted to the officiating rank of Deputy Superintendent of Police.

In January, 1948, an anonymous letter was received by the Inspector-General of Police making charges against the petitioner. After making certain confidential enquiries the Inspector-General formed the opinion that the petitioner's conduct required investigation and he directed the Deputy Inspector-General of Police, Criminal Investigation Department, to take the necessary action. At the same time he placed the petitioner under suspension and reverted him to his substantive rank of Inspector.

(3) Under the orders of the Deputy Inspector-General of Police an enquiry was conducted by Sri Sri Krishna, Superintendent of Police, Anti-Corruption Department, whose report was in due course submitted to the Inspector General of Police.

(4) In the meantime, on 4-11-1947, the Governor of the United Provinces had made rules known as the Disciplinary Proceedings (Administrative Tribunal) Rules, 1947,

> "for regulating in certain cases the conduct of disciplinary proceedings and the award of punishment to members of the public services under the Governor's rule-making control."

Under these Rules the Governor purported to confer upon himself power to refer to a Tribunal constituted in accordance with the Rules cases relating to Government servants in respect of matters involving, 'inter alia', "corruption", "failure to discharge duties properly" and "personal immorality" as defined in the Rules.

The Tribunal was required to make such enquiry as was appropriate, and thereafter to forward its findings, together with the views of an assessor co-opted by the members of the Tribunal, to the Governor with its recommendations with regard to punishment.

Rule 10(1) declared that the Governor was not bound to consult the Public Service Commission on the Tribunal's recommendations, and that he "shall pass an order of punishment" in the terms recommended by the Tribunal subject to the proviso that he could, for sufficient reason, award a lesser punishment than that so recommended.

(5) On the receipt of the report of the enquiry concerning the petitioner the Inspector-General of Police forwarded the proceedings to the Government and the Governor then referred the matter to a Tribunal appointed under the above-mentioned Rules (to which it is convenient to refer as the Disciplinary Rules).

The Tribunal framed three charges against the petitioner alleging that he had been guilty of personal immorality, of corruption and of failure to discharge his duties properly. It came to the conclusion that the first and third charges had been proved, and that the petitioner was guilty of corruption in respect of two of the thirty-two items which formed the subject of the second charge.

The Tribunal by an order made on the 4-2-1950, recommended that the petitioner be dismissed from the service and be paid one-fourth his salary during the period of suspension.

(6) The petitioner was thereafter called upon to show cause against the action proposed to be taken against him. He submitted a representation to the Governor, but the latter by an order which was communicated to the petitioner on the 5-12-1950, directed that he be dismissed from the police force. The order communicated to the petitioner so far as it is relevant, was in the following terms:

> "The Governor has considered your explanation and is of the opinion that you have not been able to clear your conduct. The Governor has therefore under the provisions of Rule 10(1) of the U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, ordered your dismissal from the State Police force with effect from the date on which this order is communicated to you".

The petitioner contends that his dismissal is illegal and he prays for the issue of a writ in the nature of 'certiorari' quashing the order of the Governor sent to him on 5-12-1950.

(7) The argument for the petitioner is a threefold one.

In the first place, it is contended that the petitioner could be dismissed only by an order made by the Inspector-General or by a Deputy Inspector-General of Police; the Governor, it is said, had no power to order his dismissal either under the Disciplinary Rules, or otherwise; secondly, it is argued that the Disciplinary Rules are invalid and, thirdly, it is said that the Tribunal failed to comply with the Disciplinary Rules and the procedure followed by it in the course of its enquiry was contrary to the principles of natural justice.

(8) The argument for the respondents is that the petitioner held his office at the pleasure of the Governor subject only to the provisions of Art. 311 (2) of the Constitution, and that the order of dismissal was an administrative order with which this Court cannot interfere. In any case, it is contended that the Disciplinary Rules were rules validly made under S. 7 of the Police Act and that there was no substantial deviation by the Tribunal from the procedure prescribed by the Disciplinary Rules.

(9) In England the tenure of office of a servant of the Crown is regulated by the rule of the common law that —

> "Unless in special cases where it is otherwise provided, servants of the Crown hold their office during the pleasure of the Crown; not by virtue of any special prerogative of the Crown but because such are the terms of their engagement, as is well understood throughout the public service."

'Shenton v. Smith', 1895 A. C. 229 at p. 234 (A). If the terms of service in a particular case are inconsistent with such an implied condition the Crown's power to dismiss at pleasure is restricted or excluded, as in — 'Could v. Stuart', 1896 AC 575 (B), where such was held to be the effect of certain provisions of the New South Wales Civil Service Act of 1884, and in — 'Reilly v. The King', 1934 A. C. 176 at p. 178 (C), where it was held that the terms of an appointment which prescribed its period and provided expressly that it could be terminated "for cause" excluded any implication of a power to dismiss at pleasure.

(10) In India the common law rule has been replaced by statutory provision. Section 96B (1), Government of India Act, 1919, provided that —

> "Subject to the provisions of this Act, and of the rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure."

This section in express terms states that office is held at pleasure; "There is, therefore," the Judicial Committee said in — 'R. Venkata Rao v. Secy. of State', AIR 1937 P. C. 31 (D), "no need for the implication of this term and no room for its exclusion".

This provision was replaced in the Government of India Act, 1935, by S. 240 (1) which reads as follows:

> "240 (1). Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the crown in India, holds office during His Majesty's pleasure".

(See also sub-s. (3) of S. 257 which refers to "the rule of law that, except as otherwise provided by statute, every person employed under the Crown holds office during His Majesty's pleasure".

The corresponding provision in the Constitution is, of course, Art. 310(1) which provides that —

> "310(1). Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor or, as the case may be, the Rajpramukh of the State."

(11) It is thus to be observed that in India the paramount power of the Crown under the 1935 Act and of the President, Governor, or Rajpramukh, as the case may be, under the Constitution, is subject, and subject only, to such exceptions as are expressly provided by the Act or the Constitution itself.

(12) The 1935 Act expressly provided that the Crown would not have power to dismiss at pleasure the holders of certain civil posts, for example the Judges of High Courts (S. 220 (2)); and it further expressly provided that the Crown's exercise of its power to dismiss at pleasure was subject to the qualification or restriction to be found in sub-s. (3) of S. 240.

As a condition precedent to the dismissal of a civil servant, the Crown was bound to afford that servant a reasonable opportunity for showing cause against the action proposed to be taken against him: — 'High Commr. for India v. I. M. Lal', AIR 1948 PC 121 (E). Provision for the same exceptions to the general rule is expressly made in the Constitution in Arts 217 (1) and 311 (2).

(13) The argument for the petitioner is that S. 243 of the 1935 Act constitutes a further express provision which excludes the power of the Crown to dismiss him; and that it has conferred upon him a right or privilege which by virtue of S. 6 of the General Clauses Act operates, after the commencement of the Constitution, as a bar to his dismissal by the Governor.

(14) Section 243 reads as follows:

"243. Notwithstanding anything in the foregoing provisions of this Chapter, the conditions of service of the subordinate ranks of the various police forces in India shall be such as may be determined by or under the Acts relating to those forces respectively."

It is convenient also to refer at this stage to S. 7 of the Police Act, for it is the petitioner's contention that the petitioner can be dismissed only by one of the officers named therein.

That section (which was amended by the Government of India (Adaptation of Indian Laws) Order, 1937, and by the Adaptation of Laws Order, 1950) is now, so far as is relevant for the present purpose, in these terms:

"7. Subject to the provisions of Article 311 of the Constitution and to such rules as the State government may from time to time make under this Act, the Inspector-General, Deputy Inspector-General, Assistant Inspectors-General and District Superintendents of Police may at any time dismiss, suspend or reduce any police officer of the subordinate ranks whom they think remiss or negligent in the discharge of his duty, or unfit for the same."

(15) The plain meaning of S. 243 of the 1935 Act appears to be this, that if with regard to the conditions of service of the subordinate ranks of the police force (as determined by or under the Police Act) there is a conflict between such conditions and the provisions of Ss. 240, 241 or 242, the former will prevail. In other words, it is only to the extent to which the conditions of service of such police officers are inconsistent with the provisions of those sections that the operation of the latter will be excluded.

Now S. 7 of the Police Act provides that (subject to Art. 311 and to such rules as the State Government may make) certain specified officers may dismiss a police officer of the subordinate ranks. There is nothing in the Act which touches on the power of the Crown to dismiss a police officer and nothing which is inconsistent therewith; on the other hand Rule 479(a) of the Police Regulations, which is a rule made under S. 7 of the Act, contains an express reservation of the Governor's powers of punishment with reference to all officers. The power vested by S. 7 in the Inspector-General and certain other officers to dismiss subordinate ranks of the police force is not, in our opinion, a delegation to them of the Crown's power of dismissal at all but is a separate statutory power which is neither a substitute for nor restricts the constitutional power of the Crown to dismiss its servants at its pleasure.

This we think is the effect of the case of — 'North-West Frontier Province v. Suraj Narain Anand', AIR 1949 PC 112 (F), where the Judicial Committee held that the only provisions of Chap. 2 to which the introductory words of S. 243 were referable in relation to conditions of service were sub-ss. (2) and (3) of S. 240, namely provisions corresponding to Art. 311 clauses (2) and (1) of the Constitution.

(16) We are of opinion, therefore, that the provisions of S. 243 did not affect the power of the Governor to dismiss a police officer of the subordinate ranks at pleasure, subject only to the requirements of S. 240(2). Putting on one side for the moment the question of the effect of Art. 320, we are also of opinion that under the Constitution the Governor has the power, subject to the provisions of Art. 311(2), to dismiss at pleasure a police officer of the subordinate ranks.

(17) It is however contended that although the petitioner was in fact dismissed by the Governor, the latter did not act in the exercise of his discretion under Art. 310 but in accordance with the advice of the Tribunal under clause 10(1) of the Disciplinary Rules.

To this argument there are we think two answers. In the first place it is not in dispute that the petitioner was afforded a reasonable opportunity of showing cause against the action proposed to be taken against him as is required by Art. 311(2), and that he did show cause. The letter communicating the Governor's decision to the petitioner, which we have quoted earlier in this judgment, makes it clear that the Governor was satisfied both as to the correctness of the conclusion reached by the Tribunal and as to the propriety of the sentence. On the facts of this particular case, it cannot, we think, be said that the Governor merely accepted without question the opinion of the Tribunal; he did not make the order of dismissal because he considered he had no alternative, but because he approved of the recommendation made to him by the Tribunal.

In our opinion, the Governor exercised his discretion in ordering the dismissal of the petitioner; we have held that he had the power to issue such an order, and we think it not to be material that he purported to act under Rule 10(1) of the Disciplinary Rules.

(18) In the second place, in our judgment, it makes no difference whether the Governor in arriving at his decision acted on the advice of the Tribunal or on an independent examination of the facts. Subject to the provisions of the Constitution the petitioner held his office at the Governor's pleasure. The Governor has signified his pleasure; the considerations which induced him to do so are not in our judgment justiciable.

(19) The Governor's power to dismiss at pleasure is subject only to the express provisions of the Constitution. Power is conferred upon the Governor by Art. 309 to make rules regulating the conditions of service of civil servants of the State Government, but such power is subject, 'inter alia', to the provisions of Art. 310, and no rules can be made which fetter or restrict his power to dismiss at pleasure. We find ourselves in agreement, if we may say so with respect, with the views of Dixit J., on this point in — 'Mrs. Lilawati v. State of Madhya Bharat', AIR 1952 Madh-B 105 (G). The Disciplinary Rules were made prior to the commencement of the Constitution, and assuming they were validly made they can, in our opinion, have no greater effect or stand on a higher footing than rules made by the Governor under Art. 309. These rules (except Rule 10(1)) are in our opinion administrative rules, and the contravention of their provisions will not confer upon the petitioner a cause of action.

In these circumstances, we do not consider it necessary to express an opinion on the allegations made by the petitioner as to the conduct of the enquiry by the Tribunal, but as we pointed out in — 'Tejpal Singh's case', Civil Misc. No. 7717 of 1951 which was argued at the

same time, the fact that we do not do so must not be taken to mean that such provisions as to enquiry as are contained in the Rules should not be scrupulously observed.

(20) The question remains whether it was necessary for the Governor to have consulted the State Public Service Commission before dismissing the petitioner.

Article 320, cl. (3) (c) of the Constitution, so far as it is relevant, provides that

"The .... State Public Service Commission .... shall be consulted

(c) on all disciplinary matters affecting a person serving under .... the Government of a State in a civil capacity including memorials or petitions relating to such matters;"

This clause is subject to a proviso that

"..... The Governor may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted."

Clause (5) of the same Article further provides that all regulations made by a Governor under cl. (3) must be laid for not less than fourteen days before the House or each House of the Legislature of the State, as the case may be, and shall be subject to such modifications as the House or Houses of the Legislature may make during the session in which they are so laid.

(21) Rule 10(1) of the Disciplinary Rules provides that the Governor "shall not be bound to consult the Public Service Commission on the Tribunal's recommendations." This provision was made under S. 266(3), Government of India Act, 1935, which is in substantially the same terms as cl. (3) of Art. 320. In 'Tejpal Singh's case (H)' it was not in dispute that, prior to the commencement of the Constitution, R. 10(1) of the Disciplinary Rules was a valid and effective provision in the case of a civil servant who was not a police officer of the subordinate ranks, and we held that the provision continued to be valid and effective after the Constitution came into force.

(22) The case of a police officer of the subordinate ranks, such as the petitioner, stands upon a somewhat different footing; for sub-s. (4) of S. 266 of the Government of India Act provides that nothing in that section shall require a Public Service Commission to be consulted in the case of the subordinate ranks of the various police forces in India as respects any of the matters mentioned in paragraphs (a), (b) and (c) of sub-s. (3) of that section. Paragraph (c) of sub-s. (3) is similar in terms of sub-cl. (c) of Art. 320(3) of the Constitution. Rule 10(1) was therefore, so far as the case of the petitioner was concerned, redundant and it assumed importance only upon the coming into force of the Constitution, for the latter contains no provision corresponding to S. 266(4) of the 1935 Act.

We do not think that the fact that the Rule was merely superfluous as regards the case of a particular class of government servants prior to the commencement of the Constitution makes it a Rule which is invalid as regards that class after the Constitution came into force. The position prior to the Constitution was that consultation with the Public Service Commission was made unnecessary by S. 266(4) and by the Rule. The Constitution repealed the section but it did not in our opinion affect the validity of the rule; and it was not, therefore, in our view necessary for the Governor to consult the State Public Service Commission prior to the dismissal of the petitioner.

(23) We hold therefore that this position fails. It is accordingly dismissed with costs, which we assess at two hundred and fifty rupees.

A/R.G.D. Petition dismissed.

A.I.R. 1954 ALLAHABAD 633 (Vol. 41, C.N. 244)

AGARWALA AND ROY JJ. (26-3-1954).

Babbu, Appellant v. State.

Cr. Appeal No. 60 of 1951, against Order, Addl. S. J., Farrukhabad, D/- 8-1-1951.

Criminal P. C. (1898), Ss. 162, 164 and 533 — Dying declaration of accused recorded by Magistrate — Declaration containing statement amounting to confession — Declaration becoming inadmissible in evidence — Admissibility in evidence of declaration as confession — (Evidence Act (1872), S. 32).

Where a statement made by an accused is recorded by the Magistrate as a dying declaration wherein the accused incriminates himself by stating that he attacked his wife and then inflicted the wounds on himself, such a statement, if becomes inadmissible in evidence under S. 32, Evidence Act, 1872 by reason of the accused surviving the wounds, cannot be admitted in evidence as a confession if it is found that the Magistrate failed to comply with the provisions of S. 164, Criminal P. C., and that he was not available for being examined as a witness under the provisions of S. 533, Criminal P. C. To such a statement the rule laid down in — 'AIR 1936 PC 253 (2), applies; AIR 1953 All 792, Distinguished.

(Paras 8, 11)

Anno: Cr. P. C., S. 162, N. 21; S. 533, N. 2, 6. Ev. Act, S. 32, N. 5.

CASES REFERRED: Paras

(A) (V23) AIR 1936 PC 253 (2): 37 Cri LJ 897 (PC) 1, 4, 5, 9, 11

(B) (V40) AIR 1953 All 792: 1953 All LJ 507: 1953 Cri LJ 1829 4, 9, 10

(C) (1880) 5 AC 214: 49 LJ QB 577 7

R. C. Ghatak, Appellant; The Govt. Advocate, for the State.

ROY, J.:

The appellant Babbu alias Babu Ram has been convicted by the learned Additional Sessions Judge of Farrukhabad under Ss. 307 and 309, I.P.C. He preferred an appeal to this Court. The appeal was heard by a learned single Judge on 26-10-1953. The learned single Judge has referred the following question for decision by this Bench:

"Whether the statement Ex. P. 8 could be admitted in evidence as a confession in view of the decision of their Lordships of the Privy Council in — 'Nazir Ahmad v. King Emperor', AIR 1936 PC 253 (2) (A), after such a statement has been ruled out as inadmissible under S. 32, Evidence Act?"

(2) The appellant was charged with having assaulted his wife with a gandasa and having caused her serious injuries. He was further charged of having inflicted injuries on himself in order to end his own life after he had assaulted his wife. Both the appellant and his wife were found lying injured and almost in an unconscious state by some people and then report of the incident was made and investigation commenced. The prose-

cution were unable to produce any eye-witnesses of the actual assault. Reliance was placed by the prosecution on the extra-judicial confession of the appellant. The confession was attempted to be proved by the evidence of three witnesses, namely, Shanker Sen, Bharat and Kunwar Sen.

The appellant and his wife were removed to the hospital for treatment after the investigation had begun. The doctor found their condition very low, He, therefore, sent a note to a Magistrate to make arrangements for the recording of the dying declaration of both. In pursuance of that request from the Medical Officer, the Tehsildar Magistrate, one Mr. Farid Uddin, went to the hospital to record the dying declaration of the appellant and his wife. The dying-declaration of the appellant is to be found at page 10 of the paper-book and has been marked Ex. P. 8 in the case. That statement was recorded after oath having been administered to him. In this dying declaration the appellant, in effect, confessed to not only having caused injuries on himself but also to having caused injuries on his wife with a gandasa.

(3) It was contended on behalf of the appellant before the trial Court that the recording of the appellant's statement by the Magistrate amounted really to the recording of a confession of the accused and since the Magistrate did not follow the procedure prescribed for the recording of confession, it was inadmissible in evidence. The learned trial Judge did not appear to have given effect to that contention on behalf of the appellant and he held that though the statement of the accused recorded as a dying declaration was not admissible in evidence under S. 32, Evidence Act, yet it was admissible as a confession.

(4) Mr. Ghatak, appearing on behalf of the appellant, has contended that in view of the decision of their Lordships of the Privy Council in the case of — 'AIR 1936 PC 253(2) (A)', the statement Ex. P. 8 was inadmissible, even though the statement was ostensibly recorded as a dying declaration. When the case was before the learned single Judge reliance was placed by the other side upon a reported decision of this Court in — 'Rex v. Moti', AIR 1953 All 792 (B), and it was contended that the statement of the appellant which was ostensibly recorded as a dying declaration would be admissible and could not be hit by the rule laid down by their Lordships of the Privy Council in — Nazir Ahmad's case (A)'. The learned Government Advocate has reiterated the same contention before us when this matter has been heard.

(5) After hearing arguments from both sides we are of opinion that the view laid down by their Lordships of the Privy Council in — 'Nazir Ahmad v. King Emperor (A)', (ante), would be completely applicable to the present case.

(6) The answer to the question which has been referred to us would depend upon the meaning and effect of certain sections of the Code of Criminal Procedure. Section 164 of the Code is as follows :

"164. (1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Provincial Government may, if he is not a police officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in S. 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect :

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make, may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,
Magistrate."

Section 364 of the Code then lays down :

"364. (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter or the Chief Court of Oudh, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined or, if that is not practicable, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263 or in the course of a trial held by a Presidency Magistrate."

Then S. 533 of the Code is in the following terms:

"533. (1) If any Court, before which a confession or other statement of an accused person

recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Indian Evidence Act, 1872, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision."

(7) In the present case, the Magistrate concerned, who recorded the statement Ex. P. 8, was not available when evidence was heard. An effort was made on behalf of the prosecution to prove that statement by producing his Judicial Clerk. In the Privy Council case, referred to above, the Magistrate himself was produced to prove the record of the statement made by him. Their Lordships of the Privy Council in dealing with the matter observed as follows:

"The matter to be considered and decided is one of plain principle and first importance namely, is such oral evidence as that of the Magistrate, Mr. Vasisht, admissible? It was said for the respondent that it was admissible just because it had nothing to do with S. 164 or with any record. It was argued that it was admissible by virtue of Ss. 17, 21, 24 and 26, Evidence Act, 1872, just as much as it would be if deposed by a person other than a Magistrate.

"It was also said that if the oral evidence was admissible then S. 91, Evidence Act, requiring evidence in writing did not apply because the matter would in such a case not be one which had to be reduced to writing. For the appellant it was said that the Magistrate was in a case very different from that of a private person, and that his case and his powers were dealt with and delimited by the Criminal Procedure Code, and that if this special Act dealing with the special subject-matter now in question set a limit to the powers of the Magistrate, the general Act could not be called in aid so as to allow him to do something which he was unable to do, or was expressly or impliedly forbidden to do, by the special Act. The argument was that there was to be found by necessary implication in the Criminal Procedure Code a prohibition of that which was here attempted to be done: in other words that the Magistrate must proceed under S. 164, or not at all.

"To this contention it was answered that there was no ground for reading the word 'may' in S. 164 as meaning 'must' on the principle described in — 'Julius v. Bishop of Oxford', (1880) 5 AC 214 (C). There is no need to call in aid this rule of construction — well recognised in principle but much debated as to its application. It can hardly be doubted that a Magistrate would not be obliged to record any confession made to him if, for example, it were that of a self-accusing madman or for any other reason the Magistrate thought it to be incredible or useless for the purposes of justice. Whether a Magistrate records any confession is a matter of duty and discretion and not of obligation. The rule which applies is a different and not less well recognised rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

(8) In the present case, the provisions of S. 164 of the Code were not complied with. If the statement Ex. P 8 is to be taken as a confession, the Magistrate had failed to warn the person making the statement that he was a Magistrate, that the person making the statement was not bound to make a confession and that if he did so it could be used in evidence against him and he could be convicted on his own confession. The statement Ex. P 8 was essentially recorded and intended to be a dying declaration, but since the man who made it survived, it was inadmissible under S. 32 of the Indian Evidence Act. Since the formalities laid down in S. 164 of the Code were not complied with and since in the present case there was not even any semblance of oral evidence to prove that the Magistrate had informed the person making the statement that he was a Magistrate, that he was not bound to make a statement, and that any statement made by him could be used against him and that he could be convicted on his own confession, the statement Ex. P. 8 cannot, in our opinion, be taken as a confession and it is, therefore, not admissible in evidence.

(9) In 'Rex v. Moti (B)' (Supra) the decision of their Lordships of the Privy Council in — 'AIR 1936 PC 253 (A)', had been noticed and a distinction drawn upon facts. We have considered the decision in 'Rex v. Moti (B)', and we are of the opinion that the present case is different on facts from what it was in 'Rex v. Moti (B)'. In — 'AIR 1953 All 792 at p. 796 (B)', the question which had to be considered was laid in the following terms:

"Whether the materials on the record go to show that the confession was being made voluntarily and the accused had been warned that he was not bound to make a confession and any confession made by him could be used in evidence against him."

Their Lordships after noticing the evidence that was produced in the case held that before the statement was recorded the Magistrate had explained to the accused that he was not bound to make a statement, that any statement made by him would be used against him and that he could be convicted on his own confession. They further observed that though it would have been better if the Magistrate had written down in the form of questions and answers all that had transpired, there was no reason to discard the evidence of the Magistrate and the defect was cured by S. 533 of the Code of Criminal Procedure, though by reason of the defects already pointed out the confession must be said to have lost much of its evidentiary value.

(10) In the present case, as we have already observed, the precautions which the Magistrate had taken as in the case of 'Rex v. Moti (B)', before recording the statement of the person, were not proved to have been taken.

(11) In every view of the matter we have come to the conclusion that the statement Ex. P. 8 could not be admitted in evidence as a confession in view of the decision of their Lordships of the Privy Council in 'Nazir Ahmad v. King-Emperor (A)' cited above. The reference is accordingly answered and the answer may be laid before the learned single Judge.

A/V.S.B. Reference answered.

A.I.R. 1954 ALLAHABAD 636 (Vol. 41, C.N. 245)

V. BHARGAVA J. (17-3-1954).

Ranvir Singh, Applicant v. Dist. Inspector of Schools, Allahabad and another, Opposite Party.

Civil Misc. Writ No. 246 of 1954.

U. P. Education Code — Rules for guidance of English schools and Intermediate Colleges, Rule 96 — Student entering institution is bound by the rules — Interference with disciplinary action taken by school authorities — (Constitution of India, Art. 226).

Any student seeking admission to an institution recognised by the Board, or an English School or Intermediate College recognised by the Board, must be deemed to have agreed to comply with and be governed by rules framed by the Board for guidance of those schools. A student entering an institution under R. 96 of Education Code of Uttar Pradesh for guidance of English schools is certainly bound by the other clauses of the same rule which prescribe a procedure for disciplinary action against him, it may be because the rule has a statutory authority or because a student when seeking admission agrees to be governed by these rules. (Para 3)

An order of rustication passed by the Inspector of Schools under Rule 96(r) after a report from the head of the institution and on an admission of charges against him by the student cannot be interfered with by a writ. AIR 1953 All 623, Ref. (Para 3)

Where there was an admission of the acts of indiscipline, the High Court will not enter into any question whether the punishment meted out is or is not in proportion to the act of indiscipline committed by the student. For that purpose it is clear that the student's remedy lies in an approach to the appropriate authorities of the institution itself which may be the Warden, the Principal or the Inspector of Schools. On such a ground no writ petition can be entertained. (Para 4)

CASE REFERRED : Para

(A) (V40) AIR 1953 All 623 3

S. C. Khare, for Applicant.

ORDER : By this petition under Art. 226 of the Constitution, the petitioner who was a student of Class XII in the Ewing Christian College, Allahabad has sought the issue of a writ in the nature of mandamus directing the opposite parties, the Inspector of Schools, Allahabad and the Secretary, Board of High School and Intermediate Education, Allahabad to hand over the applicant's admission card for the Intermediate Examination 1953-54 and not to prevent him from taking the Examination.

(2) In the affidavit filed in support of the petition, the petitioner has alleged that besides being a student of the Ewing Christian College, Allahabad he was an inmate of the Turner Hostel attached to the College.

In connection with the Saraswati Puja on the Basant Panchami day, the Warden of the hostel got seriously annoyed with the petitioner. The Principal of the institution was also annoyed with the petitioner on the same ground. On the 15th February 1954 the Warden of the hostel sent for several students including the petitioner separately and asked them that the forthcoming Holi celebration had to be done in a style that it should not offend the Christian faith and he further freely commented on the Hindu festivals in a disparaging manner. This caused a lot of resentment among the students of the College.

On the night between the 4th and 5th March 1954 two Mendhi trees from the hostel compound were uprooted and thrown in the pile of wood that had been collected for Holi by the residents of the neighbouring mohalla and, in addition, human excreta was placed near the door of the Warden. The Principal, on suspicion against four students, ordered them to leave the hostel.

The petitioner and one Ram Kirpal Srivastava, Secretary, Hostel Union, interviewed the Principal on behalf of the students to represent their case. On that occasion the Principal told the petitioner that he would see the petitioner separately. When the petitioner met the Principal alone, the Principal threatened to rusticate the petitioner saying that he had received a number of complaints against him.

On the next day, the petitioner saw the Warden and questioned him why the Principal had expressed his opinion that he would rusticate the petitioner. The Warden was in a very excited mood and said that, unless, the petitioner or some other student wrote out a letter admitting the commission of the act which had happened in the night between the 4th and 5th March 1954, all the students would be expelled & rusticated. He added that if the petitioner accepted commission of the act he would see that no harm came to any student.

In these circumstances the petitioner wrote a letter addressed to the Warden admitting that he had committed the acts along with four others. According to the petitioner, his letter was given by him on the 7th or 8th March.

Subsequently, on the 10th March, the petitioner was given a copy of a letter from the District Inspector of Schools, Allahabad informing him that the petitioner had been rusticated for four months with immediate effect. A copy of that letter has been attached as an annexture, to the affidavit. The same letter added that the admission card of the petitioner for appearing in the Intermediate Examination 1954 should be withheld. It is against this last direction that the writ of mandamus is sought by the petitioner.

(3) Learned counsel's first contention was that the Inspector of Schools who passed the order contained in the letter dated 10-3-1954, annexed to the affidavit, had no statutory authority to pass such an order.

This argument was based on the contention that R. 96, Education Code of the Uttar Pradesh was not framed under any statutory power and consequently the order passed by any authority purporting to act under that rule would not be a valid order which could be enforced against the person against whom it may be directed.

When asked whether there was any power of disciplinary action being taken by the head of an institution against a student reading in that institution, learned counsel said that the power must be in the head of the institution, as every student entering the institution must be deemed to enter into a contract under which such a power would vest in the head of the institution.

The position is, however, not so simple. The Education Code of the Uttar Pradesh lays down rules for the guidance of English Schools and Intermediate Colleges and other institutions recognised by the Board of High School and Intermediate Education, U. P. Rule 96 is one of the rules framed for the guidance of English Schools and Intermediate Colleges recognised by the Board

of High School and Intermediate Education. Any student seeking admission to an institution recognised by the Board, or an English School or Intermediate College recognised by the Board, must be deemed to have agreed to comply with and be governed by those rules. It is under R. 96, itself that these institutions admit the students. It is this very rule which lays down how a student leaving one institution can be admitted in another institution and what would be the principles governing transfer of a student from one institution to another.

The same rule lays down the principles on which discipline has to be maintained in the institutions. Clause (p) of R. 96 gives authority to the head of an institution to impose fine for irregular attendance, including unpunctuality and absence without leave. Clause (q) deals with repair of the property of the school or college, wilfully injured, at the expense of the student causing that damage. Clause (r) gives a general power to the head of an institution to punish a boy in a manner suited to the offence, for example, by detention after school or college hours or of expulsion from the institution.

If a more severe punishment is required this very clause (r) lays down that the head of the institution should report the circumstances to the Inspector stating for what period the boy should in his opinion be debarred from readmission to any institution. The Inspector can pass an order for expulsion only from the institution or for rustication for a specified period. Whatever rights the petitioner acquired on admission as a student of this institution were as a consequence of his admission under this rule and obviously, therefore, he cannot claim that he is not governed by this rule.

Whether this rule was framed under any statutory authority or not has not been fully gone into. But there can be no doubt that a student entering an institution under this rule is certainly bound by the other clauses of the same rule which prescribe a procedure for disciplinary action against him, it may be because the rule has a statutory authority or because a student when seeking admission agrees to be governed by these rules.

It may be noticed that the question of validity of an order of the Inspector of Schools under the same R. 96 came up before a Bench of this Court in the case of — 'Keshab Chandra v. Inspector of Schools', AIR 1953 All 623 (A), and before that Bench it was not contended that the powers exercised by the Inspector strictly in accordance with R. 96 could be interfered with by this Court by a writ. In fact, the learned Judges in that case recognised the fact that even the power of the head of the institution to take disciplinary action against the students was under this very R. 96.

In that case, however, the order of rustication was set aside by the issue of a writ on two grounds. One ground was that the power granted to the Inspector had not been exercised on the report of the Principal as required by R. 96 and, secondly, on the ground that the order offended the principles of natural justice as it had been passed without an enquiry.

(4) Learned counsel for the petitioner in the alternative to his argument about R. 96 having no statutory force urged that in this case also the order passed by the Inspector of Schools was vitiated by the circumstance that no enquiry was held and consequently it offended against principles of natural justice.

This argument of learned counsel cannot be accepted in view of the facts of this case. The charge against the petitioner was that he had taken part in the uprooting of Mendhi trees from the hostel compound and throwing them in the pile of wood that had been collected for the Holi by the residents of the neighbouring mohalla, and further, that he had taken part in the placing of human excreta near the door of the Warden. These were clearly acts of indiscipline.

The petitioner in his own affidavit says that he had admitted participation in these acts in his letter handed over by him to the Warden. In the affidavit an attempt has been made to make out that this letter of admission was written under duress when the Warden threatened expulsion or rustication of all the boys from the hostel if an admission was not made. It is, however, significant that in the affidavit it is nowhere stated that the admission was false.

When this petition was argued before me, I put the question to learned counsel whether the petitioner was prepared to swear an affidavit that he had not taken part in these acts. Learned counsel thereupon stated that he had questioned the petitioner & the petitioner had admitted to him that he had really taken part in these acts so that the admission made in the letter was perfectly true. Since the petitioner even at this stage admits that the acts were committed by him and that the admission which was made by him in the letter was a true admission, the circumstances under which that letter was taken become irrelevant.

Once that letter of admission was before the Principal and the Inspector of Schools, it is also clear that there was no question of any further enquiry being held before taking disciplinary action against the petitioner.

Learned counsel urged that, if an enquiry had been held, the petitioner would have got an opportunity to show to the Inspector of Schools that, though he had committed these acts, there were circumstances under which these acts were committed which would justify a milder punishment than the punishment of rustication.

That is not at all the purpose of the enquiry which has been envisaged in the principles laid down by the Division Bench of this Court which has been referred to earlier. In fact, in that case it was especially remarked by the learned Judges that :

> "To hold that a student has a legal right to come to a Court of law and require the head of the institution to justify his action where he has meted out some punishment or taken any disciplinary action will be subversive of all discipline in our schools or colleges and we must not, therefore, be deemed to have countenanced any such suggestion by this order. As a matter of fact in more than one case we have observed that this Court will not interfere in the internal autonomy of educational institutions."

In the present case, where there was an admission of the acts of indiscipline, this Court will not enter into any question whether the punishment meted out is or is not in proportion to the facts of indiscipline committed by the petitioner. For that purpose, it is clear that the petitioner's remedy lay in an approach to the appropriate authorities of the institution itself which may be the Warden, the Principal or the Inspector of Schools. On such a ground no writ petition can be entertained.

(5) This petition is consequently rejected.

A/R.G.D. Petition rejected.

A.I.R. 1954 ALLAHABAD 638 (Vol. 41, C.N. 246)

MALIK C. J. AND V. BHARGAVA J. (4-5-1954).

Jwala Prasad, Applicant v. State of Uttar Pradesh and others, Opposite Party.

Civil Misc. Writ Cases Nos. 389, 661 and 690 of 1953.

Constitution of India, Art. 226 — Resignation by Patwari — Withdrawal of, after acceptance — Writ petition.

A Patwari tendered his resignation on 2-2-1953 and asked to be relieved by 3-3-1953. On 10-2-1953, the Sub-Divisional Officer accepted the resignation. On 24-2-1953, he sent his application for permission to withdraw his resignation. No orders were passed on this application as Government's orders were awaited, and on 7-3-1953, a G. O. No. 2627/IB was issued that those Patwaris who had withdrawn their resignations before they were ordered to hand over charge and those who had applied for withdrawal after the acceptance of their resignations may be re-employed as Lekhpals provided they had not attained the age of 57 years, 6 months by March 31, 1953 and had an excellent record of work and had not taken an active part in the agitation. The petitioner was fined, suspended and reduced on a number of occasions and it could by no means be said that his service record was good. On petition under Art. 226 that he should have been allowed to continue in service,

Held, that no question of withdrawal could arise, his resignation having been already accepted. Even if his withdrawal of resignation application had been received before the resignation was accepted, he could not claim an absolute right to withdraw his resignation. The resignation was unconditional, and whether he would be permitted to withdraw that resignation was a matter within the discretion of the appointing authority. After his resignation was accepted on 10-2-1953, he could only be re-employed and the re-employment had to be in accordance with the directions issued by the Government in Government Order dated the 7th of March. The petitioner could not claim that he had a legal right to be re-appointed. His character-roll was not satisfactory. The Sub-Divisional Officer being of that opinion, he decided not to re-appoint the applicant. This he was entitled to do and the applicant could not make a grievance of it in a writ petition under Art. 226.

(Paras 2, 4, 5)

Rajeshwari Prasad, for Applicant; Standing Counsel for opposite Party.

MALIK C. J.:

These writ petitions have no force. They have been filed by three Patwaris who had tendered their resignations which were accepted by the Government, and they now claim that they should have been allowed to continue in service. Learned counsel state that the facts of the three cases are similar and the same point arises in all the three. We will, therefore, give the facts of one case and this judgment will govern the other two cases.

(2) In Miscellaneous Writ Case No. 389 of 1953 Jwala Prasad was appointed Patwari of Akoraha circle, district Banaras in the year 1942. Towards the end of the year 1952 and beginning of 1953 there was a certain amount of agitation among the Patwaris as they considered that their terms and conditions of service were not satisfactory. On 2-2-1953 Jwala Prasad sent a letter of resignation, which is annexure A to his affidavit. The first paragraph of this letter ends with the words "Atah apne pad se tyag patra de deta hun", which means "I am, therefore, tendering my resignation". The last paragraph of this resignation letter is as follows:

> "Atah main yeh tyag patra Sriman ji ki sewa men preshit karke prarthana karta hun ki tarikh 3-3-53 tak mera patra swikar karke mujhe is karya se mukta karneki kripa karen anyatha is tithi ke paschat main is pad ke karya ka uttar dai na rahunga aur apne pad ko karya mukt samjhunga. Tarikh 2-2-53.";

which can be translated as follows:

> "I am, therefore, sending this my letter of resignation to you with the request that you may kindly accept it by the 3rd of March 1953 and relieve me of my responsibilities, otherwise after the expiry of the date I shall consider myself free of the responsibility of this office."

On 5-2-1953, the Land Reforms Commissioner, U. P. issued a circular letter No. 146-196/(4)-/393, dated 5-2-1953, directing all district officers to accept such resignations forthwith and not to wait until 3-3-1953. On 10-2-1953, the resignation of Jwala Prasad was accepted by the Sub-Divisional Officer as he was the appointing authority. Pending the transfer of charge, the petitioner submitted an application on 24-2-1953, for withdrawal of his resignation and for his re-employment as Patwari. No orders were passed on this application as Government's orders were awaited and on 7-3-1953, a G. O. No. 2627/IB was issued that those Patwaris who had withdrawn their resignations before they were ordered to hand over charge and those who had applied for withdrawal after the acceptance of their resignations may be re-employed as Lekhpals provided they had not attained the age of 57 years, 6 months by 31-3-1953, & had an excellent record of work and had not taken an active part in the agitation. In accordance with Government's directions the Land Reforms Commissioner issued a D. O. No. 2658-2705/4-104/53P, dated 30-3-1953, which substantially reproduced the Government order mentioned above.

(3) It is said in the counter-affidavit that as Jwala Prasad's Character-Roll showed 18 adverse entries made against him and his record of service was found to be unsatisfactory, the Sub-Dvisional Officer did not consider him fit for re-employment and he was, therefore, not re-employed and was asked on the 8th of April, 1953, to hand over charge.

(4) In the rejoinder affidavit Jwala Prasad has denied that his service record was bad. But a certified copy of the character-roll is on the record and it shows that he was fined, suspended and reduced on a number of occasions and it can by no means be said that his service record was good. In paragraph 3 of the rejoinder affidavit Jwala Prasad states that he did not receive any order dated 10-2-1953, directing him to hand over charge. It is, however, not denied in the rejoinder affidavit that an order was passed on that date by the Sub-Divisional Officer accepting his resignation, as deposed to in paragraph 3 of the affidavit of Sri Baij Nath Singh.

(5) The facts, therefore, are that Jwala Prasad tendered his resignation on 2-2-1953; that in that resignation he wanted to be relieved by 3-3-1953. On 10-2-1953, the Sub-Divisional Officer accepted the resignation. On 24-2-1953, he sent his application for permission to withdraw his resignation. No question of withdrawal could then arise, his resignation having been already accepted. Even if his withdrawal of resignation application had been

received before the resignation was accepted, he could not claim an absolute right to withdraw his resignation. The resignation was unconditional, and whether he would be permitted to withdraw that resignation was a matter within the discretion of the appointing authority. We do not want to express any opinion on the question whether if the resignation had been conditional, the party tendering it could claim a right to withdraw it, as the point has not arisen in this case. After his resignation was accepted on 10-2-1953, he could only be re-employed and the re-employment had to be in accordance with the directions issued by the Government in Government Order dated the 7th of March. The petitioner could not claim that he had a legal right to be re-appointed. His character-roll was not satisfactory. The Sub-Divisional Officer being of that opinion, he decided not to reappoint the applicant. This he was entitled to do and the applicant cannot make a grievance of it in a writ petition under Art. 226 of the Constitution. The application has, therefore, no force and is dismissed with costs.

A/H.G.P. Petition dismissed.

A.I.R. 1954 ALLAHABAD 639 (Vol. 41, C.N. 247)

CHATURVEDI J. (7-4-1954).

Ram Saroop and others, Applicants v. Board of Revenue, Uttar Pradesh, Allahabad and another, Opposite Party.

Misc. Writ No. 185 of 1954.

(a) Tenancy Laws — U. P. Abolition of Zamindari and Land Reforms Act 1950 (1 of 1951), S. 6(1) — Rules under Act, Rr. 4 and 5 — "Suit" in S. 6(1) includes appeal — Rules regarding abatement of appeal are not ultra vires — (Words and Phrases — "Suit")

The word 'suit' includes appeals and S. 6(1) which permitted the framing of rules with respect to abatement of suits, therefore, also conferred power on the State Government to frame rules with respect to abatement of appeals as well.

Rules 4 and 5 under the Act, which permit the stay and the abatement of the appeals as well as the suit are not therefore ultra vires. (Para 3)

(b) Tenancy Laws — U. P. Abolition of Zamindari and Land Reforms Act, 1950 (1 of 1951), S. 26 (2) (b) — Abatement of suit is one of the methods of disposal — Rr. 4 and 5 under Act are not ultra vires.

Abatement of suit being one of the methods of disposing of a suit it is included within S. 26(2)(b) under which the State Government was permitted to adopt any method it thought proper of disposal of the suit. Hence Rr. 4 and 5 are not ultra vires on this ground. (Para 4)

(c) Tenancy Laws — U. P. Abolition of Zamindari and Land Reforms Act, 1950 (1 of 1951), Ss. 6(1) and 26(2)(b) — Rr. 4 and 5 taking away right of appeal — Rules are validly framed.

Both S. 6(1) and S. 26(2)(b), specifically confer power on the State Government to make rules providing for the stay or disposal of suits of a certain nature. The power cannot be challenged as being an undue delegation of authority because the whole of the Act has been declared to be valid by the Supreme Court of India. It must therefore be taken that the power conferred by the above two provisions on the State Government to make the rules is a valid power and if the power has been validly conferred and the State Government, in the exercise of the power so conferred, has made rules, it cannot be said that the rules are ultra vires or beyond the powers of the State Government. Rules 4 and 5 therefore cannot be challenged on the ground that they take away right of appeal conferred by statute. (Para 4)

(d) Tenancy Laws — U. P. Abolition of Zamindari and Land Reforms Act, 1950 (1 of 1951), S. 6(1) — Orders under, after vesting order are valid.

The power conferred under S. 6(1) can be properly exercised after the passing of the vesting order. Consequently orders of the Revenue Board passed after 1st July 1952, i.e. after the vesting order, are valid. (Para 4)

(e) Tenancy Laws — U. P. Abolition of Zamindari and Land Reforms Act, 1950 (1 of 1951), Rules under, Rule 5 — Rule is not invalid because it leads to multiplicity of suits — (Interpretation of Statutes) — (C. P. C. (1908), Preamble).

The rules framed under this Act have really the force of law. It cannot be said that the provision of Rule 5 is in any way unreasonable.

An enactment cannot be held to be invalid because as a result of it a multiplicity of litigation may follow. Rule 5 which provides that an order of abatement shall not debar a person from having his right determined in any subsequent proceeding is not invalid because it leads to multiplicity of suits. (Para 4)

Anno: C. P. C., Preamble N. 7.

Bhawani Prasad, for Applicants; Standing Counsel, for Opposite Party.

ORDER: This is a petition under Art. 226 of the Constitution. The petitioners filed a suit under S. 180, of the U. P. Tenancy Act in respect of certain plots of land against the respondent No. 2. The suit was decreed by the trial court but was dismissed by the Additional Commissioner of Agra. The petitioner then filed a second appeal before the Board of Revenue. This appeal was filed on 29-7-1950. Before, however, the appeal could be heard on merits, a vesting order was passed under S. 4, U. P. Zamindari Abolition and Land Reforms Act (No. 1 of 1951), on 1-7-1952. Certain rules were framed under the said Act and under rule 4 of the Rules the Board of Revenue ordered the hearing of the appeals to be stayed on the merits and fixed 10-11-1953 for hearing the parties under rule 5(a) (I) of the rules in order to determine whether the appeal should be abated or not.

One Member of the Board of Revenue heard the appeal on that date and passed an order on 12-11-1953 holding that the suit and the appeal should both be held to have abated. On 18-12-1953, another Member of the Board concurred in this order. The result of these two orders was that the petitioners' appeal and the suit were held to have abated.

(2) The present petition was filed on 2-3-1954 praying for the quashing of the orders of the Members of the Board of Revenue dated 12th

November and 18-12-1953 already referred to above and to direct the Board to hear and decide the appeal on merits.

(3) It is not contended by the learned counsel that the decision of the Board that rules 4 and 5 apply to the case and that the appeals had to be declared to have abated under those rules was an incorrect decision.

What he has submitted beore me is that these rules are ultra vires and should not have been acted upon by the Members of the Board. He has urged a number of grounds on which he asserts that the rules should be held to be ultra vires. He has challenged the validity of rules Nos. 4 and 5 only framed under the Act.

The first contention of the learned counsel is that section 6(1) only says that suits and proceedings of the nature to be prescribed shall be stayed and the rule does not say that the appeals are also to be stayed. Rules 4 and 5 permitted the stay and the abatement of the appeals as well as the suit. The argument of the learned counsel is that the rules in respect of the abatement of appeals were not authorised by clause (1) of S. 6, U. P. Zamindari Abolition and Land Reforms Act.

I do not agree with the contention because the word 'suits' really includes appeals also. The appeals are really a continuation of the suits and the suits continue not only in the court of the first appeal but also in the court of the second appeal. There are a number of decisions of this Court on the point, and it is not necessary to mention those decisions. It is well settled that the word 'suit' includes appeals and S. 6(1) which permitted the framing of rules with respect to abatement of suits, therefore, also conferred power on the State Government to frame rules with respect to abatement of appeals as well.

(4) The second point argued by the learned counsel was that under S. 26 (2) (b) the State Government is authorised to make rules for the disposal of suits and proceedings stayed under this chapter, but he says that clause (b) does not permit the Government to frame a rule directing the abatement of a suit.

Learned Counsel concedes that abatement of a suit is one of the methods by which a suit may be disposed of. But he says that it is not the only method of disposing of a suit. Abatement being one of the methods. I fail to see why it is not included within S. 26 (2) (b). It is one of the methods of disposal of a suit and the State Government was permitted to adopt any method it thought proper of disposal of the suits. This argument of the learned counsel also therefore does not appeal to me.

His third contention was that the petitioners were conferred a right of appeal by the Statute and the right could only be taken away by another statute and not by any rules framed by the State Government. This contention would have had force if the Statute itself had not provided for the stay or abatement of the suit; but both S. 6(1) and S. 26(2)(b) specifically confer power on the State Government to make rules providing for the stay or disposal of suits of a certain nature. The power cannot be challenged as being an undue delegation of authority because the whole of the Act has been declared to be valid by the Supreme Court of India. I must therefore take it that the power conferred by the above two provisions on the State Government to make the rules is a valid power and if the power has been validly conferred and the State Government, in the exercise of the power so conferred, has made rules, it cannot be said that the rules are ultra vires or beyond the powers of the State Government.

If the power itself conferred by the above two provisions could be questioned as an invalid delegation of power, the position might have been different; but as far as the U. P. Zamindari Abolition and Land Reforms Act is concerned, this power has been finally held to be properly delegated and that being the position, it cannot be said that the delegatee when he exercised that power was not authorised to do so.

The next argument of the learned counsel was that the rules purported to have come into force on the 30th of June, 1952, whereas the consequences of the vesting order mentioned in section 6 could only have ensued after the vesting order had been made which was done on the 1st of July, 1952, that is, one day after the rules are said to have come into force.

The power conferred under S. 6(1) could be properly exercised after the passing of the vesting order and it may be that the rules framed for the staying of suits under section 6 (1) may not have been valid on 30-6-1952. But the vesting order having been passed the next day the rules could certainly be enforced after the vesting order, that is, from 1-7-1952. In this case it will be immaterial whether the rules staying suits were actually valid or not on 30-6-1952. The orders of the Board of Revenue were passed after the 1st July 1952, that is, after the date of the vesting order and the rules after the vesting order certainly had the force of law.

The next point urged by the learned counsel was that rule 5 of the Rules provides that an order of abatement shall not debar a person from having his right determined in any subsequent proceeding and this provision is invalid because it leads to multiplicity of suits.

An enactment cannot be held to be invalid because as a result of it a multiplicity of litigation may follow and the rules framed under this Act have really the force of law. It cannot also be said that this provision was in any way unreasonable. In view of the change brought about by the vesting order it was found necessary to put an end to a number of previous suits which were filed when the zamindars still had the right to eject tenants. That right having been taken away by the vesting order, the Government considered it proper to stay some of the old suits and even to declare them to have abated. As the situation then stood, the provision was a reasonable one.

The further provision that the abatement did not debar the party from having his right determined in other proceedings was an essential provision because the suit having abated without being decided on merits any decision that had been arrived at in those proceedings could not obviously be given the force of res judicata. It was but reasonable that under the circumstances a provision should have been made that the abatement of the suits would be no bar to the determination of the same question in any subsequent litigation.

I am therefore not prepared to hold that rules 4 and 5 are invalid or ultra vires on the grounds urged by the learned counsel for the petitioners.

(5) The petition, therefore, fails and is hereby dismissed.

B/R.G.D. Petition dismissed.

A.I.R. 1954 ALLAHABAD 641 (Vol. 41, C. N. 248)

(LUCKNOW BENCH)

MALIK C. J. (12-3-1954).

Surendra Nath, Plaintiff-Appellant v. Manik **Chand**, Defendant-Respondent.

Second Appeal No. 63 of 1953, against decree of **Addl.** Civil J., Lucknow, D/- 18-11-1952.

(a) Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), Ss. 14 and 3 — Decree for ejectment obtained prior to Act becoming inexecutable — Second suit for ejectment — Maintainability — (Civil P. C. (1908), Ss. 47 and 48) — (Limitation Act (1908), Art. 182.)

Section 14 applies to cases where a decree was obtained for ejectment of a tenant before the date of the Act. Such a decree can be executed on one of the grounds mentioned in S. 3 of the Act. (Para 4)

If, before the period of limitation prescribed under Art. 182, Limitation Act or S. 48, Civil P. C., for execution of the decree has expired, any one of the grounds mentioned in S. 3 of the Act has come into existence, the decree-holder can execute his decree for ejectment. If, however, instead of executing the decree, he has filed a fresh suit in the Court, which could execute the decree, S. 47 of the Code of Civil Procedure will apply and the suit may be treated as a proceeding for execution. If, however, the period of limitation for execution of the decree has expired, and the decree has thus become unexecutable, if the relationship of landlord and tenant has continued to exist, there is nothing in law to prevent a landlord from giving fresh notice for ejectment and on the new cause of action filing a fresh suit on any of the grounds mentioned in S. 3. (Para 6)

(b) Houses and Rents — U. P. Temporary Control of Rent and Eviction Act (3 of 1947), S. 14, Proviso — Scope.

The proviso to S. 14 is only for the protection of the landlord and it means that a tenant cannot take advantage of the provisions of S. 14 of the Act unless he agrees to pay to the landlord reasonable annual rent or the rent payable by him before the passing of the decree, whichever is higher. If the tenant gives the undertaking the decree becomes unexecutable, but that does not mean that the landlord has lost all remedy and is not entitled to execute the decree if the period of limitation has not expired, or file a fresh suit, if any of the grounds mentioned in S. 3 has come into existence. To take a contrary view would mean that once the undertaking has been given by the tenant under S. 14 and the decree has become unexecutable the tenant has only to wait and after the decree has become time-barred he can do so as he likes and, even if any of the grounds (a) to (f) or all of them in S. 3 exist, the landlord can do nothing to him. (Para 8)

R. B. Bisaria, for Appellant; D. P. Khare, Suraj Sahai and Ram Saran Bhatia, for Respondent.

JUDGMENT: This is a plaintiff's appeal. It is admitted that the plaintiff is the owner of the house and the defendant is his tenant. On 22-9-1945, the plaintiff filed a suit No. 282 of 1945 in the court of the Munsif Havali, Lucknow, for the ejectment of the defendant. The parties entered into a compromise and a decree in terms of the compromise was passed on 31-12-1945. The decree provided that the defendant had agreed to vacate the house on 1-8-1946. The defendant, however, did not vacate the premises and the plaintiff filed an application for execution. The defendant thereupon filed an objection under S. 7, U. P. Ordinance No. 111 of 1946, which had come into force on 1-8-1946, that he could not be ejected from the premises except in accordance with the provisions of that section.

Section 7 provided that no decree for the eviction of a tenant from any accommodation passed before the commencement of the Ordinance shall in so far as it relates to the eviction of such tenant be executed against him as long as the Ordinance remained in force except on any of the grounds mentioned in section 3 provided that the tenant agreed to pay to the landlord reasonable annual rent or the rent payable by him before the passing of the decree, whichever was higher. On 8-2-1947, the objection was allowed and the execution case was dismissed.

(2) On 7-11-1950, the plaintiff obtained from the District Magistrate permission under S. 3, U. P. Temporary Control of Rent and Eviction Act (U. P. Act III of 1947), which had replaced the Ordinance, to file a suit for the ejectment of the tenant and filed suit No. 3 of 1951, after having given the defendant notice to quit. The suit failed as the notice to quit was held to be invalid as it did not end with the date of termination of the tenancy. A third suit, Suit No. 161/174 of 1952, was then filed after a fresh notice and it was decreed by the trial court. The lower appellate court allowed the defendant's appeal and dismissed the suit on the ground that a suit for ejectment of the defendant did not lie and the plaintiff's only course was now to wait as long as the Act remained in force and apply for execution of the decree in suit No. 282 of 1945 after the Act was repealed. The plaintiff has come up to this Court in second appeal.

(3) The only question for consideration in this appeal is whether the suit was maintainable. The learned Civil Judge was of the opinion that no fresh suit could be filed.

(4) The scheme of the Act has been discussed by me in several cases. I have pointed out that S. 14 applies to cases where a decree was obtained for ejectment of a tenant before the date of the Act. Such a decree can be executed on one of the grounds mentioned in S. 3 of the Act. Section 15 makes the Act applicable to pending suits and no decree for ejectment can be passed except on one of the grounds mentioned in S. 3 and no suit can be filed after the Act was passed except on one of the grounds mentioned in that section.

(5) There is no provision in the Act to stay proceedings and the decree has to be executed within the period of limitation prescribed by Art. 182 of the Limitation Act and S. 48 of the Code of Civil Procedure.

(6) If, before the period of limitation for execution of the decree has expired, any one of the grounds mentioned in S. 3 of the Act has come into existence, the decree-holder can execute his decree for ejectment. If, however, instead of executing the decree, he has filed a fresh suit in the court, which could execute the decree, S. 47, Civil P. C., will apply and the suit may be treated as a proceeding for execution. If, however, the period of limitation for execution of the decree has expired, and the decree has thus become unexecutable, if the relationship of landlord and tenant has continued to exist, there is nothing in law to prevent a landlord from giving fresh notice for ejectment and on the new cause of action file a fresh suit on any of the grounds mentioned in S. 3.

(7) It is admitted in this case that the defendant has continued to pay rent and the plaintiff has continued to receive it. It is also admitted that the plaintiff is the owner of the premises and the defendant is his tenant. The mere fact that the previous decree has become inexecutable does not take away the right of the landlord to give a fresh notice for ejectment if any of the grounds mentioned in S. 3 of the U. P. Temporary Control of Rent and Eviction Act has come into existence. If a landlord brings a suit for ejectment and that suit fails on any technical ground it cannot be said that he has no right to file a fresh suit. If the decree for ejectment became inexecutable by reason of the provisions of the U. P. Temporary Control of Rent and Eviction Act there seems to be no reason why a fresh suit should be barred. Even if a landlord has obtained a decree for ejectment against a tenant but for some reason has not ejected the tenant and the relationship of landlord and tenant has continued — the tenant has continued to pay rent and the landlord to accept it — a fresh suit for ejectment would lie after due notice giving rise to a fresh cause of action.

(8) Reliance has been placed by learned counsel on the proviso to S. 14 of the Act and it is urged that the view that I have taken will make that proviso nugatory. I fail to see why that should be so. The proviso to S. 14 is only for the protection of the landlord and it means that a tenant cannot take advantage of the provisions of S. 14 of the Act unless he agrees to pay to the landlord reasonable annual rent or the rent payable by him before the passing of the decree, whichever is higher. If the tenant gives the undertaking the decree becomes unexecutable, but that does not mean that the landlord has lost all remedy and is not entitled to execute the decree if the period of limitation has not expired, or file a fresh suit, if any of the grounds mentioned in S. 3 has come into existence. To take a contrary view would mean that once the undertaking has been given by the tenant under S. 14 and the decree has become unexecutable the tenant has only to wait and after the decree has become time-barred he can do so as he likes and, even if any of the grounds (a) to (f) or all of them in section 3 exist, the landlord can do nothing to him. Some of the grounds are serious from the point of view of the landlord; (a) relates to a case of wilful default in payment of rent, (b) relates to a case of causing substantial damage to the accommodation, (c) relates to a case of addition and alteration made to the building, (d) provides for a case of nuisance, (e) for illegal sub-letting and (f) for renouncing his character as such and denying the title of the landlord. No doubt in this case it is not alleged that any of the grounds (a) to (f) exist but the landlord has obtained from the District Magistrate permission to file a suit, which has been held to be enough to entitle him to maintain it. I am, therefore, of the opinion that the case was correctly decided by the trial court and the decision of the lower court is erroneous and must be set aside.

(9) The learned Additional Civil Judge has in his judgment made the following remarks:

> "unless the legislature desired that some owners should not get their own houses so long as the Act was in force, inspite of the District Magistrate desiring it, an amendment is long overdue".

I may point out that judges will do well to confine themselves to the issues before them that call for decision and avoid as far as possible such general remarks. I may further point out that it is not open to the courts to question the policy of the legislature, which represents the sovereign will of the people.

(10) The decree of the lower appellate court is set aside and the decree of the trial court is restored. I consider, however, it is a fit case in which the parties should bear their own costs.

(11) Leave to appeal is refused.

B/K.S.B. Appeal allowed.

A.I.R. 1954 ALLAHABAD 642 (Vol. 41, C. N. 249)

BRIJ MOHAN LAL J. (10-2-1954).

Aziz Khan, Applicant v. State.

Criminal Reference No. 201 of 1953.

Criminal P. C. (1898), Ss. 408, 414, 415 and 439(5) — Scope — (Penal Code (1860), S. 53) — (Essential Supplies (Temporary Powers) Act (1946), S. 7) — (Cotton Textile (Control of Movement) Order (1948), Cl. 3).

Section 408, Cr. P. C., confers on a person convicted by a Magistrate, First Class, a right of appeal to the court of Session. Section 414 contains an exception to the general rule. The exception contained in the latter section will not apply to the case of a person convicted in a summary trial of an offence of contravening clause 3, Cotton Textile (Control of Movement) Order where he is awarded both a sentence of fine and sentence of forfeiture of the cloth seized because the punishment awarded is of two different kinds and not a sentence of fine only within the meaning of S. 414. In such a case, an appeal could be brought by an application of S. 415 also because the sentence of fine has been combined with the sentence of forfeiture of property. In such circumstances no revision would lie as an appeal lies. (Paras 3, 4, 5)

Anno: Cr. P. C., S. 408, N. 8; S. 414, N. 4; S. 415, N. 1; S. 439, N. 46; Pen. Code, S. 53, N. 1.

ORDER: This is a reference under S. 438, Criminal P. C., by the learned Sessions Judge of Shahjahanpur. He recommends that Aziz Khan's conviction under S. 7 of the Essential Supplies (Temporary Powers) Act (24 of 1946) read with Cl. 3, Cotton Textile (Control of Movement) Order, 1948 recorded by a learned Magistrate of that district in a summary trial be quashed and that the sentence of a fine of rupees twentyfive and of the forfeiture of certain quantity of cloth be set aside.

(2) Aziz Khan had filed a revision before the learned Sessions Judge and thereupon the learned Sessions Judge made this reference. Obviously it was taken for granted by Aziz Khan in the court below that the sentence awarded to him was not appealable. The learned Sessions Judge made a brief reference to this question in the note appended to his judgment. He was of the opinion that since it was not proved that the cloth of which forfeiture had been ordered was worth more than rupees one hundred and seventyfive, no appeal lay. In a summary trial an appeal is not provided in cases where the sentence is of fine only, and the fine does not exceed rupees two hundred. Obviously the learned Judge thought that no appeal lay if the value of the cloth and the amount of the fine taken together did not exceed the sum of rupees two hundred.

(3) I have given due thought to this question and I have come to the conclusion that the

sentence passed by the learned Magistrate was appealable and that the learned Sessions Judge could himself give appropriate relief to Aziz Khan if an appeal had been preferred by him. In the circumstances S. 439 (5), Criminal P. C. came into play; no revision could be entertained at the instance of Aziz Khan and consequently no reference could be made to this Court.

(4) Section 408, Criminal P. C. confers on a person convicted by a Magistrate, First Class, a right of appeal to the Court of Session. Section 414 contains an exception to the general rule and provides that:

"Notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under Section 260 passes a sentence of fine not exceeding two hundred rupees only."

In order to make this section applicable two conditions must exist, viz., (1) the sentence must be of fine only and (2) the amount of fine imposed on the convicted person must not exceed rupees two hundred. If the sentence is not of fine only in the sense that besides fine some other kind of punishment also is inflicted the section does not apply.

In the present case the Magistrate awarded, in addition to the sentence of fine, a sentence of forfeiture of cloth. Forfeiture of property is one of the recognised forms of punishments. Section 53, I. P. C. enumerates the different kinds of punishments which can be awarded to an accused person and forfeiture of property and fine are mentioned as two distinct kinds of punishments under clauses fifthly and sixthly. The result, therefore, is that in the present case punishments of two different kinds were awarded to Aziz Khan and, therefore, the sentence was not of fine only within the meaning of S. 414. If the exception contained in S. 414 did not apply the case fell within the ordinary rule contained in S. 408, Cr. P. C., and the appeal lay.

(5) Reference may also be made in this connection to Section 415, Criminal P. C. which lays down that:

"An appeal may be brought against any sentence referred to in..... Section 414 by which any punishment therein mentioned is combined with any other punishment....."

By the application of this section also an appeal could be brought. In the present case a sentence of fine has been combined with the sentence of forfeiture of property which is a punishment of a different kind. An appeal, therefore, lay to the learned Sessions Judge. The value of the cloth ordered to be forfeited was totally immaterial.

(6) I am, therefore, of the opinion that an appeal did lie to the learned Sessions Judge and no revision lay to him. It may be that the appeal may have by this time become time-barred. The learned Sessions Judge may either treat the revision as a petition of appeal or may, in the event of a separate appeal being preferred, give the accused the benefit of Section 5 of the Indian Limitation Act.

(7) Subject to the above remarks the reference is rejected. Let the papers be returned to the learned Sessions Judge.

B/M.K.S. Reference rejected.

A.I.R. 1954 ALLAHABAD 643 (Vol. 41, C.N. 250)

MALIK C. J. AND MUKERJI J. (12-2-1954)

Pt. Balmukand, Judgment-debtor-Objector-Appellant v. Veer Chand, Decree-holder-Respondent.

Execution First Appeal of 1954 against order of Civil J., Agra, D/- 6-2-1954.

Civil P. C. (1908), S. 47 and O. 21, R. 32 — Decree for specific performance of contract of sale silent as to delivery of possession — Power of executing Court to grant delivery of possession — (T. P. Act (1882), S. 55(1)(f)).

Where a decree for specific performance of a contract of sale is silent as to the relief of delivery of possession even though claimed in the suit, the executing Court is still competent to deliver possession. AIR 1950 All 415, Rel. on. (Para 4)

It is not necessary in a suit for specific performance either to separately claim possession or for the Court to pass a decree for possession. A decree for specific performance of contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by S. 55 of the Transfer of Property Act. (Para 4)

The decree for specific performance, which provides that the property shall be sold to the plaintiff by the defendants and the sale deed shall be executed within a certain time, failing which the Court will have the sale deed executed by a person nominated by it, implies that delivery of possession shall be given in accordance with the provisions of S. 55(1)(f) of the Transfer of Property Act. Delivery of possession is a necessary ingredient and part of transfer of ownership. (Para 2)

Anno: C. P. C., S. 47 N. 2; O. 21, R. 32 N. 13; T. P. Act, S. 55 N. 7.

CASE REFERRED: Para

(A) (V37) AIR 1950 All 415: 1950 All LJ 296 4

Shambhu Prashad and Pratap Narain Bakshi, for Appellant.

MALIK C. J.:

This is a judgment-debtor's appeal The plaintiff filed a suit for specific performance of a contract and the suit was decreed. Learned counsel has stated that the plaintiff had also asked for delivery of possession of the property but no mention was made in the decree about delivery of possession. The terms of the decree were as follows:

"The plaintiff's suit for specific performance of the contract of sale dated 12-1-1948 is decreed against the defendants and the defendants 1 to 5 are ordered to execute a sale deed of the property in dispute in favour of the plaintiff on payment of....."

It is urged by learned counsel that the plaintiff having claimed possession and possession not having been specifically granted in the decree, it must be deemed that the relief for possession was refused and the plaintiff cannot, therefore, claim delivery of possession.

(2) We do not think there is any force in this contention. Section 55(1) (f) of the Transfer of Property Act (iv of 1882) provides that

"The seller is bound

(f) to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits;"

The decree for specific performance, which provides that the property shall be sold to the plaintiff by the defendants and the sale deed shall be executed within a certain time, failing which the court will have the sale deed executed by a person nominated by it, implies that delivery of possession shall be given in accordance with the provisions of S. 55(1) (f), T. P. Act. Delivery of possession is a necessary ingredient and part of transfer of ownership.

(3) Learned counsel has relied on the provisions of Order 21, Rule 32(5), Civil P. C. which are as follows:

"Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree."

We fail to see how these provisions help the judgment-debtor appellant. The sub-rule quoted above provides what the executing court can do when there is a decree for specific performance and where it is necessary for something to be done by the decree-holder at the cost of the judgment-debtor.

(4) In — 'Arjun Singh v. Sahu Maharaj Narain', AIR 1950 All 415 (A), a Bench of this Court held that:

"Where in a suit for specific performance of a contract of sale no relief for possession is claimed and consequently the decree passed in the suit contains no relief for delivery of possession, the Court executing the decree is competent to deliver possession, an order directing delivery of possession being merely incidental to the execution of the deed of sale."

Learned counsel has urged the case is distinguishable as in that case relief for possession was not claimed, but in the case before us relief for possession was claimed, but no mention of it was made in the decree. We do not think that it is necessary in a suit for specific performance either to separately claim possession or it is necessary for the Court to pass a decree for possession. A decree for specific performance of contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by S. 55, T. P. Act.

(5) There is, therefore, no force in this appeal and it is dismissed under Order 41, R. 11, Civil P. C.

B/K.S.B. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 644 (Vol. 41, C.N. 251)

MALIK C. J. AND GURTU J. (23-3-1954)

Gopal Das and others, Creditors-Appellants v. Mst. Parbhawati Devi, Claimant-Respondent.

First Appeal No. 266 of 1946, from decision of Special J., 1st grade, Ghazipur, D/- 27-2-1945.

Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 11(2) — Ornaments as security for certain debt — Application under S. 4 — Effect.

It is not possible under the Encumbered Estates Act to earmark any property for the satisfaction of any particular debt. The words of S. 11(2) of the Act that "the Special Judge has to determine whether the property specified in the claim or any part thereof is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant" must be interpreted to mean debts generally and not any specified debt.

Held on facts of the case that certain ornaments were available as a part of the general assets of the landlord-applicants and the objector could not claim that she was entitled to get back the ornaments by paying the amount of the specific debt borrowed on the basis thereof. (Para 3)

K. B. Asthana, for Appellants; Shambhu Prasad and P. N. Bakshi, for Respondent.

MALIK C. J.:

Rajendra Lal and Pande Lal, Gopal Lal and others applied under S. 4, Encumbered Estates Act. In the list of debts it was mentioned that certain amounts were due and had been borrowed from the appellants on the security of certain ornaments. The list of ornaments was given in lists A, B, C and D of the application. An objection was filed by Parbhawati Devi that these ornaments were her 'stridhan' property and did not belong to the landlord-applicants. The objection was considered by the learned Special Judge who held that certain ornaments, mentioned in the order of the learned Judge, were stridhan property of Parbhawati Devi. Her objection was allowed as regards those ornaments but her claim to the rest of the ornaments was dismissed. The creditors filed an appeal while on behalf of Parbhawati Devi a cross-objection was filed in this Court.

(2) So far as the facts are concerned, learned counsel have not been able to satisfy us that the decision of the lower court on the facts was wrong and the finding, therefore, that only some of the ornaments were 'stridhan' properties of Parbhawati Devi must be affirmed. The argument advanced by learned counsel for the appellants, however, is that under S. 11, Encumbered Estates Act, the learned Special Judge had to decide whether the property specified in the claim of Parbhawati Devi, or any part thereof, was liable to attachment, sale or mortgage in satisfaction of the debts of the landlord-applicants. Reliance is placed on the statement made by Parbhawati Devi in the witness-box that she had given those ornaments to her husband with the knowledge that he was going to pawn them and borrow money on their security. She stated that she was on good terms with her husband, that she knew that he was going to raise money and that she believed the husband's assurance that he would redeem the ornaments and return the same to her.

It is argued by learned counsel for the appellants that the ornaments were, therefore, liable to sale in satisfaction of the debts of the landlord-applicants and the learned Judge need not have gone into the question whether they were the 'stridhan' property of Parbhawati Devi.

(3) The scheme of the Act, however, is that the Special Judge has to prepare a complete list of all debts, secured and unsecured, and a list of properties belonging to the landlord-applicants. Both these lists are sent to the Collector to satisfy the debts from the property contained in the list. The debts are classified into six classes under S. 16 in order of priority but the entire property of the landlord-applicants is available for payment of the debts in the order in which they have been placed under S. 16 of the Act. If it is held that the ornaments which belonged to Parbhawati Devi and

were her stridhan property were liable for the debts of the landlord-applicants, it would mean that the ornaments will be available for the satisfaction of all the debts of the landlord-applicants and not necessarily the debt which was borrowed on the security of the ornaments.

To illustrate this a little in detail, we may mention that suppose a sum of Rs. 2,000/- was borrowed on the security of these ornaments but the total liability of the landlord-applicants amounts to Rs. 50,000/-. The ornaments will be available as a part of the general assets of the landlord-applicants and the objector Parbhawati Devi could not claim that she was entitled to get back the ornaments by paying the amount of loan borrowed on the basis thereof. It is not possible under the Encumbered Estates Act to earmark any property for the satisfaction of any particular debt. The words of section 11(2) of the Act that "the Special Judge has to determine whether the property specified in the claim or any part thereof is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant" must be interpreted to mean debts generally and not any specified debt. In the case of a Hindu son the doctrine of pious obligation entitles the creditors of the father to recover their debts not only from the father's share but also from the son's share in the joint family property. The section would apply to such a case. To hold in appellants' favour would mean that even though Parbhawati Devi gave her ornaments as security for a particular loan of a limited amount, by reason of her husband and other members of the family having now applied under the Encumbered Estates Act, her ornaments would be available for satisfaction of other debts with which she had no concern. In the circumstances we think that the proper interpretation of sub-s. (2) of S. 11 is that the property or any part thereof should be liable to attachment, sale or mortgage in satisfaction of the debts of the applicants and not of any particular specified debt.

(4) The appeal and the cross-objection both fail and are dismissed but we do not think it is a fit case in which we need make any order as to costs.

B/D.R.R. Appeal and cross objection dismissed.

A.I.R. 1954 ALLAHABAD 645 (Vol. 41, C.N. 252)

(LUCKNOW BENCH) SAPRU J. (5-2-1954).

Ram Adhar and others, Applicants v. State.

Criminal Revn. No. 308 of 1953, against order of Civil and Sessions J., Pratapgarh, D/- 5-8-1953.

Criminal P. C. (1898), S. 340 — Court refusing to hear counsel of accused — Effect.

One of the principles which is firmly embedded in the system of jurisprudence that is administered in India is that justice must not only be done, but must seem to be done. If parties either to a civil or a criminal litigation were to get the impression that Courts have no use for counsel, that they are not prepared to hear arguments addressed to them and that they come to Courts with closed minds, confidence in the administration of justice will be shaken. (Para 2)

It is therefore neither right nor proper for a judge to remark that no useful purpose will be served by hearing the applicants or their counsel. An accused person has right to expect that his case shall not be approached with a closed mind but this is the impression which such a remark is likely to create in the minds of the litigant public. (Para 2)

While it is incumbent on the courts to see that their time is not wasted by frivolous arguments, it is also obligatory on them to remember that without the assistance of counsel the quality of their work will possibly suffer. (Para 2)

Held that the Court was wrong in refusing to allow any arguments addressed to him and hence the order passed in revision was set aside. (Para 4)

Anno: Cr. P. C., S. 340, N. 7.

1949 Mitra: S. 340, (Topic discussed in N. 7 to S. 340 in AIR Com., extra).

B. L. Shukla, for Applicants; K. S. Verma, for Addl. Govt. Advocate, for the State.

ORDER : I am rather surprised at the judgment of the learned Sessions Judge upholding the conviction of the applicants accused without affording an opportunity either to the applicants or to their counsel to present the case for them. The learned Sessions Judge appears to think that special credit is due to him for having refused to hear arguments proposed to be addressed by the applicants' counsel or the applicants themselves.

(2) It may be that in an application in revision it is not obligatory on the Court to hear counsel, but even at the admission stage Courts prefer to hear counsel. It should be borne in mind by our Sessions Judges and our Magistracy that citizens have a right in a democratic State to seek the assistance of our Courts of law for the protection of their right to life, reputation and liberty. One of the principles which is firmly embedded in the system of jurisprudence that we administer is that justice must not only be done, but must seem to be done. If parties either to a civil or a criminal litigation were to get tne impression that Courts have no use for counsel, that they are not prepared to hear arguments addressed to them and that they come to Courts with closed minds, confidence in the administration of justice will be shaken. It is neither right nor proper for a Judge to remark, as the learned Sessions Judge has done in this particular case, that no useful purpose will be served by hearing the applicants or their counsel. An accused person has right to expect that his case shall not be approached with a closed mind but this unfortunately is the impression which a remark of the character made by the learned Sessions Judge is likely to create in the minds of the litigant public. While it is incumbent on the Courts to see that their time is not wasted by frivolous arguments, it is also obligatory on them to remember that without the assistance of counsel the quality of their work will possibly suffer.

(3) Fortunately the reputation of our Judiciary in this State stands high and it is not usual for our Judges to refuse to hear counsel or the accused, if he is not represented by counsel. I do not mean to suggest that it is not part of a Judge's duty to control arguments so as to ensure that they shall only be of a relevant character. It is, however, definitely undesirable to rule out all arguments whether relevant or irrelevant and to make a boast of having done so. I am bound to say that I do not look upon the approach to this case by the learned Sessions Judge as a proper one. It is not consistent with principles of natural justice.

(4) As I think that the learned Sessions Judge was wrong in refusing to allow any argument to

be addressed to him, I do not think it desirable to discuss his judgment, which in other respects too is a perfunctory one, to see whether the view arrived at by him was correct or not. I have, in these circumstances, come to the conclusion that the correct course for me is to set aside the order of the learned Sessions Judge and direct him to rehear the application in revision according to law, after giving an opportunity to the applicants or their counsel to argue their case. I order accordingly.

B/D.R.R. Revision allowed.

A.I.R. 1954 ALLAHABAD 646 (Vol. 41, C.N. 253)

V. BHARGAVA J. (9-3-1954)

Sm. Ramditi Kharbanda, Applicant v. Collector Allahabad and others, Opposite Party.

Misc. Writ No. 95 of 1953.

(a) Co-operative Societies Act (1912), S. 42 — Contribution and other assets — Distinction — (Constitution of India, Art. 226).

Section 42 deals separately with contributions to be made by the members etc. with costs of liquidation and with collection and distribution of assets of the society. The amounts due by a debtor to the society can be treated as assets of the society and not as contributions. The liquidator is wrong in treating the amount due from a member in respect of the loan taken by him as contributions. The amount which was claimed from the member in respect of loans advanced or interest thereon being the dues of the society and not contribution, the liquidator is wrong in including those amounts in the contribution order. Further, these amounts are not recoverable under Sub-s. (4A) of S. 42 as arrears of land revenue. These amounts can only be recovered by following the procedure laid down by Cl. (a) of sub-section (5) of S. 42. Consequently, the proceedings that are being taken for the realisation of sums due on account of the loans advanced to the member as arrears of land revenue are not in accordance with law and they are liable to be quashed. (Para 3)

Anno: C. S. Act, S. 42 N. 2a, 2b, 4.

(b) Co-operative Societies Act (1912), S. 42 — Objections to realisations — (Constitution of India, Art. 226).

The point whether the petitioner should have filed her objections before the liquidator or before the Registrar or can put forward her objections when proceedings are taken by the Civil Court under Cl. (a) of Sub-s. (5) of S. 42 is a matter that can be decided when those proceedings are taken. It is not necessary to go into this question in the proceedings under Art. 226 for the issue of a writ restraining the opposite parties from taking proceedings for realising as arrears of land revenue the amounts due in respect of the loans and interest thereon. (Para 3)

Anno: C. S. Act, S. 42 N. 4, 5.

(c) Co-operative Societies Act (1912), S. 42 — Costs of liquidation — (Constitution of India, Art. 226).

The liquidator has the power to determine the costs of liquidation and such costs of liquidation can be recovered as arrears of land revenue under sub-s. (4A) of S. 42. If the petitioner has any grievance that the costs of liquidation had been determined incorrectly or on wrong basis such as fixation of the costs of liquidation on persons in proportion to their liabilities as debtors instead of their liability as members, past members or their legal representatives, it is for her to move the appropriate authorities which may be the liquidator or the Registrar. The costs of liquidation being payable by a member, past member or his legal representative are liable to be paid by the petitioner in that capacity. Therefore, whatever proceedings are being taken in respect of the realisation of the costs of liquidation can continue. (Para 4)

Anno: C. S. Act, S. 42 N. 4, 5.

Shambhu Prasad, for Applicant; A. P. Pandey, for Opposite Party.

ORDER: The petitioner by this petition under Article 226 of the Constitution seeks the issue of a writ of certiorari quashing the order of opposite party No. 4, the liquidator appointed under the Co-operative Societies Act in connection with the liquidation of the Housing and House Mortgage Society Limited, Allahabad, passed on the 1st August 1952 ordering realisation of a sum of Rs. 9,379/10/- from the petitioner as arrears of land revenue. Further, a writ of mandamus is sought for a direction to the opposite parties to furnish to the petitioner all the particulars of the claims of the Society in liquidation against the petitioner or her husband and to take proceedings in a civil Court according to law in respect of these claims.

(2) It appears that Shri M. L. Kharbanda, the husband of the petitioner, was a member of a limited co-operative society known as the Housing and House Mortgage Society Limited, Allahabad. After having become a member of the Society he obtained a loan of Rs. 2,500/- repayable with interest at the rate of Rs. 7½ per cent. in monthly instalments of Rs. 25/- each, from the Society on the basis of an agreement. It further appears that subsequently further loans were taken. It is not necessary to specify all the loans that were taken for the purpose of deciding this writ petition; nor have the details of those loans been given to the Court clearly by either party. Some time in 1949 the Society went into liquidation. By that time, part of the loan that had been taken had been repaid. According to the petitioner the amount that had been repaid was Rs. 1,400/-. Subsequently also some payments were made by the petitioner herself on the death of her husband; two such payments being sums of Rs. 500/- each in or about August 1950 and January 1951.

Thereafter a letter was received by the petitioner from the liquidator calling upon her to pay a sum of Rs. 8,740/13/- consisting of Rs. 7,769-4-0 due as principal of the loans taken, Rs. 476-9-0 as interest on it and Rs. 495/- as liquidation costs. The petitioner protested against this demand and there was a certain amount of correspondence. Thereafter the liquidator moved the Collector through the Registrar to realise this amount as arrears of land revenue. Consequently this petition was presented in order to quash those proceedings.

(3) A number of affidavits have been filed in connection with this petition, but it is not necessary to relate all the facts contained in those affidavits. I shall, therefore, only mention those facts which are essential for the purpose of deciding this case. There is no dispute that Shri M. L. Kharbanda was a member of this Society, nor is there any dispute that the Society has gone into liquidation and that opposite party No. 4 has been

appointed as liquidator in accordance with the provisions of the Co-operative Societies Act. In S. 42, Co-operative Societies Act, the powers of the liquidator have been defined. He is entitled to determine the contributions to be made by the members, and past members of the Society to the assets of the Society, and further to give such directions in regard to the collection and distribution of the assets of the Society as may appear to him to be necessary for winding up the affairs of the Society.

He is also empowered to determine by what persons and in what proportion the costs of liquidation are to be borne. In pursuance of these powers the liquidator proceeded to make a determination and passed a contribution order on 1-8-1952, a copy of which is Annexure E to the affidavit filed on behalf of the petitioner in support of this petition. This Annexure shows that the liquidator purported to pass a contribution order and in that contribution order he held that the petitioner was liable to pay to the liquidator as contributions a sum of Rs. 8,884-10-0 and as costs of liquidation a sum of Rs. 495/-. The order is headed as:

"Contribution Order.

Passed by the liquidator determining contribution to be made by the members, past members or the legal representatives of members to the assets of the society."

It is also clear that the sum of Rs. 8,884-10-0, determined as contribution payable by the petitioner, represents either the entire amount which was due from the petitioner in respect of the loans that had been taken by her husband and the interest thereon, or at least the major part of the sum that may be due as loan and interest. This fact is clear from the entire correspondence which passed between the parties and which has been filed before the Court. It appears that the liquidator was wrong in treating the amount due from the petitioner in respect of the loan taken by her husband as contributions. Section 42, as mentioned above, deals separately with contributions to be made by the members etc., with costs of liquidation and with collection and distribution of assets of the society. The amounts due by a debtor to the society can be treated as assets of the society and not as contributions. This fact is clarified further by the rules framed under the Act.

Rule 144 deals with the determination of dues and assets of the society as they stand at the time of the cancellation of the registration which brings about liquidation. The liquidator is required to draw up a scheme for the recovery of the assets and submit it for the approval of the Registrar. Rule 145 proceeds to give power to the liquidator to determine the contributions to be made by the members, past members of the society or their legal representatives so as to determine the costs of liquidation that are to be paid by particular persons. These two rules, therefore, clearly make a distinction between the dues and assets of the society on the one side and contributions and costs of liquidation on the other. After both have been determined, the liquidator is to submit the order for the approval of the Registrar.

Under rule 147, the Registrar has been given special power to lay down the principles on which and the manner in which the contributions are to be determined. There is no power in the Registrar to direct the manner of determination of the dues and assets of the society. The reports submitted by the liquidator have to be approved by the Registrar. Rule 148 enjoins on the liquidator the duty of recovering all sums and other properties to which the society may be entitled as well as the contribution which he orders. Here again a distinction is made between contributions & all other sums and properties. The manner of realisation is laid down in rules 149 and 150 which refer back to s. 42, sub-s. (4A) and clause (a) of sub-s.(5) respectively. The contribution and the costs of liquidation are to be recovered under s. 42 sub-s. (4A) as arrears of land revenue whereas the orders for the realisation of all other amounts have to be enforced by a civil court having local jurisdiction in the same manner as a decree of such court under clause (a) of sub-s. (5) of section 42.

These provisions clearly indicate that the contributions paid by the members, past members or their legal representatives and costs of liquidation have been placed in a class apart and a distinction has been drawn between them and other assets and dues of the society. The amount which was claimed from the petitioner in respect of loans advanced to her husband or interest thereon was the dues of the society and not contribution, and the liquidator obviously made a mistake in including those amounts in the contribution order. Further, these amounts are not recoverable under sub-s.(4A) of S. 42 as arrears of land revenue. These amounts can only be recovered by following the procedure laid down by cl. (a) of sub-s. (5) of s. 42. Consequently, the proceedings that are being taken for the realisation of sums due on account of the loans advanced to the petitioner's husband, as arrears of land revenue are not in accordance with law and they are liable to be quashed.

Since on the quashing of these proceedings for realisation of those sums as arrears of land revenue, the liquidator, in order to realise those sums, will have to approach the civil court under cl. (a) of sub-s. (5) of s. 42, it is unnecessary for me to enter into the disputes between the parties about the liability of the petitioner to pay those sums at once or to pay them at all. The question whether the amount claimed as loans and interest is realisable and what is the amount realisable, must be agitated by the petitioner before the appropriate court when proceedings are taken by the liquidator for the purpose of enforcing that liability.

The point whether the petitioner should have filed her objections before the liquidator or before the Registrar or can put forward her objections when proceedings are taken by the civil court under cl. (a) of sub-s. (5) of s. 42 is also a matter that can be decided when those proceedings are taken. It is not necessary to go into this question at this stage in these proceedings for the issue of a writ restraining the opposite parties from taking proceedings for realising as arrears of land revenue the amounts due in respect of the loans and interest thereon.

(4) So far as the costs of liquidation are concerned, the various provisions of the Act and the rules mentioned by me above clearly show that the liquidator had the power to determine the costs of liquidation and such costs of liquidation can be recovered as arrears of land revenue under sub-s. (4A) of s. 42. The petition does not disclose that the determination of the costs of liquidation was beyond the jurisdiction of the liquidator or was made after violating any principles of natural justice that would justify this Court in interfering with that order. If the petitioner has any grievance that the costs of liquidation had been determined incorrectly or on wrong basis such as fixation of the costs of liquidation on persons in pro-

portion to their liabilities as debtors instead of their liability as members, past members or their legal representatives it is for her to move the appropriate authorities which may be the liquidator or the Registrar. The costs of liquidation being payable by a member, past member or his legal representative are liable to be paid by the petitioner in that capacity. Therefore, whatever proceedings are being taken in respect of the realisation of the costs of liquidation can continue.

But I may also make it clear that the contribution order to which I have referred above does not make it clear that the entire amount of Rs. 8,884/10/- is in respect of loans and interest thereon and there is a possibility that apart from the amounts due as loans and interest thereon it might include sums ordered as contribution from the petitioner in her capacity as a legal representative of a past member. If so, the order passed by me today shall not stand in the way of realisation of that latter sum from the petitioner.

(5) Consequently, I direct that a writ shall issue directing the opposite parties not to realise as arrears of land revenue any amount, which can be recovered from the petitioner under the contribution order dated 1-8-1952, which is in respect of the amount due to the Society or claimed by it for loans advanced to the petitioner's husband or interest thereon. The rest of the prayers in the petition are rejected.

(6) The parties shall bear their own costs.

B/D.H.Z. Order accordingly.

A.I.R. 1954 ALLAHABAD 648 (Vol. 41, C.N. 254)

ROY J. (29-1-1954).

Ram Charan and another Applicants v. Devendra Kumar Opposite Party.

Reference No. 367 of 1951; against order of Addl. S J. Bijnor.

(a) Criminal P. C. (1898), Ss. 179 and 181 (2) — Scope — Criminal breach of trust or misappropriation — Venue of trial.

The decision of the proper venue for the trial of a charge of criminal breach of trust has been taken entirely outside the ambit of S. 179 by the provisions of S. 181 (2), and the local jurisdiction of a court to try a charge of criminal breach of trust must be decided solely with reference to sub-s. (2) of S. 181, Cr. P. C. Where the accused is under a liability to deliver goods at a particular place and also to render accounts at that particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him, the court, within the local limits of whose jurisdiction that place is situated, may enquire into and try the offence under the provision of S. 181 (2), Cr. P. C. It is not essential under S. 181 (2) that at the time the property is said to be received or retained by the accused person he must have a dishonest intention to misappropriate it or to commit criminal breach of trust with reference to it. It is enough for the purposes of the section if the property which is the subject of the offence was received or retained by the accused at a particular place to give jurisdiction to the magistrate of that place to try the case even if the property was received quite properly and innocently at that place and was subsequently dealt with at another place dishonestly. (Para 5)

Anno: Cr. P. C., S. 179 N 5; S. 181 N. 7.

(b) Criminal P. C. (1898), S. 181 (2) — 'Received or retained.'

The word 'received' in S. 181 (2) cannot be construed to mean 'actually received' by the accused. (Para 5)

The accused, a commission agent at Delhi, was to purchase certain goods and deliver them to the complainant at Bijnor and also to render accounts to him at Bijnor. The accused sent the goods to the complainant under a railway receipt 'to self' through his agent, a Bank at Bijnor with instructions to the Bank that they should recover the amount of hundi from the complainant and deliver the railway receipt. The accused actually received the amount of hundi at Delhi. The complainant filed a complaint against the accused for criminal misappropriation at Bijnor:

Held that as the accused had received the amount at Bijnor through their agent, the court at Bijnor had jurisdiction to try the offence. (Para 5)

Anno: Cr. P. C., S. 181 N. 9.

S. N. Misra, for Applicant; P. C. Chaturvedi for Opposite Party.

ORDER: This is a reference by the Sessions Judge of Bijnor recommending that the trial court's order assuming jurisdiction to try the case be set aside.

(2) The complainant Devendra Kumar is a partner in a cloth firm of Najibabad in the district of Bijnor, styled as Yogendra Kumar Devendra Kumar, while the firm of the accused works as commission agents in cloth business at Delhi. The complainant's case was that it had been agreed upon between the two firms that the accused firm was to purchase 60 bales of cloth from the Delhi Cloth Mills at Delhi as agents of the complainant & deliver the same to the complainant's firm at Najibabad; that the accused was to render accounts to the complainant's firm at Najibabad, that in consequence of the agreement the accused had first received the sum of Rs. 6,000/- by means of a draft at Delhi, whereafter 63 bales had been dispatched by them from Delhi to the complainant at Najibabad under a railway receipt "to self" through the Bharat Bank, Bijnor, which Bank was directed by the accused to pass the railway receipt to the complainant on receiving payment of a sum of Rs. 72,000/-; that out of the total receipts of Rs. 78,000/- which had been received by the accused the latter had rendered accounts for Rs. 65,000/- only but did not render accounts for the remaining amount of Rs. 13,000/- and that this sum was criminally misappropriated.

(3) On behalf of the accused it was not disputed that they as commission agents had received the sum of Rs. 6,000/- by means of a draft at Delhi and had also received another sum of Rs. 72,000/- through the Bharat Bank, Bijnor, after they had sent 63 bales of cloth under a railway receipt, and that this subsequent amount of Rs. 72,000/- had been received under a 'hundi' for which the accused had sent a letter dated 18-1-1949. In that letter, the accused-firm had written to the complainant's firm that the former had sent a 'hundi' to be honoured by the complainant's firm and that the complainant was to pay the amount of the 'hundi' to the Bharat Bank, Bijnor. The case of the accused was that out of the amounts received by them they had purchased and handed

over cloth worth Rs. 64,184/11/- to the complainant's firm and the remaining sum of Rs. 13,815/5/- which had been left with the accused had been credited in part payment of some previous account.

In the trial court two objections were taken on behalf of the accused: The first was that the court at Bijnor had no jurisdiction. And the second was that the dispute was essentially of a civil nature and could not be taken cognisance of by the criminal court. The trial court held that the Bijnor court had jurisdiction and that the matter was not of a civil nature. Upon revision before the learned Sessions Judge, the Sessions Judge has been of the opinion that the courts at Bijnor have no jurisdiction to try the case. The Sessions Judge has therefore referred the matter to this Court with the recommendation that the trial court's order assuming jurisdiction to try the case be set aside.

(4) The question turns upon the construction of S. 181(2), Criminal P. C. That section lays down that the offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed. The question in the present case would be whether the sum of Rs. 72,000/- "was received or retained" by the accused person at Bijnor. The learned Sessions Judge observed that the word "received" in S. 181, sub-cl. (2), Criminal P. C., would mean "actually received" and that the sum of Rs. 72,000/-, although paid to the Bharat Bank at Bijnor under the instructions of the accused, had not actually been received by them at Bijnor but had been received by them actually at Delhi subsequently.

(5) The Bharat Bank, Bijnor, acted as the agent of the accused and for all practical purposes the payment that had been made to the Bharat Bank was payment to the accused. Consequently, since that payment was admittedly made at Bijnor, the Bijnor court had jurisdiction to try the case. The word "actually" is not to be found in S. 181, sub-cl. (2), Criminal P. C., and we cannot import into the section something which is not really to be found there in order to support the contention of the accused that money "received" by their agent at Bijnor for them would not come within the four corners of that word in S. 181(2), Criminal P. C., and that that word must be restricted in its meaning to the place where the money is actually delivered by the agent to them viz., to Delhi. The decision of the proper venue for the trial of a charge of criminal breach of trust has been taken entirely outside the ambit of S. 179 by the provisions of S. 181(2), and the local jurisdiction of a court to try a charge of criminal breach of trust must be decided solely with reference to sub-s. (2) of S. 181, Cr. P. C.

Where the accused is under a liability to deliver goods at a particular place and also to render accounts at that particular place and fails to do so by reason of having committed an offence of criminal breach of trust which is alleged against him, the court, within the local limits of whose jurisdiction that place is situated, may enquire into and try the offence under the provisions of S. 181(2), Cr. P. C. It is not essential under S. 181(2) that at the time the property is said to be received or retained by the accused person he must have a dishonest intention to misappropriate it or to commit criminal breach of trust with reference to it. It is enough for the purposes of the section if the property which is the subject of the offence was received or retained by the accused at a particular place to give jurisdiction to the magistrate of that place to try the case even if the property was received quite properly and innocently at that place and was subsequently dealt with at another place dishonestly. In the present case, the money was received by the accused at Bijnor through their agents. Consequently, the Bijnor court has jurisdiction to enquire into and try the alleged offence of criminal misappropriation or of criminal breach of trust. The reference is accordingly rejected.

(6) The record be sent back to the trial court through the Sessions Judge for proceeding with the trial in accordance with law.

(7) Leave to appeal is refused.

B/K.S.B. Reference rejected.

A.I.R. 1954 ALLAHABAD 649 (Vol. 41, C.N. 255)

(LUCKNOW BENCH) RANDHIR SINGH J. (26-2-1954).

Asghar Defendant Appellant v. Uttar Pradesh Govt. through D. C. Gonda Plaintiff Respondent.

Second Appeal No. 223 of 1951; against decree of Dist. J. Gonda; D/- 28-4-1951.

Transfer of Property Act (1882), Ss. 111 (g), 114A — Suit for ejectment on breach of condition —Absence of notice under S. 114A — Effect.

Determination of a lease by forfeiture on a breach of condition can take place only after a notice in writing to determine the lease had been served upon the lessee. (Para 4)

The right to institute a suit for ejectment accrues only after the requirements of S. 114A have been complied with. The section requires that the plaintiff should allege in the plaint that the requirements of the section have been complied with. Where there is no evidence to show that the lease had been validly determined by notice as required by S. 114A the suit cannot be decreed.

(Paras 5, 6, 7)

Anno: T. P. Act, S. 111 N. 21, S. 114A N. 2.

Mahabir Prasad Srivastava, for Appellant; B. N. Roy, Addl. Junior Standing counsel for Respondent.

JUDGMENT: This is a defendant's appeal against a decree for possession passed by the lower appellate Court modifying a conditional decree passed by the Munsif of Gonda.

(2) It appears that a lease in respect of three plots of land was granted by the Deputy Commissioner of Gonda to the appellant on the 28th October, 1933, for making certain constructions on the land. One of the conditions in the lease was that the lessee was to complete the constructions within six months of the date of the lease. It was further provided that if no construction was made or if there was a breach of the terms of the lease, the lessor shall have a right of re-entry. No construction was made on the leased land and the U. P. Government instituted a suit on 17-10-1949, for possession of the land.

(3) The suit was resisted by the defendant on the ground that he had applied for permission to the Municipal Board to build, but the permission was not granted in time and he could not therefore comply with the terms of the lease. The trial Court passed a conditional decree and

it was provided that the defendant was at liberty to make the constructions within six months of the date of the decree and the suit would stand decreed if he failed so to do. The plaintiff then went up in appeal. The lower appellate Court, however, took a different view and found that there was no good ground for attaching a condition to the decree or giving the defendant further time to make the constructions. It, therefore, set aside the decree passed by the trial Court and decreed the suit for possession. The defendant has now come up in second appeal.

(4) The first point which has been pressed in arguments on behalf of the appellant is that the plaintiff did not determine the lease as required by S. 111(g), T. P. Act and as such was not entitled to maintain the suit. It is not disputed that the determination of a lease by forfeiture could take place only after a notice in writing to determine the lease had been served upon the lessee. In the present case there is no mention in the plaint that any such notice was served, nor is there any evidence on the record to establish that any such notice was served upon the defendant lessee.

(5) Section 114A which was added by the amendment to the Transfer of Property Act made in 1929 clearly lays down that "no suit for ejectment shall lie", where there has been a forfeiture of a lease of immoveable property,

> "unless and until the lessor has served on the lessee a notice in writing—
>
> (a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach, and the lessee fails within a reasonable time from the date of the service of notice, to remedy the breach, if it is capable of remedy."

It would thus appear that the right to institute a suit for ejectment accrues only after the requirements of S. 114A have been complied with. The plaintiff has not only not mentioned in the plaint that a notice as required by S. 114A of the T. P. Act had also been given before the institution of the suit but there is also no evidence to show that a notice as required by S. 114A had been given. The plaintiff was therefore not entitled to maintain the suit.

(6) It has been argued by the learned counsel for the respondent that it was not necessary in law that it should be mentioned in the plaint that a notice as required by S. 114A, Transfer of Property Act had been served upon the defendant before the suit was instituted. A perusal of S. 114A shows that the plaintiff should allege in the plaint that the requirements of S. 114A had been complied with. I am unable, therefore, to agree with the contention put forward on behalf of the respondent.

(7) In view of the fact that there is no evidence to show that the lease had been validly determined by notice as required by S. 114A of the Transfer of Property Act, the suit cannot be decreed. The view taken by the lower appellate Court was, therefore, clearly incorrect. The appeal is, therefore, allowed and the decree passed by the lower appellate Court is set aside. The suit is dismissed, but in view of the peculiar circumstances of this case the defendant shall get only a half of his costs in all the three courts.

B/D.R.R. Appeal allowed.

A.I.R. 1954 ALLAHABAD 650 (Vol. 41, C.N. 256)

RAGHUBAR DAYAL J. (4-2-1954).

Baldeo and others-Applicants v. The State and another, Opposite Party.

Criminal Misc. Writ. Appln. No. 75 of 1954.

(a) Penal Code (1860), Ss. 447, 352 and 426 — Possession — Nature of.

For the purpose of convictions under Ss. 447, 352 and 426, Penal Code, if the complainant alleges his possession and if he succeeds in establishing it he would succeed in establishing the commission of the offence under S. 447, I. P. C. It is not necessary for the Court to hold that the land really belonged to the complainant. (Para 3)

Anno: I. P. C., S. 447 N. 11; S. 352 N. 1; S. 426 N. 1.

(b) U. P. Panchayat Raj Act (26 of 1947), S. 77A — Scope — Judgment by Panchas less than five — (U. P. Panchayat Raj Act (26 of 1947), S. 110 — Rules under, R. 100) — (Words and Phrases — Hearing).

Section 77A allows the trial of a case by panchas less than five in certain circumstances and any trial by such panchas in those circumstances would be valid. In view of this, Rule 100 should be interpreted to mean that the register should have the signatures of the panchas who deliver the judgment and not of all the panchas irrespective of the fact whether any of them had taken part in the delivery of judgment or not. It may be that sub-s. (1) and sub-s. (2) of S. 77A refer only to the effect of the non-presence of any panch constituting the bench at any hearing and does not refer to the effect of the absence of a panch at the time of pronouncing the judgment. But the word 'hearing' includes the stage of the delivery of the judgment itself and it is not very reasonable that a panch who has not taken part in all the proceedings should have his say in the judgment. S. 77A therefore allows the delivery of a judgment by panchas less in number than five in the circumstances mentioned in that section. (Para 5)

Ram Singh Yadav for Applicants.

ORDER: This is an application under Article 227 of the Constitution for quashing the order of the Panchayati Adalat, Derapore, Kanpur, convicting the applicants of offences under Ss. 352, 447 and 426, I. P. C.

(2) Two points are taken in this application: One is that the judgment was signed by four Panches and not by all the five panches who constituted the bench for the trial of this case; the second point is that no offence was made out on the allegations of the complainant.

(3) The complainant alleged that the accused-applicants had demolished his cattle-trough which stood on the land in front of his house, that the accused placed some 'jhankars' over that land in front of the house and on the complainant's asking them to remove them they were prepared to fight. These allegations, if proved to the satisfaction of the court, could establish the offences of which the applicants have been convicted. It was not necessary for the court to hold that the land in front of the complainant's house really belonged to him. The complainant alleged possession and if he succeeded in establishing it he would succeed in establishing the commission of the offence under S. 447, I. P. C.

(4) For the consideration of the other question reference has to be made to S. 77-A of the U. P. Panchayat Raj Act and to R. 100 framed by State Government. Rule 100 provides that the Adalat shall record, in the prescribed register, a brief judgment or order and the signatures of the Panches and signatures or thumb-impressions of the parties present at the time of the decision. It has been held by this Court in some cases that this Rule required the delivery of judgment by all the panches constituting the bench and also the signing by all the panches in the register. Subsequent to these cases, S. 77-A has been enacted. It reads:

"77-A (1) If any Panch appointed to a bench constituted under S. 49 for the trial of a case, suit or proceeding is absent at any hearing, the remaining Panches may, notwithstanding anything contained in this Act, try the case, suit or proceeding provided, however, that at least three Panches, including the chairman, are present and provided further that at least one of the Panches present is able to record evidence and proceedings.

(2) No trial as aforesaid shall be invalid by reason merely that all the five Panches forming the bench were not present at any hearing or that the same Panches were not present at all the hearings.

(3) The provisions of sub-sections (1) and (2) shall 'mutatis mutandis' apply to an inquiry made by a Panchayati Adalat under section 63."

(5) It appears to me that section 77-A allows the trial of a case by panches less than 5 in certain circumstances and that any trial by such panches in those circumstances would be valid. If a trial by panches less in number than five can be valid, it is clear that the judgment has to be signed by only those panches who deliver it & not also by the panches who have not delivered the judgment & that therefore Rule 100 should now be interpreted to mean that the register should have the signatures of the panches who deliver the judgment and not of all the panches irrespective of the fact whether any of them had taken part in the delivery of judgment or not. It may be said that sub-S. (1) and Sub-S. (2) of S. 77-A refer only to the effect of the non- presence of any panch constituting the bench at any hearing and does not refer to the effect of the absence of a panch at the time of pronouncing the judgment.

I see no good reason to restrict the scope of the word 'hearing' to the proceedings in the case up to the stage of the delivery of the judgment and not to include the stage of the delivery of the judgment itself. It is not very reasonable that a panch who has not taken part in all the proceedings should have his say in the judgment. I, therefore, see no good reason to hold that section 77-A does not allow the delivery of a judgment by panches less in number than five in the circumstances mentioned in that section. The panches who delivered the judgment included the sar-panch & were four in number & therefore the judgment is covered by the provisions of S. 77-A.

(6) I, therefore, reject this application.

B/H.G.P. Application rejected.

A.I.R. 1954 ALLAHABAD 651 (Vol. 41, C.N. 257)

(LUCKNOW BENCH) MALIK C. J. AND RANDHIR SINGH J. (5-4-1954).

Mst. Sunder Kali and another, Appellants v. Pateshwari Prasad Singh and others, Respondents.

Ex. Decree Appeal No. 47 of 1946, against decree of Revenue Officer, Gonda, D/- 20-5-1946.

Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 168(1) — Application under when to be made.

The words of S. 168(1) clearly show that it was not the intention of the Legislature that a decree-holder should exhaust all remedies in execution before making an application under S. 168. (Para 3)

H. D. Srivastava, for Appellants; R. K. Varma, (for No. 1) and Rampati Pandey, (for Nos. 3/1-3), for Respondents.

RANDHIR SINGH J.:

This is an execution appeal against an order passed by the Revenue Officer of Gonda on 20-5-1946 ordering ejectment of the appellant from a part of his holding under S. 168, U. P. Tenancy Act.

(2) It appears that a decree for arrears of rent was passed against the appellant on 27-3-1943. The decree-holder applied for execution on 30-11-1943, but his execution remained infructuous and the file was ultimately consigned to the record room on 17-1-1944. On 18-5-1945, the decree-holder applied for issue of a notice under S. 168, U. P. Tenancy Act, as the decree for arrears of rent, which had been passed against the appellant on 27-3-1943, had remained unsatisfied. Objections were filed to this application of the decree-holder on behalf of the appellant. The main grounds on which he opposed the application were that he was an under-proprietor & not a permanent lessee and as such the decree-holder had no right to make an application under S. 168, Tenancy Act; that the application was barred by time, and lastly that the appellant was not liable to ejectment as the decree-holder had not exhausted all remedies which lay in execution against the appellant.

The learned Revenue Officer found that the appellant was not an under-proprietor but was a lessee. He also held that the application was not barred by time and that it was not necessary for the decree-holder to exhaust all remedies by way of execution before making an application under S. 168 of the U. P. Tenancy Act. He, therefore, ordered ejectment of the appellant from a part of the holding. The appellant has now come up in appeal.

(3) The learned Counsel for the appellant does not now press the first two points, that is, he does not now challenge the finding of the lower court that the appellant was not an under-proprietor or that the application was barred by time. The only ground which he has pressed in arguments before us is that the decree-holder was not entitled to avail himself of the remedy provided by S. 168, U. P. Tenancy Act, as he had not exhausted all the modes of execution which were open to him before making an application under section 168 of the Tenancy Act. Section 168 runs as follows:

"168(1) When a decree for arrears of rent against an ex-proprietary, an occupancy or hereditary tenant has not been completely satisfied within one year from the date of such decree by any mode of execution other than sale of holdings, the land-holder may apply to the Court which passed the decree for the issue of a notice to

the tenant for payment of the amount outstanding and for his ejectment in case of the default and the Court shall thereupon issue such notice."

A perusal of the words quoted above clearly shows that it was not the intention of the legislature that a decree-holder should exhaust all remedies in execution before making an application under S. 168, of the U. P. Tenancy Act. Learned Counsel for the appellant has not been able to show us any authority in support of his contention. There seems to be no force in the contention raised on behalf of the appellant. The order passed by the lower Court was, therefore, a perfectly good order.

(4) Another point which has been pressed on behalf of the appellant is that the appellant had become a 'sirdar' in view of the provisions of S. 19(ix) of the Zamindari Abolition and Land Reforms Act. It is not disputed that the appellant was actually ejected from the holding on 26-6-1947. The appellant already having lost possession of the holding, and the order passed by the Revenue Officer having been found to be a good order, no relief can be given to the appellant under S. 19 of the Zamindari Abolition and Land Reforms Act.

(5) The appeal is therefore dismissed with costs to the respondents.

B/G.M.J. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 652 (Vol. 41, C.N. 258)

(LUCKNOW BENCH), P. L. BHARGAVA J. (30-5-1951)

Suraj Prasad and others, Applicants v. State.

Criminal Reference No. 20 of 1951, reference made by S. J., Sitapur, D/- 22-1-1951.

Criminal P. C. (1898), Ss. 107(2) and 117 — Magistrate's Court situated outside his jurisdiction — Breach of peace within the Court premises — Jurisdiction to start proceedings.

Where a Sub-Divisional Magistrate whose Court is situate beyond the local limits of his jurisdiction initiates proceedings under S. 107, Cr. P. C. against certain persons who are resident within his jurisdiction, for quarrelling in the Court-room and passes an interim order under S. 117(3) demanding security from the parties, the proceedings and the order under S. 117(3) are both without jurisdiction. The reason is that at the time when the breach of the peace or disturbance was apprehended they should have been present within the local limits of the Magistrate's jurisdiction. If the place or the persons concerned are not within the local limits of the Magistrate's jurisdiction the mere residence within those limits would not confer jurisdiction on the Magistrate to initiate proceedings in respect of what had happened or was likely to happen outside his jurisdiction.

Further if there is no validly initiated proceedings there can be no inquiry contemplated by sub-section (1) or an order pending such inquiry under sub-section (3) of S. 117 of the Code. (Paras 6, 8 and 10)

Anno: Cr. P. C., S. 107 N. 19; S. 117 N. 6.

Kesri Bir Prasad (for Nos. 1 and 2) and K. S. Varma (for No. 3) for Applicants; Govt. Advocate, for the State.

ORDER: This is a reference by the learned Sessions Judge, Sitapur in the following circumstances: A criminal case was pending in the Panchaiti Adalat between Suraj Prasad and Mukta Prasad. Suraj Prasad made an application for transfer of the case from the Panchaiti Adalat. The application for transfer came up for hearing before the Sub-Divisional Magistrate of Misrikh at Sitapur. When the application was taken up for hearing by the Magistrate, Suraj Prasad & Mukta Prasad began to exchange hot words in court. Ram Prasad joined his brother, Suraj Prasad. Thereupon the Magistrate drew up a 'rubkar' initiating proceedings under s. 107 of the Code of Criminal Procedure against Suraj Prasad, Ram Prasad and Mukta Prasad. This 'rubkar' is dated 29-9-1950. On the same date the Magistrate drew up a notice under sections 112/107 of the Code calling upon Suraj Prasad, Ram Prasad and Mukta Prasad to show cause why they may not be ordered to execute a personal bond for Rs. 1,000/- and to furnish two sureties in the like amount for keeping the peace for a period of six months. Having initiated the proceedings under S. 107 of the Code in the manner stated above, the learned Magistrate made an order under s. 117(3) of the Code directing Suraj Prasad, Ram Prasad and Mukta Prasad to execute a personal bond for Rs. 1,000/- and to furnish two reliable and substantial sureties each in the like amount for keeping the peace until the conclusion of the enquiry under s. 107 of the Code pending against them.

(2) Against the above order passed by the Magistrate Suraj Prasad and Ram Prasad filed a revision in the court of the Sessions Judge of Sitapur. It was urged before the learned Sessions Judge that there were no materials before the Magistrate to satisfy him that the parties were likely to commit breach of peace or disturb the public tranquillity or do any wrongful act that might occasion breach of the peace; and as such the proceedings under s. 107 of the Code were illegal and unnecessary. On this point the learned Sessions Judge expressed the view that there was no sense in resorting to proceedings under S. 107 of the Code. Another point raised before the learned Sessions Judge was that the Magistrate was incompetent to take any action under s. 107 of the Code in connection with what had taken place in his presence in court, inasmuch as he could act under s. 107 of the Code on information received from others and not on what he had himself seen. In disposing of this contention, the learned Sessions Judge observed that the action taken by the Magistrate was wholly unwarranted and not supported by the provisions of s. 107 of the Code. The third point raised before the learned Sessions Judge was that the act complained of having taken place at Sitapur, it was not within the jurisdiction of the Magistrate and no proceedings could have been taken by him under s. 107 for want of jurisdiction. This contention was upheld by the learned Sessions Judge. Lastly, it was contended before him that the Magistrate did not issue an order under s. 112 of the Code and so he was incompetent to take any action under s. 117(3) of the Code. The learned Sessions Judge has pointed out that the procedure laid down in s. 112 of the Code was not followed by the Magistrate. He further observed that the procedure laid down in the first part of sub-s. (1) of s. 117 of the Code was also not complied with and that the order of the Magistrate was illegal on account of the non-observance of the procedure laid down in ss. 112 and 117 sub-s. (1) of the Code.

(3) Accordingly, the learned Sessions Judge has made this reference and recommended that the order of the Magistrate be quashed and the proceedings under s. 107 of the Code be dropped.

(4) The learned Government Advocate has opposed this reference and taken exception to the views expressed by the learned Sessions Judge.

(5) The first question that arises for consideration in this case is whether the Magistrate, who is the Sub-divisional Magistrate of Misrikh, had jurisdiction to initiate the proceedings under S. 107, Criminal P. C. Section 107 empowers a Presidency Magistrate, District Magistrate, or Magistrate of the first class on being 'informed' that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion breach of the peace, or disturb the public tranquillity to require such person in the manner provided in the Code to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix. Sub-section (2) of S. 107 of the Code lays down that proceedings shall not be taken under the section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate other than a Chief Presidency or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction.

(6) In this case, the place where the breach of the peace or disturbance was apprehended was the court room of the Sub-Divisional Magistrate of Misrikh at Sitapur, which was undoubtedly beyond the local limits of the jurisdiction of the Magistrate. Now, let us see if the persons concerned were within the local limits of the Magistrate's jurisdiction. It is not disputed that the persons concerned reside within the local limits of the Magistrate's jurisdiction but according to my interpretation of S. 107, Criminal P. C., at the time when the breach of the peace or disturbance was apprehended they should have been present within the local limits of the Magistrate's jurisdiction. If the place or the persons concerned are not within the local limits of the Magistrate's jurisdiction, the mere residence within those limits would not confer jurisdiction on the Magistrate to initiate proceedings in respect of what had happened or was likely to happen outside his jurisdiction. It follows, therefore, that the proceedings, under S. 107 of the Code, in respect of what had happened at Sitapur in the court room of the Sub-Divisional Magistrate of Misrikh could not be initiated by the Magistrate.

(7) There is a special provision in sub-section (3) of S. 107 for such cases. It is provided therein that when any Magistrate not empowered to proceed under sub-s. (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such persons in custody, such Magistrate may, after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons. It would thus appear that the Magistrate was not absolutely helpless if he apprehended that the parties before him would come to blows or commit some other offence. He could proceed under sub-section (3) of section 107 and detain the persons concerned in custody and proceed in the manner laid down therein and commit them for trial to a competent court. That course was, however, not adopted by the Magistrate.

(8) The learned Government Advocate has pointed out that the order of the Magistrate having been made under sub-s. (3) of S. 117, Criminal P. C., was perfectly valid and is not vitiated on any ground. The order of the Magistrate purports, no doubt, to have been made under sub-section (3) of S. 117 and it has to remain in force pending the completion of the inquiry under sub-section (1) of the said section; but it has been made in a proceeding under S. 107 of the Code, which was initiated without any jurisdiction. An order under sub-section (3) of S. 117 has to be made when inquiry is being made into the truth of information upon which the proceedings under S. 107 of the Code have been initiated; and the inquiry contemplated by sub-section (1) of S. 117 is an inquiry validly initiated when an order under S. 112 has been read or explained under S. 113 to a person present in court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under S. 114. If there is no validly initiated proceedings there can be no inquiry contemplated by sub-section (1) or an order pending such inquiry under sub-section (3) of S. 117 of the Code. Consequently, the fact that the order purports to have been made under sub-s. (3) of S. 117 does not save an order made in a proceeding initiated without jurisdiction.

(9) Learned Government Advocate has also urged that the learned Sessions Judge has made a reference upon the basis of wrong facts, inasmuch as in this case an order under S. 112 had been made, while the learned Judge has observed that there was no such order. It, no doubt, appears that an order under S. 112 of the Code of Criminal Procedure had been made; but the fact remains that it was made in a proceeding which had been initiated without jurisdiction and as such that fact is of no consequence.

(10) In my opinion, therefore, the proceedings initiated by the Sub-divisional Magistrate of Misrikh were without jurisdiction and as such the order made by the Magistrate under S. 117(3) of the Code cannot be sustained. I, therefore, accept this reference and quash the proceedings under S. 107, Criminal P. C., and set aside the order made by the Magistrate calling upon Suraj Prasad, Ram Prasad and Mukta Prasad to furnish security for keeping the peace under S. 117(3) of the Code of Criminal Procedure.

B/K.S. Reference accepted.

A.I.R. 1954 ALLAHABAD 653 (Vol. 41, C.N. 259)

MALIK C. J. AND V. BHARGAVA J. (3-5-1954).

Zaheer and another, Applicants v. State and others, Opposite Party.

Misc. Writ Case No. 229 of 1953.

†**U. P. Panchayat Raj Act** (26 of 1947), **Ch. VI and S. 85 — Chapter is not ultra vires — (Constitution of India, Art. 14).**

It cannot be said that S. 85 authorising the superior Court in a case where it apprehends that there might be miscarriage of justice to cancel the jurisdiction of the Panchayati Adalat is discriminatory. Ch. VI of the Act is not therefore ultra vires as it is not in conflict with the provisions of Art. 14

of the Constitution. AIR 1952 SC 123 and AIR 1953 SC 404, Foll.; AIR 1952 SC 75, Distinguished. (Paras 1, 6 and 9)

CASES REFERRED: Paras

(A) (V39) AIR 1952 SC 75: 1952 Cri LJ 510 (SC) 4
(B) (V40) AIR 1953 SC 404: 1953 Cri LJ 1621 (SC) 6
(C) (V40) AIR 1953 Nag 14: 1953 Cri LJ 251 7
(D) (V39) AIR 1952 SC 123: 1952 Cri LJ 805 (SC) 8

B. N. Katju, for Applicants; N. D. Ojha, for Opposite Party No. 3; D. P. Uniyal, D. G. A., for the State.

MALIK C. J.:

The applicants were convicted of offences under Ss. 447 and 323, Penal Code, by the Panchayati Adalat, Village Para, Police Station Kotwali, District Ghazipur, and were sentenced to pay a fine of Rs. 15/- and Rs. 5/- under the two sections respectively. This order is dated 29-10-1952. The applicants filed a revision in the Court of the Sub-Divisional Magistrate Sadar, Ghazipur, which was dismissed by him on 6-7-1953. This writ petition has been moved under Article 226 of the Constitution and the only point raised is that Chapter VI of the U. P. Panchayat Raj Act (XXVI of 1947) is 'ultra vires' being in conflict with the provisions of Art. 14 of the Constitution.

(2) The offences mentioned in S. 52 of the Act are exclusively triable by Panchayati Adalats. Section 54 provides for penalties which the Panchayati Adalat can impose. Section 55 bars the cognizance of any case or suit which is cognizable under the Act by a Panchayati Adalat unless an order has been passed by a Sub-Divisional Magistrate or Munsif under S. 85. Section 56 provides that

> "If at any stage of proceedings in a criminal case pending before a magistrate it appears that the case is triable by a Panchayati Adalat, he shall at once transfer the case to that Panchayati Adalat, which shall try the case 'de novo'."

Section 58 provides for return of complaint to the complainant by a Panchayati Adalat where it finds that it has no jurisdiction, or the offence is one for which it cannot award adequate punishment, or the case is of such nature or complexity that it should be tried by a regular Court. Section 59 bars the cognizance by the Panchayati Adalat of any offence in which the accused belongs to one of the categories mentioned in Cls. (a) to (e). Section 85 then provides that if a Sub-Divisional Magistrate or a Munsif or a Sub-Divisional Officer finds that there is apprehension of miscarriage of justice if a case, suit or proceeding is tried by a Panchayati Adalat, it shall cancel the jurisdiction of that Adalat and in such a case under sub-sections (2), (3) and (4) of S. 85 the case, suit or proceeding will have to be instituted in a regular Court having jurisdiction.

(3) Learned counsel has urged that this amounts to discrimination. He has argued that if a Sub-Divisional Magistrate, Munsif or Sub-Divisional Officer had been given the power under S. 85 to transfer the case to the Court of another Panchayati Adalat, he would raise no objection to the validity of the provision, but inasmuch as for the same type of offence triable by a Panchayati Adalat, if on the ground that there is apprehension of miscarriage of justice the jurisdiction of the Panchayati Adalat is cancelled and the case has to be tried under the ordinary law in the regular Courts having jurisdiction, that procedure being more elaborate amounts to discrimination under Article 14 of the Constitution.

(4) Reliance has been placed on the judgment of the Supreme Court in — 'State of West Bengal v. Anwar Ali Sarkar', AIR 1952 SC 75 (A) and on the remarks of Fazl Ali J., where the learned Judge dealing with the West Bengal Special Courts Act (X of 1950) said:

> ".....once it is established that one procedure is less advantageous to the accused than the other, any person tried by a Special Court constituted under the Act, who but for the Act would have been entitled to be tried according to the more elaborate procedure of the Code, may, legitimately enquire:
>
> Why is this discrimination being made against me and why should I be tried according to a procedure which has not the same advantages as the normal procedure and which even carries with it the possibility of one's being prejudiced in one's defence?"

The West Bengal Special Courts Act was different in certain material particulars from the U. P. Panchayat Raj Act. There, for the same offence it was open to the Government to direct the trial by a Tribunal rather than by an ordinary court of law in the so-called interest of speedy decision. The procedure before the Tribunal being different and less advantageous to the accused than the procedure before an ordinary court of law, the learned Judge said:

> "The Act itself lays down a procedure which is less advantageous to the accused than the ordinary procedure, and this fact must in all cases be the root-cause of the discrimination which may result by the application of the Act."

In that very case Fazl Ali, J. pointed out that classification of offences for the purpose of applying different sets of provisions relating to summary trials, trial of summons cases, trial of warrant cases and trial of cases by a court of session, according to the gravity of the offence, was possible.

(5) In the case before us there has been no discrimination between person and person and all offences mentioned in section 52 of the U. P. Panchayat Raj Act if committed within the jurisdiction of a Panchayati Adalat were cognizable by such Panchayati Adalat. No appeals are provided against the decisions of Panchayati Adalats but revisions can be filed in the court of a Sub-Divisional Magistrate, Munsif or Sub-Divisional Officer according to the cases, criminal, civil or revenue. The Court of the Sub-Divisional Magistrate Munsif or Revenue Officers is thus the superior court before which correctness of the decisions of Panchayati Adalats can be challenged. These courts have been given the power, in a case where it is apprehended that there would be miscarriage of justice, to cancel the jurisdiction of the Panchayati Adalat and leave the parties to the remedy under the ordinary law.

(6) In — 'Kedar Nath v. State of West Bengal'. AIR 1953 SC 404 (B), their Lordships held that the provisions of Ss. 4 and 9(1) of the West Bengal Criminal Law Amendment (Special Courts) Act (XXI of 1949) did not violate the provisions of Art. 14 of the Constitution and said that:

> "Hence the system of Special Courts to deal with the special types of offences under a shortened and simplified procedure was devised and it seems to us that the legislation in question is based on a perfectly intelligible principle of classification having a clear and reasonable relation to the object sought to be attained."

Neither can it be said that the provision authorising the superior court in a case where it apprehends that there might be miscarriage of justice to cancel the jurisdiction of the Panchayati Adalat is discriminatory. Such provisions are to be found in numerous Acts. Under the Small Cause Courts Act cases giving rise to difficult questions of law can be transferred to the regular side. Cases giving rise to questions of interpretation of the Constitution have now to be transferred to the High Court so that they may be quickly decided. In — 'Kedar Nath Bajoria's case (B)', their Lordships held that:

"Section 4 of the Act (West Bengal Criminal Law Amendment (Special Court) Act) offends against Article 14 of the Constitution merely because the Government is not compellable to allot 'all' cases of offences set out in the schedule to Special Judges but is vested with a discretion in the matter."

In the case before us, there is no discretion in the Government. It is the superior court which, in a fit case, may cancel the jurisdiction of the Panchayati Adalat.

(7) Reference has been made to — 'Shrikisan Jaskaram v. Dattu Shiwaram', AIR 1953 Nag 14 (C), where a Bench of the Nagpur High Court held that the C. P. and Berar Panchayats Act (I of 1947) was valid.

(8) In — 'Kathi Raning Rawat v. State of Saurashtra', AIR 1952 SC 123 (D), Fazl Ali, J. pointed out that

"a distinction should be drawn between 'discrimination without reason' and 'discrimination with reason'. The whole doctrine of classification is based on this distinction....."

(9) There is no question, in the case before us of discrimination without reason. It is when a superior court apprehends that there might be miscarriage of justice that it has right to cancel the jurisdiction. That right is usually given to the superior courts to prevent miscarriage of justice, and we are of the opinion that it cannot be said that such provisions are either discriminatory or improper.

(10) The application has no force and is dismissed.

BY THE COURT:

(11) A request has been made by the applicants that leave may be granted under Art. 132 and Art. 134(1)(c) of the Constitution. In our opinion, the case does not raise any such question of interpretation of the Constitution or any other question of law of such general importance that certificate can be granted. The prayer is, therefore, refused.

A/V.R.B. Application dismissed.

A.I.R. 1954 ALLAHABAD 655 (Vol. 41, C.N. 260)

MALIK C. J. AND V. BHARGAVA J. (3-5-1954).

Tej Bahadur Singh and others, Applicants v. State through Data Din, Opposite Party.

Criminal Misc. Case No. 1454 of 1952.

†(a) U. P. Panchayat Raj Act (28 of 1947), Preamble — Validity of the Act (Government of India Act (1935), Sch. VII, List III Items 1, 2, 5, 15, List II, Item 13 and S. 107(2) — (Interpretation of Statutes — Constitution law) — (Civil P. C. (1908), Pre.).

The legislatures, when enacting a particular statute, do not, in that statute itself, lay down provisions indicating what power of legislation is being exercised in enacting that statute. It is from the provisions of the statute itself and by reference to the legislative power granted to the legislatures that it is to be inferred what particular power is exercised in enacting a particular provision of the statute.

In enacting provisions constituting Panchayati Adalats, defining their powers, laying down the procedure and regulating the rules of evidence, the U. P. Legislature purported to act under the relevant items of List III of Schedule VII of the Government of India Act, 1935. The mere fact that the preamble did not mention that the U. P. Panchayat Raj Act was being enacted also for the purpose of constituting village Courts and laying down a special procedure for trial of petty offences in village areas by such Courts does not mean that the legislature necessarily purported to act under Item No. 13 of List II and not under Items 1, 2, 5 and 15 of List III of Schedule VII.

The U. P. Panchayat Raj Act received the assent of the Governor General before the Act was published in the U. P. Gazette. Under S. 107(2), Government of India Act, 1935, therefore, the provisions of the U. P. Panchayat Raj Act, in so far as they are repugnant to the provisions of Criminal P. C. and the Evidence Act, prevailed within the United Provinces and the validity of those provisions could not, therefore, be challenged when the Constitution came into force. On the enforcement of the Constitution, the U. P. Panchayat Raj Act, 1947, which was an existing law, continued in force and is, therefore, still effective and valid in the State of Uttar Pradesh. (Para 2)

Anno: Civil P. C., Pre., N. 7.

†(b) U. P. Panchayat Raj Act (28 of 1947), S. 83 — Validity of the Act — Classification on basis of area — (Constitution of India, Art. 14 — Equality before law — Reasonable classification).

It is not every discrimination that makes a statute void under Art. 14. It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the Act.

Further, the Constitution itself lays down provision, indicating that, on subjects which are included in Lists II and III of the Seventh Schedule of the Constitution, there might be discrimination between residents of one state and another. This accepts the principle of classification on the basis of areas. There is no reason why it must be held that, if classification on the basis of states is reasonable, classification on the basis of rural and urban areas for the same purposes is not reasonable. (Para 3)

U. P. Panchayat Raj Act was designed to simplify the administration in village areas by providing for management by bodies elected by village communities themselves and to provide easy and simple remedies for

redress for grievances of members of such village communities. The discrimination brought about by the Act is therefore based on classification which has a rational basis having a reasonable relation to the purpose of the Act. AIR 1952 SC 75; AIR 1952 SC 235; AIR 1953 SC 404, Relied on. (Para 3)

Anno: Constitution of India, Art. 14, N. 1, 25.

†(c) **U. P. Panchayat Raj Act (28 of 1947), S. 83 — Validity of the Act — Classification on basis of special procedure — (Constitution of India, Art. 14 — Special Courts and special procedure).**

No citizen has any vested right in the rules of procedure laid down in Criminal P. C. or in the rules of evidence laid down in Evidence Act. They are, no doubt, the principal enactments on these subjects which are of more or less, general application throughout the territory but even the provisions in these enactments are subject to amendments within the states by appropriate state legislatures with the assent of the President.

The mere fact that the U. P. Panchayat Raj Act lays down a different procedure and different rules of evidence in respect of cases triable by the Panchayati Adalats is no ground for holding that this piece of legislation violates the equal protection clause on the ground of discrimination.

Further, the fact that the trial is by a different Court under a different procedure does not offend against equal protection clause as there is a rational basis and a reasonable classification which distinguishes such cases from cases which continue to be triable by the Panchayati Adalats. AIR 1954 SC 186, Ref. (Para 4)

Anno: Consti. of India, Art. 14, N. 25.

†(d) **U. P. Panchayat Raj Act (28 of 1947), S. 80, Proviso — Validity — (Constitution of India, Arts. 14, 20(1).**

The classification of accused persons on the basis of being under arrest or at liberty is clearly a reasonable classification. Art. 20(1) grants a right to a person, who is sought to be deprived of his personal liberty, to be represented by legal practitioners. No such right is granted by the Constitution if the liberty of his person is not threatened. The proviso to S. 80, merely enforces the fundamental right which has been granted by Art. 20 of the Constitution. Consequently, the contention that the proviso to S. 80 brings about discrimination favourable to a person who may be under arrest as against a person who is not under arrest even though the two persons may be tried by the same Panchayati Adalat and this offends against the equal protection clause must be rejected. (Para 5)

Anno: Consti. of India, Art. 14, N. 29; Art. 20, N. 1.

(e) **Interpretation of statutes — Preamble — (Civil P. C. (1908), Pre.).**

In judging the purpose of an Act, it is not necessary that the preamble alone should be taken into consideration and the plain language of the provisions in the Act itself must be ignored altogether. The underlying purpose and policy of the Act are disclosed by "its title, preamble and provisions". The preamble can be used only as an aid to the interpretation of the provisions of the Act itself and it cannot be held that, if any particular provisions of the Act are not covered by the brief language of the preamble, the legislature did not intend to make provision for purposes which can clearly be inferred from those provisions of the Act though not mentioned in the preamble. AIR 1953 SC 404, Relied on. (Para 3)

Anno: Civil P. C., Pre., N. 10.

CASES REFERRED: Paras

(A) (V39) AIR 1952 SC 75: 1952 Cri LJ 510 (SC) 3

(B) (V39) AIR 1952 SC 235: 1952 Cri LJ 1167 (SC) 3

(C) (V40) AIR 1953 SC 404: 1953 Cri LJ 1621 (SC) 3

(D) (V41) AIR 1954 SC 186 (Petn. No. 304 of 1953, D/- 25-11-1953): 1954 Cri LJ 460 (SC) 4

Shanker Sahai Verma, for Applicants; Kedar Nath Sinha, for Opposite Party; D. P. Uniyal, for the State.

V. BHARGAVA J.:

The petitioners, Tej Bahadur Singh, Jang Bahadur Singh and Raj Narain Singh, were convicted for offences punishable under Ss. 447 and 506, Penal Code, by Opposite Party No. 3, the Panchayati Adalat of Sarai Haidar Shah, pergana Amethi, district Sultanpur, on a complaint made before the Panchayati Adalat by Data Din Dhobi opposite party No. 1 and sentenced to fines of Rs. 25/- and Rs. 10/- each for the two offences respectively. After the conviction by the Panchayati Adalat, the petitioners moved a revision before opposite party No. 2, the Sub-Divisional Magistrate of Amethi but that revision was dismissed. The petitioners, consequently, moved this petition under Art. 227 of the Constitution, challenging the validity of their conviction.

(2) The first point, that has been urged by learned counsel for the petitioners, is that the provisions relating to trial of criminal cases by a Panchayati Adalat under the U. P. Panchayat Raj Act, 1947, are ultra vires of the legislature inasmuch as the U. P. Legislature had no power to legislate on this subject. Learned counsel referred to the preamble of the U. P. Panchayat Raj Act which is as follows:

"Preamble: Whereas it is expedient to establish and develop Local Self Government in rural areas of the United Provinces and to make better provisions for village administration and development; it is hereby enacted as follows:"

It was urged that, from this preamble, it is clear that, when enacting this statute, the U. P. Legislature purported to act under item 13 of List II of Schedule VII of the Government of India Act, 1935.

Item 13 relates to

"local government, that is to say, the constitution and power of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."

His contention was that, under this item, the U. P. Legislature had no power to enact provisions, constituting Panchayati Adalats, granting them powers to try criminal offences, laying down the procedure to be followed by them in trying criminal cases and regulating the rule of evidence applicable to such trials. There is no doubt that this part of the enactment is beyond the scope of item 13 of List II of the Seventh Schedule

of the Government of India Act, 1935. It may, however, be noticed that, under items Nos. 1, 2, 5 and 15 of List III, the Provincial Legislatures and the Central Legislature had concurrent powers of legislation on subjects of criminal law, criminal procedure, evidence and Constitution and Jurisdiction of Courts.

The legislatures, when enacting a particular statute, do not, in that statute itself, lay down provisions indicating what power of legislation is being exercised in enacting that statute. It is from the provisions of the statute itself and by reference to the legislative power granted to the legislatures that it is to be inferred what particular power is exercised in enacting a particular provision of the statute.

The constitution of Panchayati Adalats and the powers to be exercised by them in respect of criminal cases were within concurrent legislative powers of the Provincial and Central Governments under the Government of India Act, 1935, according to item No. 15 of List III of the Seventh Schedule of that Act. The power to legislate on criminal law, criminal procedure and evidence was also exercisable concurrently by the Provincial Legislatures and the Central Legislature under items Nos. 1, 2 and 5 of List III of Schedule VII mentioned above. It must, therefore, be presumed that, in enacting provisions constituting Panchayati Adalats, defining their powers, laying down the procedure to be followed by them and regulating the rules of evidence in those courts, the U. P. Legislature purported to act under the relevant items of List III of Schedule VII of the Government of India Act, 1935.

The mere fact that the preamble did not mention that the U. P. Panchayat Raj Act was being enacted also for the purpose of constituting village courts and laying down a special procedure for trial of petty offences in village areas by such courts does not mean that the legislature necessarily purported to act under item No. 13 of List II and not under items 1, 2, 5 and 15 of the List III of Schedule VII.

The U. P. Panchayat Raj Act, having been passed by the U. P. Legislature, was reserved by the Government for assent of the Governor General and received the assent of the Governor General before the Act was published in the U. P. Gazette. Under sub-s. (2) of S. 107, Government of India Act, 1935, therefore, the provisions of the U. P. Panchayat Raj Act, in so far as they are repugnant to the provisions of the Code of Criminal Procedure and the Indian Evidence Act, prevailed within the United Provinces and the validity of those provisions could not, therefore, be challenged when the Constitution came into force. On the enforcement of the Constitution, the U. P. Panchayat Raj Act, 1947, which was an existing law, continued in force and is, therefore, still effective and valid in the State of Uttar Pradesh.

(3) The second ground, on which learned counsel contended that these provisions of the U. P. Panchayat Raj Act, 1947, are void, is that they infringe the fundamental right guaranteed by Article 14 of the Constitution. This argument was based on two contentions : One was that the provisions of the U. P. Panchayat Raj Act, relating to trial of criminal offences by Panchayati Adalats, brought about discrimination between people who might have committed offences in rural areas where the U. P. Panchayat Raj Act is applicable and others committing the same offences in the neighbouring areas to which that Act is not applicable.

It was submitted that an occasion may arise when some offence is committed by some person within a municipal area to which the U. P. Panchayat Raj Act does not apply and the same offence is committed by another person outside the municipal area, though within a few yards from it, to which the U. P. Panchayat Raj Act is applicable, and the effect of the U. P. Panchayat Raj Act would be that the latter would be tried according to the procedure laid down by the U. P. Panchayat Raj Act whereas the former would be tried in accordance with the provisions of the Code of Criminal Procedure.

The second point was that the procedure, laid down in the U. P. Panchayat Raj Act for trial of criminal cases, curtailed some of the rights which were granted to an accused who might be tried under the Code of Criminal Procedure and, further, that the rules of evidence applicable to a trial under the U. P. Panchayat Raj Act were also less favourable than those applicable to a trial under the Code of Criminal Procedure. This argument was urged with reference to section 83 of the U. P. Panchayat Raj Act, 1947, which lays down that the Code of Criminal Procedure and the Indian Evidence Act shall not apply to trials by Panchayati Adalats under that Act and that the procedure and the rules of evidence applicable to such trials would be laid down in that Act itself or in the rules framed thereunder.

It cannot be denied that the effect of S. 83, U. P. Panchayat Raj Act, is to discriminate between a person tried under the provisions of the U. P. Panchayat Raj Act and another person who may be tried under the Code of Criminal Procedure, in which trial the Indian Evidence Act would also be applicable. It is, however, not every discrimination that makes a statute void under Article 14 of the Constitution. In the case of — 'the State of West Bengal v. Anwar Ali Sarkar', AIR 1952 SC 75 (A), on which learned counsel has mainly placed reliance in support of his contention, Mahajan, J. has held as follows :

> "Equality of right is principle of republicanism and Article 14 enunciates this equality principle in the administration of justice. In its application to legal proceedings, the article assures to everyone the same rules of evidence and modes of procedure. In other words, the same rule must exist for all in similar circumstances. This principle, however, does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position.
>
> By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.
>
> The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

Thus the legislature may fix the age at which persons shall be deemed competent to contract between themselves, but no one will claim that competency to contract can be made to depend upon the statute or colour of the hair. 'Such a classification for such a purpose would be arbitrary and a piece of legislative despotism'."

Mukherjea, J., who delivered the leading majority judgment, held :

"It can be taken to be well settled that the principle underlying the guarantee in Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation, their position is substantially the same.

This brings in the question of classification. As there is no infringement of the equal protection rule, if the law deals alike with all of a certain class the legislature has the undoubted right of classifying persons and placing those whose conditions are substantially similar under the same rule of law, while applying different rules to persons differently situated."

In — 'Lachmandas Kewalram v. State of Bombay', AIR 1952 SC 235 (B), Das J. remarked :

"It is now well established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the Act."

Patanjali Sastri, C. J., in — 'Kedar Nath Bajoria v. State of West Bengal', AIR 1953 SC 404 (C), held :

"Now it is well settled that the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation.

To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils the requirement then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the equal protection of the law, for, if the legislation were all-embracing in its scope, no question could arise of classification being based on intelligible differentia having a reasonable relation to the legislative purpose."

In the present case, therefore, we have only to see whether the discrimination brought about by the U. P. Panchayat Raj Act is based on any classification which has a rational basis having a reasonable relation to the purpose of the Act. From the preamble and the main provisions of the Act, it is clear that this Act was designed to simplify the administration in village areas by providing for management by bodies elected by village communities themselves and to provide easy and simple remedies for redress of grievances of members of such village communities.

It was contended by learned counsel for the petitioners that, in order to judge the purpose of the Act, we should confine ourselves to the preamble only and this preamble would indicate that the legislature intended merely to establish and develop Local Self-Government in rural areas and make better provision for village administration and development.

The constitution of village 'panchayats' and trial of criminal offences by them by a simple procedure, it is contended, is not covered by the objects of the Act as disclosed in this preamble. Firstly, we are not at all satisfied that the general words 'provision for village administration and development' would not cover administration of justice in the rural areas also. Secondly, in judging the purpose of an Act, it is not necessary that the preamble alone should be taken into consideration and the plain language of the provisions in the Act itself must be ignored altogether.

In — 'Kedar Nath Bajoria's case (C)', cited above, when dealing with the validity of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, Patanjali Sastri C. J. observed :

"The real issue, therefore, is whether having regard to the underlying purpose and policy of the Act as disclosed by its title, preamble and provisions as summarised above, the classification of the offences, for the trial of which the Special Court is set up and a special procedure is laid down, can be said to be unreasonable or arbitrary and, therefore, violative of the equal protection clause."

According to this view of the Supreme Court, the underlying purpose and policy of the Act are disclosed by "its title, preamble and provisions". In the case of the U. P. Panchayat Raj Act, the provisions relating to the Constitution and powers of the Panchayati Adalats and trial of cases, suits or proceedings by them clearly indicate that one of the objects of the legislature was to provide for effective and speedy remedy locally to the village communities for trial of petty offences and decision of petty civil disputes. Das J., in the case of — 'AIR 1952 SC 75 (A)', cited earlier, held :

"Although the Preamble of an Act cannot override the plain meaning of the language of its operative parts, it may, nevertheless, assist in ascertaining what the true meaning or implication of a particular section is, for the Preamble is, as it were, a key to the understanding of the Act."

The preamble can, therefore, be used only as an aid to the interpretation of the provisions of the Act itself and it cannot be held that, if any particular provisions of the Act are not covered by the brief language of the preamble, the legislature did not intend to make provision for purposes which can clearly be inferred from those provisions of the Act though not mentioned in the preamble.

The provisions in the U. P. Panchayat Raj Act relating to Panchayati Adalats give a clear indication that the intention of the legislature was

that trials of petty offences and decisions of petty suits in rural areas should be entrusted to courts constituted by election from amongst the members of the village communities by themselves and that the procedure and the rules of evidence applicable to the proceedings before such courts should be considerably simplified.

In enacting the U. P. Panchayat Raj Act, the legislature was making provision for people residing in the village areas only and felt that such special provisions for residents of village areas would be justified even though they may differ very considerably from provisions on similar matters applicable to residents in urban areas. Classification by areas has always been considered to be a rational basis of classification for discrimination in respect of the equal protection clause. In the Constitution itself, the legislatures of various States are given independent powers of legislation on a number of matters which are included in Lists II and III of Schedule VII of the Constitution. The Constitution, thus, recognises that different legislative provisions may be made for people residing in different states by the legislatures of those states.

Just as the U. P. Panchayat Raj Act discriminates between a person accused of committing an offence in a rural area as against a person committing the same offence in an adjoining urban area, it may frequently happen that an enactment passed by the legislature of one state may discrinate between a person committing an offence within that state as against a person committing the same offence in the adjoining state who would be governed by the statutes passed by the latter state. If the principle be recognised that, in adjoining areas, there can be no such discrimination, the provisions of the Constitution permitting state legislatures to legislate on subjects like Criminal law, Criminal Procedure and Evidence would become meaningless as legislation by the legislature of one state would not be enforcible in an adjoining state.

The Constitution itself, therefore, lays down provisions, indicating that, on subjects which are included in Lists II and III of the Seventh Schedule of the Constitution, there might be discrimination between residents of one state and another and this accepts the principle of classification on the basis of areas. There is no reason why it must be held that, if classification on the basis of states is reasonable, classification on the basis of rural and urban areas for the same purposes is not reasonable.

(4) Coming to the second contention, it is to be remembered that no citizen has any vested right in the rules of procedure laid down in the Code of Criminal Procedure or in the rules of evidence laid down in the Indian Evidence Act. They are, no doubt, the principal enactments on these subjects which are, of more or less, general application throughout the Indian territory but even the provisions in these enactments are subject to amendments within the states by the appropriate state legislatures with the assent of the President.

The Supreme Court, in — 'Sukhdev Singh v. Teja Singh C. J.', AIR 1954 SC 186 (D), recognised that the Code of Criminal Procedure does not apply in matters of contempt triable by the High Court. The High Court can deal with it summarily and adopt its own procedure. All that is necessary is that the procedure is fair and that the contemner is made aware of the charge against him and is given a fair and reasonable opportunity to defend himself.

It has not been urged by learned counsel that the procedure prescribed by the U. P. Panchayat Raj Act for trial of cases by Panchayati Adalats is not fair or does not give a reasonable opportunity to an accused to defend himself. The mere fact, therefore, that the Panchayat Raj Act lays down a different procedure and different rules of evidence in respect of cases triable by the Panchayati Adalats is no ground for holding that this piece of legislation violates the equal protection clause on the ground of discrimination.

These provisions of the U. P. Panchayat Raj Act also bring about discrimination based on gravity of offences. It is only minor offences which have been made triable by the Panchayati Adalats, and major offences continue to be triable by regular courts under the ordinary procedure. Even these minor offences are, under certain circumstances, triable by regular courts under the ordinary procedure, e.g. when a Sub-Divisional Magistrate cancels the jurisdiction of the Panchayati Adalat on grounds of miscarriage of justice or apprehension of miscarriage of justice, or, when a Panchayati Adalat may return the complaint to the complainant, directing him to file it before the Sub-Divisional Magistrate having jurisdiction to try such a case on the ground that the offence is one for which it cannot award adequate punishment, or, the case is of such a nature or complexity that it should be tried by a regular court.

The fact that, in such cases, the trial is by a different court under a different procedure does not however offend against equal protection clause as there is a rational basis and a reasonable classification which distinguishes such cases from cases which continue to be triable by the Panchayati Adalats.

(5) Learned counsel for the petitioners has urged one more point based on the language of S. 80, U. P. Panchayat Raj Act, 1947, which runs as follows :

> "80: No legal practitioner shall appear, plead or act, on behalf of any party in any suit, case or proceeding before a Panchayati Adalat.
>
> Provided that a person who is arrested shall have the right to consult and be defended by a legal practitioner of his choice."

It was contended by learned counsel that the proviso to S. 80 brought about discrimination favourable to a person who may be under arrest as against a person who is not under arrest even though the two persons may be tried by the same Panchayati Adalat and this offends against the equal protection clause. The argument was, however, not seriously pressed by learned counsel and it is obvious that it has no force.

The classification of accused persons on the basis of being under arrest or at liberty is clearly a reasonable classification. Article 20(1) of the Constitution grants a right to a person, who is sought to be deprived of his personal liberty, to be represented by legal practitioners. No such right is granted by the Constitution of being represented by a legal practitioner if the liberty of his person is not threatened. The proviso to S. 80, merely enforces the fundamental right which has been granted by Art. 20 of the Constitution. Consequently, this contention must also be rejected.

(6) No other points were urged in support of this petition.

(7) The petition fails and is dismissed.

A/H.G.P. Petition dismissed.

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MALIK C. J. AND GURTU J. (3-5-1954)

Raghubir, Appellant v. Govt. of U. P., Lucknow and others, Respondents.

Special Appeal No. 15 of 1954.

(a) Constitution of India, Arts. 226 and 215 — Judgment of concurrence of one of members of Revenue Board quashed on ground and that he did not hear parties — Case sent back to Board for disposal according to law — State Legislature passing Act 30 of 1953, authorising Member who had not heard the parties to sign concurrence with judgment written by another member who had heard the parties — Judgment in case signed by another member purporting to act under the new Act — There is no disregarding the decision of the High Court — U. P. Board of Revenue (Declaration of Procedure and Validation) Act (30 of 1953).

Appeal before Revenue Board — One of the Members hearing parties, writing judgment and sending it to another member for concurrence — The other member concurring and signing judgment without hearing parties — High Court in petition under Art. 226, quashing the judgment of the other member who had not heard the parties — Case going back to the Board for disposal according to law — Three days after the High Court decision, State Legislature passing U. P. Board of Revenue (Declaration of Procedure and Validation) Act 1953 — Under Act, hearing of parties by both Members of Board not necessary — Purporting to act under the Act, the judgment of Member who heard the parties sent to another Member for concurrence — Other member signing concurrence without giving opportunity to parties for being heard — In the circumstances of the case, held that the Board could not be said to have disregarded the decision of the High Court upon the writ petition — This would have been the case had the new Act not intervened. (Para 4)

(b) U. P. Board of Revenue (Declaration of Procedure and Validation) Act (30 of 1953) — Validity — There is no discrimination — (Constitution of India, Art. 14).

U. P. Act 30 of 1950 prescribes a special procedure in all cases coming before the Revenue Board and the same procedure is applicable to every case before it. There is no discrimination. Act is not invalid on this ground. AIR 1952 SC 75, Distinguished. (Para 6)

(c) U. P. Board of Revenue (Declaration of Procedure and Validation) Act (30 of 1953) — Validity — Act is not invalid because a member of the Board of Revenue who has not heard the parties can sign concurrence to the judgment written by another who heard the parties — (Constitution of India, Art. 226 — Rule of natural justice that parties should be heard).

In India no so-called rule of natural justice that no case shall be decided without giving the parties an opportunity to be heard can invalidate an Act passed by our legislatures within their legislative competence. (Para 7)

So, the U. P. Act 30 of 1953 is not invalid on the ground that it allows a Member of the Revenue Board who has not heard the parties to sign the judgment written by another member who has heard the parties. AIR 1954, SC 194, Distinguished. (Para 8)

(d) U. P. Board of Revenue (Declaration of Procedure and Validation) Act (30 of 1953) — Act does not amend Civil P. C. and did not require sanction of President for its validity — (Constitution of India, Art. 254(2)).

The Civil Procedure Code is not applicable to proceedings in Revenue Courts, except to the extent that the revenue law makes it applicable and the U. P. Act 30 of 1953 provides that in revenue Courts the procedure laid down in the Act shall be followed; and thus there is no question of this Act amending the Civil P. C. and therefore requiring the sanction of the President. Act is not invalid on this ground. (Para 9)

CASES REFERRED: Paras

(A) (V40) AIR 1953 All 264: 1953 All LJ 1 (FB) 2
(B) (V39) AIR 1952 SC 75: 1952 Cri LJ 510 (SC) 6
(C) (V41) AIR 1954 SC 194: 1954 Cri LJ 475 (SC) 7, 8

A. P. Dube, for Appellant.

MALIK C. J.:

This is an appeal filed on behalf of one Raghubir against the order of a learned single Judge dismissing a petition under Art. 226 of the Constitution.

(2) Raghubir filed a suit for possession of a number of plots in the court of an Assistant Collector. The suit was dismissed. He filed Civil Appeal No. 371 of 1948 before the Additional Commissioner of Meerut. The appeal was allowed and the suit was decreed. The other side then filed a Second Appeal before the Board of Revenue. On 29-10-1951, Mr. Ram Nagina Singh, one of the Members of the Board, heard the arguments of the parties and wrote out his judgment which he sent to another Member of the Board. Mr. J. O. N. Shukla for concurrence. Mr. Shukla on 3rd of November, 1951, without hearing the parties concurred with the opinion of Mr. Ram Nagina Singh, as a result of which the appeal was allowed and the judgment of the trial court restored.

Raghubir then filed a writ petition in this Court (Writ No. 391 of 1952). This came up before a Bench of this Court — Mr. Justice Mootham and Mr. Justice Chaturvedi. Relying on the judgment of a Full Bench in — 'Suraj Mal v. The Board of Revenue, U. P. Allahabad', AIR 1953 All 264 (A), they held that the judgment of Mr. J. O. N. Shukla was a nullity as he had passed it without hearing the parties. They, therefore, passed the following order:

> "We consequently allow this application in part and quash the order passed by Sri J. O. N. Shukla dated 3rd November, 1951, only."

Obviously, it meant that the judgment of Mr. Ram Nagina Singh dated 29-10-1951, stood but the opinion of Mr. J. O. N. Shukla dated 3-11-1951, was held to be null and void. The case had, therefore, to go back to the Board so that the appeal might be disposed of according to law.

Three days after the decision of this case the U. P. Legislature passed a new Act — U. P. Act XXX of 1953, U. P. Board of Revenue (Declaration of Procedure and Validation) Act, 1953. The Act came into force on 5-12-1953. The Act provided that it was not necessary for all the Members of the Board, who participated in the decision of an appeal, to actually hear, whether sitting together or separately, the parties or their counsel. Purporting to act under the provisions of this Act, the other Member of the Board, Mr. S. N.

Mitra, on 18-12-1953, concurred with the opinion of Mr. Ram Nagina Singh without giving the parties an opportunity to be heard afresh.

(3) Thereafter, a writ petition was again filed in this Court which was dismissed by a learned single Judge on 15-1-1954, and it is against the order of dismissal that this appeal has been filed.

(4) Two points have been raised by learned counsel;

Firstly, that the order of the Bench dated 2-12-1953, in Writ Petn. No. 391 of 1952, was binding on the Board and the Board should have conducted itself in accordance with that decision and should have given the parties an opportunity to be heard before deciding the appeal. We have looked into the judgment of this Court dated 2-12-1953. This Court declared the judgment of Mr. J. O. N. Shukla invalid and left it to the Board to decide the case according to law.

If the new Act had not intervened, the second Member would no doubt have also heard the parties or their counsel, but as there was a new legislation on the point, the Board acted in accordance with the provisions of the new Act and it cannot, therefore, be said that in passing this order the Board in any way disregarded the decision given in Writ Petition No. 391 of 1952.

(5) The Board having acted in accordance with the provisions of Act 30 of 1953, the order passed by the Board can be challenged only if learned counsel can show that that Act is invalid.

(6) Learned counsel has urged three grounds for holding the Act to be invalid: Firstly, that it is discriminatory and hits against the provisions of Article 14 of the Constitution. Reliance has been placed on the decision of the Supreme Court in — 'State of West Bengal v. Anwar Ali Sarkar', AIR 1952 SC 75 (B).

That case has no bearing on the point. In that case, offences under the same section of the Indian Penal Code were made triable in accordance with the provisions of the Criminal Procedure Code by regular courts of law or at the option of the State Government by a special tribunal in accordance with a special procedure prescribed under the impugned Act. In other words, if two persons had committed the same kind of offence, one could be convicted under the Indian Penal Code and tried in accordance with the procedure of the Criminal Procedure Code, and the other could be tried at the option of the State Government before a special tribunal and in accordance with the special procedure prescribed which was less advantageous to the accused.

It was in those circumstances that their Lordships said that there was discrimination and, therefore, the Act was bad. There is no discrimination in the case before us. There is a special procedure prescribed for all cases before the Board of Revenue and the same procedure is applicable to every case before the Board.

(7) The next submission is that there is a rule of natural justice that no case shall be decided without giving the parties an opportunity to be heard, and this rule of natural justice which was recognised by the Supreme Court in — 'Surendra Singh v. State of Uttar Pradesh', AIR 1954 SC 194 (C), has been violated.

(8) In — 'Surendra Singh's case (C)', the Supreme Court did not rely on any rule of natural justice. The Court relied on the provisions of the Criminal Procedure Code and pointed out that a judgment has to be pronounced in open court and so long as the judgment has not been pronounced, it is merely a draft judgment and it is open to the Judges to change their minds.

The Supreme Court pointed out that as one Judge had died before the judgment was pronounced, it could not be said with any degree of certainty that if he had been alive he might not have changed his mind, and in the circumstances the judgment could not be said to be valid. Moreover, no so-called rule of natural law can in our country invalidate an Act passed by our legislatures within their legislative competence.

(9) The third point urged by learned counsel is that the new Act involves an amendment of the Civil Procedure Code, which cannot be valid without the sanction of the President. To our minds, no such question arises in the case. The Civil Procedure Code is not applicable to proceedings in revenue courts, except to the extent that the revenue law makes it applicable and this Act provides that in revenue courts the procedure laid down in the Act shall be followed.

(10) We are not, therefore, satisfied that the judgment of the learned single Judge was erroneous.

(11) The appeal has no force and is dismissed.

A/R.G.D. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 661 (Vol. 41, C.N. 262)

MALIK C. J. AND V. BHARGAVA J. (11-2-1953).

Beni Ram Moolchand, Applicant v. Commr. of Income Tax, United Provinces; Lucknow, Respondent.

Misc. Case No. 217 of 1949.

(a) Income Tax Act (1922), S. 66 (4) — Question of law.

The principle governing the application under S. 66 (4), Income Tax Act, is that the High Court can ask for further statement of facts on questions of law already framed by the Tribunal and, further the Court can reframe question referred so as to cover points of law which really arise on the facts already found by the Tribunal in the case. It is not within the scope of the powers of the High Court to frame a new question of law not framed by the Tribunal which does not arise on the facts found in the case, or, which requires further facts to be found and stated by the Tribunal besides the facts already found and stated. Case law Ref. (Para 5)

Anno: Income Tax Act S. 66 N. 4.

(b) Income Tax Act (1922), S. 26A — Partnership business — Partnership Act (1932), S. 4.

Assessee doing business also carrying on agency business jointly with another claiming business to be partnership — Burden is on him to prove partnership — Agreement of agency between principal on the one hand and assessee and another on the other, is no evidence of partnership — There must be agreement between assessee and another to share profits and carry on business by all or any of them on behalf of all — Merely sharing commission given by principal does not show partnership — Jointly working agency does not show that it is partnership — Expenses for working agency incurred separately Agency worked by separate staff — Business held not partnership business. (Para 9)

Anno: Income Tax Act, S. 26A, N. 1; Partnership Act, S. 4, N. 1.

CASES REFERRED: Paras

(A) (V20) AIR 1933 PC 108: 1933-1 ITR 94 (PC) 5
(B) ('44) 1944-12 ITR 450 (All) 5
(C) (V39) AIR 1952 All 271: 1951-20 ITR 271 5
(D) (V34) AIR 1947 Bom 89: 1946-14 ITR 635 5
(E) (V40) AIR 1953 Nag 173: 1952-22 ITR 448 6
(F) (V36) AIR 1949 Bom 24: 1948-16 ITR 227 6
(G) (1911) 1911-1 Ch. 92: 80 LJ Ch 210 10

Gopalji Mehrotra and S. K. Varma, for Applicant; J. Swarup, for Respondent.

V. BHARGAVA J.:

This is a reference under S. 21 of the Excess Profits Tax Act read with S. 66 (1), Income-tax Act.

(2) The assessee Beniram Moolchand carries on the business of manufacturing scents and scented oils and of dealing in foreign scents at Kannauj. During the relevant chargeable accounting period, he also held the selling agency for the sale of Sandalwood oil manufactured by the Mysore Government Factory. The agreement of selling agency granted the agency in the joint names of the assessee and another person, Lala Banarasi Das Khattri, who had also a business similar to that of the assessee at Kannauj. This agreement was executed on 1-3-1942, and granted the sole right to the assessee and Lala Banarsi Das Khattri to sell Sandalwood oil manufactured by the Mysore Government in the territory consisting of the United Provinces (now the State of Uttar Pradesh), the Central Provinces (now the State of Madhya Pradesh), Central India (now the State of Vindhya Pradesh), The Punjab, Delhi, Rajputana (now the State of Rajasthan) and all the Indian States within these limits.

Only a few of the terms of this deed of agreement are relevant for the purpose of this reference and we, therefore, need mention only those terms. According to those terms, the agents guaranteed a minimum sale of 12,000 pounds of oil in their agency territories at rates fixed by the Mysore Government from time to time. If, in any year, the agents failed to take the minimum quantity guaranteed, they were bound to take a larger quantity in the next year so that the minimum for the next year was to be increased to that extent. The packed oil was to be delivered to the agents F. O. R. at any railway station in the agency territory. The agents had to furnish a security of Rs. 20,000/- and they were allowed credit to this extent as well as further credit to the extent of Rs. 15,000/- against drafts at 60 days' sight. The agents were bound to arrange to take delivery of the oil, warehouse it and insure it to its full value against all risks and losses. All expenses incurred in this respect had to be borne by the agents themselves. The agents were permitted to sell the oil on credit but they were to indemnify the Mysore Government against all losses caused by default in payment on the part of the customers. The agents were also bound to make effective arrangements for advertising the oil in a suitable manner. They were to receive a contribution of Rs. 500/- a year, provided that minimum amount was spent, for advertisement purposes and any excess expenditure on advertisement had to be borne by the agents themselves. In consideration of all this business, the agents were entitled to receive a commission of four annas on every pound of oil supplied to them for sale and sold by them.

(3) The Excess Profits Tax authorities sought to include the income of the assessee from this agency business for Excess Profits Tax purposes in the income from the assessee's own business of manufacturing scents and scented oils and dealing in foreign scents. The assessee contended that this agency business was a partnership business, of which the assessee and Lala Banarsi Das Khattri were partners and consequently this business must be held to be separate and distinct from the old business for purposes of the assessment of Excess Profits Tax. The Income-tax Appellate Tribunal found that each of the commission agents, namely, the assessee and Lala Banarsi Das Khattri, had been carrying on the business of the commission agency along with their separate business activities through their respective firms by means of their own separate staff, separate office and separate set of dealings, keeping separate account of their respective transactions and had also entered into certain separate and independent dealings out of the Sandal oil stock received by them as commission agents and earned profits on them. It was also found that separate account of expenditure had been kept by each of them and no common expenses were incurred nor any net profits were worked out or ascertained through the medium of any partnership account.

It was also admitted before the Tribunal that if, in respect of such separate dealings, any stock was left with either of the two commission agents and the prices depreciated, the loss was to be borne by the Mysore Government and that part of the loss, which was not borne by the Mysore Government, was to be borne by the assessee or by Lala Banarsi Das Khattri, whosoever had the stock left in his hands. The further finding of the Tribunal was that the commission on the total purchases made by both the agents was finally divided equally between the assessee and Lala Banarsi Das Khattri. In entering into the agreement, the executants had entered as representing their respective firms so that the firm Beniram Moolchand was as such one of the commission agents. As a result of the transactions in connection with this selling agency, the assessee and Lala Banarsi Das Khattri jointly earned a sum of Rs. 12,473-3-9 as commission and contribution towards advertisement charges. This amount was received by the assessee and half of it was credited by the assessee in favour of Lala Banarsi Das Khattri. The remaining half retained by the assessee was his own share. On these facts, the Tribunal held that no partnership existed between the assessee and Lala Banarsi Das Khattri and that the work of selling agency in respect of the oil manufactured by the Mysore Government done by the assessee was his own separate business. On the application of the assessee, the following question has been referred by the Tribunal for our decision:

> "Q. Whether, on the above facts, the Tribunal was justified in drawing the inference that the commission agency in the joint name of the appellant and Lala Banarsi Das held under the deed of agreement, dated 1-3-1942, was not a partnership?"

(4) Learned counsel for the assessee has contended that the question has not been properly framed by the Tribunal and has presented an application under section 66(4) of the Indian Income-tax Act, requesting that the question be re-framed as follows:

> "Q. Whether the sum of Rs. 5,986-9-9 earned by the applicant as commission from the Mysore State Government from Sandalwood oil Agency is exempt from Excess Profits Tax?"

The argument of the learned counsel is that the question, as framed by the Tribunal, confines the

assessee to one contention only, viz., that the sum of Rs. 5,986-9-9 earned by the assessee from the selling agency business was not liable to Excess Profits Tax, only because it had been earned in a business carried on by the assessee in partnership with Lala Banarsi Das Khattri. The question has been sought to be reframed in an attempt to challenge the liability of the amount earned by the assessee to Excess Profits Tax on two other grounds: One ground that the learned counsel wanted to urge was that, even though the selling agency business might not have been carried on in partnership with Lala Banarsi Das Khattri, yet it was a business of the assessee which was separate and distinct from his old business of manufacturing scent and scented oil and dealing in foreign scents and, for the purpose of Excess Profits Tax, the amount earned in the selling agency business should not be added to the income from his old business; the other ground was that the profits from the selling agency business were earned in the State of Mysore and as such those profits were exempt from being charged to Excess Profits Tax under the third proviso to S. 5 of the Excess Profits Tax Act.

(5) The application of the assessee under S. 66 (4) of the Indian Income-tax Act has to be disallowed as we are not satisfied that the points of law, which the learned counsel wants to urge after having the question re-framed, arise out of the appellate order of the Income-tax Appellate Tribunal. The scope of the jurisdiction of the High Court in references under S. 66, Income-tax Act, is restricted to deciding questions of law raised by the case referred to the Court by the Tribunal. Their Lordships of the Judicial Committee in — 'Commr. of Income-tax, B and O. v. Kameshwar Singh of Darbhanga', AIR 1933 PC 108 at pp. 114-115 (A) remarked:

"The duty of the High Court under S. 66(5) is to 'decide the questions of law raised' by the case referred to them by the Commissioner and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the question to be decided as being.....Their Lordships deprecate this departure from regular procedure, but, in the circumstances, have not thought it proper to decline to express their view on the question thus informally presented."

The words "questions of law raised by the case" have since been interpreted in the various High Courts and there are two decisions of this Court also. In 'In re Govind Ram Tansukh Rai', (1944) 12 ITR 450 (All) (B), a Bench of this Court held:

"It is not necessary that all legal arguments in support of a contention should be put forward before the Assistant Commissioner or the Commissioner so long as the contention itself is substantially put forward and variation is permissible in regard to legal arguments in support of the contention provided they clearly and properly arise on the facts found and on the contention raised by the assessee."

In — 'Mahabir Prasad v. Commr. of Income-tax, U. P.', AIR 1952 All 271 (C), in considering the scope of sub-section (4), S. 66, Indian Income-tax, we hold:

"Sub-section (4), to our minds, is wide enough to cover such a case and if this Court is satisfied that the statement of the case is insufficient, it can refer the case back to the Income-tax Appellate Tribunal to give a fuller statement.. If the Court then considers that it would like to have further statement of facts and other questions referred to it, it can always pass suitable orders under Section 66(4) of the Income-tax Act. The point is covered by the decision of a Bench of the Bombay High Court in — 'Khandvala and Co. v. Commr. of Income-tax', AIR 1947 Bom 89 (D)."

The Bombay High Court, in — 'AIR 1947 Bom 89 (D)', held:

"When a statement of case, with the question of law framed by the Tribunal, is filed in Court for disposal, if a party is aggrieved and wants to contend that certain further facts ought to be stated, or certain questions of law should be raised, he can make an application by way of notice of motion. That should be heard along with the case stated by the Tribunal for the Court's opinion. At that time, the Court will consider whether the statement of case is complete for the question of law raised by the Tribunal. The Court can also consider whether, on the case stated by the Tribunal, the proper question is raised or not. That is the proper time for an aggrieved party to bring to the notice of the Court that certain further and other facts are necessary to be stated or certain further or other questions of law arise and should be brought for decision by the Court."

These decisions clearly indicate that the principle governing the application under S. 66(4), Income-tax Act, is that the High Court can ask for further statement of facts on questions of law already framed by the Tribunal and, further, the Court can reframe question referred so as to cover points of law which really arise on the facts already found by the Tribunal in the case. It is not within the scope of the powers of the High Court to frame a new question of law not framed by the Tribunal which does not arise on the facts found in the case, or, which requires further facts to be found and stated by the Tribunal besides the facts already found and stated.

(6) Learned counsel for the assessee has very strongly relied on a decision of the Nagpur High Court in — 'Mohanlal Hiralal v. Commr. of Income-tax', AIR 1953 Nag 173 (E), in which the learned Judges held:

"In interpreting the expression 'the question of law arising out of such order', Chagla, C. J., summed up the correct legal position very tersely thus:

".....looking at the plain language of the section apart from any authority, I should have stated that a question of law arose out of the order of the Tribunal if such a question was apparent on the order itself or it could be raised on the facts found by the Tribunal & which were stated in the order. I see no reason to confine the jurisdiction of this Court to such questions of law as have been argued before the Tribunal or are dealt with by the Tribunal. The Section does not say so and there is no reason why we should construe the expression 'arising out of such order' in a manner unwarranted by the ordinary grammatical construction of that expression': — 'Madanlal Dharnidharka v. Commr. of Income-tax', AIR 1949 Bom 24 at p. 25 (F)."

This view of the Nagpur High Court, or the view of the Bombay High Court which it follows, is, in no way, in conflict with the opinion which we have expressed above and which is supported by the decisions of this Court and the Bombay High Court and does not widen the scope of the jurisdiction of the High Court beyond answering the question of law framed by the Tribunal after asking for further statement of the facts, or,

answering questions of law after reframing them so as to cover points of law arising out of facts found in the case. The application of this principle to this case rules out the contention of the learned counsel for the assessee that the question referred by the Tribunal should be reframed as suggested in the application under S. 66(4) of the Act.

(7) The facts necessary for deciding the two questions of law, which learned counsel wanted to argue by amendment of the question referred to us, have not all been found by the Income-tax Appellate Tribunal, probably for the reason that those contentions were not raised before it and, consequently, it had no occasion to investigate into those facts. As the facts stated above show, the Tribunal did hold that the agency business of the assessee was not carried on in partnership with Lala Banarsi Das Khattri and, for this purpose, the Tribunal held that each of the two persons alleged to constitute the partnership carried on separate business activities through their respective firms by means of a separate staff, separate office and separate set of dealings, keeping separate account of their respective transactions and had also entered into certain separate and independent dealings out of the Sandal oil stock received by them as commission agents and earned profits on them.

The word 'separate' used in this finding was meant to distinguish between the activities of the assessee and the activities of Lala Banarsi Das Khattri as commission agents of the Mysore Government. This word was not used to connote that the commission agency work of the assessee was separate from his previous continuing business of manufacturing scents and scented oils and dealing in foreign scents. The Tribunal did not enter into the question whether the assessee kept a separate staff, separate office and separate accounts of the commission agency business apart from the staff, office and accounts of the old business of manufacturing scents and scented oils and dealing in foreign scents. The Tribunal would have investigated this question of fact, if it had been contended by the assessee before it that his commission agency business was separate and distinct from his old business even though it might not have been in partnership with Lala Banarsi Das Khattri. The ground, that learned counsel wanted to urge, can, therefore, be considered only after obtaining fresh facts from the Tribunal and cannot, therefore, be said to be a question of law raised by the case referred to us.

(8) Similarly, the second argument that learned counsel wanted to urge, would also require a further finding from the Tribunal whether the profits from the commission agency business were earned by the assessee in the State of Mysore or at his place of business in Kannauj. The facts found only show that the oil was supplied by the Mysore Government from an area to which the Indian Income-tax Act did not apply and the commission was also sent to the assessee from the same place. The income, which was earned by the assessee, arose out of the assessee's dealings with the Mysore Government as well as out of the activities which the assessee had to carry on at various places in stocking and selling oil and in advertising it. It cannot, therefore, be said that enough facts have already been found by the Tribunal which would show that the profits from the selling agency business were earned in the State of Mysore and, consequently, it is not permissible for us to re-frame the question so as to permit the assessee to contend that the profits were exempt from being charged to Excess Profits Tax under the third proviso to S. 5, Excess Profits Tax Act. We are, therefore, not inclined to re-frame the question and dismiss the application under S. 66(4) of the Indian Income-tax Act.

(9) In these circumstances, the only question, that falls to be determined by us, is the question which has already been framed by the Tribunal and referred to us for decision. The burden of proving that the commission agency business carried on by the assessee was in partnership with Lala Banarsi Das Khattri lay on the assessee. To discharge this burden, the assessee has relied on the agreement of agency entered into between the assessee and Lala Banarsi Das Khattri as one party and the Government of Mysore as the other party. It has been contended that, under this agreement, the assessee and Lala Banarsi Das Khattri had jointly taken the sole selling agency from the Mysore Government and had given a joint guarantee for the sale of the oil, that they were also joint guarantors in respect of all other obligations to Mysore Government and that the commission earned on the oil purchased was to be equally shared by them, and this shows that the business of sole agency constituted a partnership between the assessee and Lala Banarsi Das Khattri.

It is to be noticed that the assessee has not produced any deed or agreement of partnership executed by the assessee and Lala Banarsi Das Khattri, nor has any other evidence been adduced to prove what the agreement 'inter se' between the assessee and Lala Banarsi Das was. The terms of the agreement with the Mysore Government do not, in our opinion, necessarily lead to an inference that the assessee and Lala Banarsi Das Khattri, in working jointly as selling agents, had agreed to enter into a partnership. Even persons, who may not be partners in carrying on commission agency business, may make themselves jointly responsible to the principal granting the agency in respect of matters arising between the commission agents and the principal, but this circumstance would not indicate that such persons must be acting as partners. The rights of such persons 'inter se' would have to be determined by the terms of the agreement between them and not by the terms of the agreement jointly entered into by them with the principal. Occasions arise when persons individually may not be in a position to comply with the terms demanded for granting the commission agency, or, when persons may combine to take the agency jointly in order to avoid competition and thus obtain more favourable terms.

The mere fact of taking the agency jointly would not necessarily constitute partnership. To constitute partnership under S. 4 of the Indian Partnership Act, persons should have agreed to share profits of a business carried on by all or any of them acting for all. The two ingredients, which are necessary to constitute partnership, are an agreement to share the profits and the carrying on of the business by all or any of them acting for all. The agreement with the Mysore Government does not show that there was any agreement between the assessee and Lala Banarsi Das Khattri to share the "profits" of the selling agency business. On the other hand, even the contention of the assessee is that the agreement between the assessee and Lala Banarsi Das Khattri was to share the "commission" on the oil purchased from the Mysore Government. The commission earned on the oil

purchased cannot be said to be the profits of the selling agency business.

The facts found by the Tribunal show that the agency business did not consist of merely purchasing oil from the Mysore Government. Under the agreement with the Government, the assessee and Lala Banarsi Das Khattri had not merely to purchase the oil but they had to carry out a number of other operations. They were required to take delivery of the oil and warehouse it at their own expense. They were also required to insure the oil to its full value against all risks and losses out of their own pockets. They had to incur expenditure on advertisement and were to be re-imbursed to the extent of Rs. 500/- a year only by the Mysore Government. If the expenses on advertisement exceeded Rs. 500/, the excess had to be borne by them; and if there was a surplus, it could be appropriated by them. For carrying on all these activities they had to maintain a staff and incur other expenses. The commission earned by them could only turn into profits after setting off all these and other incidental expenses.

The agreement between the assessee and Lala Banarsi Das Khattri was only to share the commission while there was no agreement to share the various expenses. It is, therefore, clear that the facts established by the assessee do not, in the absence of proof of the terms of the agreement between the assessee and Lala Banarsi Das Khattri, prove that a partnership between them had come into existence. There are the further facts that the assessee and Lala Banarsi Das Khattri had separate business activities through their respective firms by means of a separate staff, separate office and separate set of dealings. They were keeping separate accounts of their respective transactions and had also entered into certain separate and indepedent dealings out of the Sandal oil stock received by them as commission agents and earned profits on them. Separate accounts of expenditure had to be kept by each of them and no common expenses were incurred nor any net profits worked out or ascertained. An extract from the 'Rokar Bahi' of the assessee has been placed before us by the Tribunal as a part of the statement of the case. It shows that even the sum of Rs. 500/- received from the Mysore Government for expenses over advertisement was equally divided by the assessee and Lala Banarsi Das Khattri irrespective of the actual expenditure incurred by each on advertising the Sandal oil. All these circumstances lead to the inference that, though the assessee and Lala Banarsi Das Khattri had entered into a joint agreement with the Mysore Government, they kept their own business separate from each other and did not enter into any agreement 'inter se' to share the profits arising from the commission agency as a whole.

(10) The word 'profit' was explained by Fletcher-Moulton L. J. — 'In re Spanish Prospecting Co. Ltd.', (1911) 1 Ch. 92 at p. 98 (G), as follows :

> "'Profit' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates."

Later, in his judgment, Fletcher-Moulton L. J. proceeded to hold :

> "We start, therefore, with this fundamental definition of profits, namely, if the total assets of the business at the two dates be compared, the increase which they shew at the later date as compared with the earlier date (due allowance of course being made for any capital introduced into or taken out of the business in the meanwhile) represents in strictness the profits of the business during the period in question."

This definition of the word 'profits' clearly indicates that profits depend on the total assets at the beginning of a period and at the end of that period and the ascertainment of these profits without actual stock valuation would always depend on the calculation of the gross receipts during the period and the gross expenditure incurred during that period. The receipts alone without having any regard for the expenditure cannot be deemed to be the profits of the business. The assessee and Lala Banarsi Das Khattri had agreed to share the gross receipts of the business, namely, the commission and the contribution towards expenses for advertisement paid to them by the Mysore Government. There was no agreement to share the expenses which have also to be taken into account in working out the profits. We, therefore, hold that the Tribunal was justified in drawing the inference that the commission agency in the joint name of the assessee and Lala Banarsi Das Khattri held under the deed of agreement, dated the 1st of March, 1942, was not a partnership.

(11) We answer the question accordingly. The assessee shall pay costs to the Department which we assess at Rs. 400/-

B/R.G.D. Answer accordingly.

A.I.R. 1954 ALLAHABAD 665 (Vol. 41, C.N. 263)

MALIK C. J. AND V. BHARGAVA J. (28-9-1953).

Ram Swarup Bangalimal, Applicant v. Commr. of Income Tax, U. P. & V. P. Lucknow, Respondent.

Misc. Case No. 164 of 1948.

Income Tax Act (1922), S. 13 — Option of assessee.

Under the well recognised system of accountancy, the assessee has the right to value his closing stock at market price or cost price whichever is less, and, in the absence of a proof or finding that the assessee has been regularly valuing his stock at cost price, even though the market price may have been less or, in the absence of evidence that, in any year, the market price is less than the cost price, it cannot be said that he has made a change in the method of accounting. Even if the assessee has not substantiated his plea that he had always been valuing his stock at cost price or market price, whichever was less, the Income-tax Officer is entitled to add back the difference between the cost price and the market price to the income shown by the assessee only if he can arrive at a definite finding that there had been a change in the regular method of accounting employed by the assessee and the burden of proving that there had been such a change is on the Department. It was held that the assessee was entitled to value his closing stock at market rate. Case law relied on. (Para 14)

Anno: Income Tax Act S. 13, N. 4.

CASES REFERRED: Paras

(A) (1926) 12 Tax Cas 813: 1926 SC 20 7
(B) (1949) 65 TLR 725: 1949-2 All ER 889 8

(C) (1941) 23 Tax Cas 174 8
(D) (V12) AIR 1925 Mad 1242: 2 ITC 14 8
(E) (V36) AIR 1949 Mad 580: 1949-17 ITR 1 9
(F) ('37) 1937-5 ITR 261 (Bom) 12
(G) (V17) AIR 1930 PC 56: 57 Ind App 21 (PC) 13
(H) (V25) AIR 1938 PC 1: 65 Ind App 1 (PC) 13

J. Swarup, for Applicant; S. C. Das, for Respondent.

MALIK C. J.:

The question referred to this Court for its decision in compliance with an order under section 66 (2) of the Indian Income-tax Act is—

"Whether on the facts and in the circumstances of this case, the assessee was entitled to value his closing stock at market rate?"

(2) The assessee is a firm mainly carrying on wholesale cloth business. The accounts produced showed a total turn-over of Rs. 12,81,375/-. The receipts showed a balance of Rs. 9,263/- in favour of the assessee. After deducting certain expenses the assessee, however, worked out a net loss of Rs. 13,915/-. In preparing the Profit and Loss Account the assessee had valued his closing stock at the market rate at Rs. 1,64,191/-. The cost price of the said stock was, however, Rs. 2,27,913/-. The Income-tax Officer was of the opinion that the assessee should have valued his closing stock at the cost price as he had been doing in previous years and he added back the difference between Rs. 2,27,913/- and Rs. 1,64,191/-, i.e., Rs. 63,722/-. The Appellate Assistant Commissioner and the Tribunal agreed with the decision of the Income-tax Officer.

(3) The assessee had pleaded that his usual method of accounting was that at the end of the year, for the purpose of the preparation of his Profit and Loss Account, he used to value the closing stock either at cost price or at market price, whichever was lower, and that he had followed the same practice in the year in question. He further pleaded that by reason of the textile control restrictions, which came into force in June 1943, there was an appreciable fall in the market price and he could not expect any relaxation of the controls and the rise in prices, so as to recover what he had paid for the stock.

(4) The Appellate Tribunal held — and it is also stated in the Statement of the Case — that the assessee had failed to prove that he had always valued the closing stock at the lower of the two prices — the cost price and the market price. It is stated in the Statement of the Case that the method followed in preparing the Profit and Loss Account by the assessee was that he valued his stock at cost price and in the year in question there had been a departure from the method of valuation followed in the previous years.

(5) We may mention that though the assessee may not have succeeded in proving his case that he had valued his closing stock at the lower of the two figures — the cost price and the market price — the Department has not established that in any year the assessee had valued his stock at cost price though the market price might have been lower. The burden of proving that there has been a change in the method of accounting was on the Department and, in the absence of any evidence that the assessee had in any year valued his stock at cost price, even though the market price might have been lower, it cannot be said that the method of accounting followed by the assessee was to value his stock at cost price even though the market price might have been less.

(6) We are asked to answer the question, whether the assessee was entitled to value the closing stock at market rate, when in the previous years he had been valuing it at cost price.

(7) In — 'Whimster & Co. v. Commissioners of Inland Revenue', (1926) 12 Tax Cas 813 at p. 823 (A), it was laid down that in preparing profits and gains for the purposes of Income-tax two principles must be kept in mind: In the first place, the profits of any particular year of accounting must be taken to consist of the difference between the receipts from the trade or business during such accounting period and the expenditure laid out to earn those receipts. In the second place, the account of profit and loss to be made up for the purpose of ascertaining that difference must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty, as the case may be.

(8) No correct picture of the profits and loss account can be had unless the opening and the closing stocks are also taken into account. Two principles have now become well settled (1) that the assessee is entitled to value the closing stock either at cost price or market value whichever is lower and (2) that the value of closing stock must be the value of opening stock in the succeeding year, that is, an assessee cannot close his accounts and value his stock at a particular figure and the next morning on the first day of the next year he cannot value it at a different figure. — 'In Halsbury's Laws of England, Hailsham Edition, Volume 17, page 124, paragraph 232 is as follows:

"It is to be observed that the allowance by the Inland Revenue authorities of a writing down of stock when market value is lower than cost is in effect the allowance of a reserve for a future unrealised loss, and as such is an exception to the general rule that precautionary reserves are not allowable."

In — 'Inland Revenue Commissioners v. Cock, Russell and Co. Ltd.', (1949) 65 TLR 725 (B), it was held that in valuing stock in trade for the purpose of ascertaining the profits of a business for revenue purposes it is proper to consider each item of stock separately and to take it at cost, or value it at market value, whichever is the lower. Clauson, L. J. in — 'B. G. Utting & Co. Ltd. v. Hughes', (1941) 23 Tax Cas 174 at p. 185 (C), said:

"The normal method of dealing with this item would be to make it up by calculating cost or market value, whichever is the lower, of the various assets represented."

In 'Spicer and Pegler's Practical Auditing, Sixth Edition, Page 170, basis of valuation of stock is laid down as follows:

"Stock should be valued at cost or market price, whichever is lower at the date of the Balance Sheet.

In this connection, the term "market value" means either the replacement value or the selling value, whichever is the lower .....

In no case should the value be higher than cost, even though the market value has risen, as this would result in taking profit before the sale is effected and the profit earned. On the other hand, a fall in the market value, due to a fluctuation in the price, need not be considered if the value has since risen. A permanent fall in value, however, must be taken into account.

Stock is a floating asset, and as such must be brought into account at its realisable value, when that value is lower than cost."

The reason for this has been given by Coutts-Trotter, Chief Justice in — 'Commissioner of Income-tax, Madras v. Chengalvaraya Chetty', AIR 1925 Mad 1242 at p. 1243 (D), to enable a trader more evenly to distribute his loss. The learned Chief Justice observed:

"I should add that the accepted rule is that the assessee in crediting the closing stock figure is to take either the cost price or the market value whichever be the less — a provision obviously intended to be in favour of the trader and enables him more evenly to distribute his loss."

(9) The learned Chief Justice Rajamannar, in — 'Commissioner of Income Tax and Excess Profits Tax, Madras v. Messrs. Chari and Ram, Madura', AIR 1949 Mad 580 (E), has said:

"The accepted basis of valuation of stock is cost or market value, whichever is lower, at the date to which the accounts for a period are made up."

As regards the reason for the rule the learned Chief Justice has observed as follows:

"If one can speculate on the rationale of the rule, which allows an assessee to adopt the market value when it is lower than the cost, it appears to be this: If one were to imagine a sale taking place on the closing day of the entire stock, it is reasonable to expect that the articles of which the market value is lower would not fetch anything more than at those rate, and therefore loss would be certain. But there would be no assurance that there would be a market for the entire stock of articles of which the market value is higher and therefore it would be hazardous "to assume that the entire stock could be sold at the prevailing market rate and necessarily bring in a profit."

Whatever may be the reason for the rule it is now well settled that while the Income-tax Department is not entitled to anticipate profits and compute such anticipated profit as income the trader has been given a concession, not by any statute but by the general practice of accountancy, to value his closing stock at cost or market value whichever is lower, so that he may be able to spread out his loss.

(10) In the case before us on behalf of the Commissioner of Income-tax, reliance is placed on the fact that the assessee has not claimed that he made a change in the method of accounting and his plea that he had always been valuing the stock at market price or cost price whichever was lower has not been found to be true. On behalf of the Commissioner of Income-tax reliance is also placed on the fact that the assessee had always been valuing his stock at cost price and, it is said, that he is bound by the method of accounting regularly followed by him and as he has not even alleged that he had made a change in the method of accounting there is no reason to give him any relief.

(11) Section 13 of the Indian Income-tax Act makes it clear that the Income-tax authorities are bound to accept the method of accounting regularly employed by the assessee for computation of his income unless the method employed by him is such that in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom. In that case the Income-tax Officer has been given the right to make the computation on such basis and in such manner as he may determine. Section 13 of the Income-tax Act is as follows:

"Method of accounting income, profits and gains shall be computed, for the purposes of Sections 10 and 12, in accordance with the method of accounting regularly employed by the assessee:

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deducted therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine."

(12) As regards the assessee's right to change the method, learned counsel for the Commissioner of Income-tax has urged that though the assessee may have the right to change the method of accounting adopted by him, one method of accounting can be replaced only by another regular method of accounting. In — 'Ramkumar Kedarnath v. Commr. of Income-tax, Bombay', (1937) ITR 261 (Bom) (F), Beaumont, Chief Justice said:

"Although I think it is open to an assessee to change the regular basis on which he keeps accounts, still if he seeks to do that he must satisfy the Commissioner on proper evidence that he has in fact changed the regular basis of accounting. I do not think here he did in fact change the regular basis of accounting except for this particular half year; and if the company had been reinstated again and had continued the agency agreement as before, there is nothing to show that the basis on which the accounts had been kept in the past would not have been continued in future."

(13) On behalf of the Commissioner of Income-tax it is, therefore, urged that unless it is established that the assessee has now adopted a regular method of accounting of valuing his stock at market price or cost price, whichever is less, he should not be allowed to value the closing stock at the market price which was lower in the accounting year in question. Reliance is placed on the observations of their Lordships of the Judicial Committee in — 'Commissioner of Income-tax, Bombay Presidency v. Ahmedabad New Cotton Mills Co. Ltd.', AIR 1930 PC 56 (G), that:

"The one thing that is essential is that there should be a definite method of valuation adopted which should be carried through from year to year, so that in case of any deviation from strict market value in the entry of the stock at the close of one year it will be rectified by the accounts in the next year."

We were at one time inclined to the view that the words 'method of accounting' in this section do not relate to the question of the valuation of the closing stock but mean whether the assessee had been keeping his account on cash basis or on mercantile basis or had followed the hybrid system of accounting, that is, partly mercantile and partly cash. In view, however, of the observations made by their Lordships of the Judicial Committee in — 'Commr. of Income-tax, Bombay Presidency v. Ahmedabad New Cotton Mills Co. Ltd.', (G)', referred to above, and — 'Commr. of Income-tax, Bombay v. Sarangpur Cotton Manufacturing Co., Ltd., Ahmedabad', AIR 1938 PC 1 (H), we must hold that how the closing stock was to be valued must also be deemed to be part of the method of accounting.

(14) We have already said that it has been found that the assessee had all along been valu-

ing his stock at cost price. It has not been shown on behalf of the Department that, in any year, the market price was less than the cost price. It cannot, therefore, be said that the assessee was following the method of valuing his stock at cost price even though the market price might have been less. Under the well recognised system of accountancy, the assessee had the right to value his closing stock at market price or cost price whichever was less and, in the absence of a proof or finding that the assessee had been regularly valuing his stock at cost price, even though the market price might have been less, or, in the absence of evidence that, in any year, the market price was less than the cost price, it cannot be said that he has made a change in the method of accounting. No doubt, the assessee has not substantiated his plea that he had always been valuing his stock at cost price or market price, whichever was less, but the Income-tax Officer was entitled to add back the sum of Rs. 63,722/- to the income shown by the assessee only if he could arrive at a definite finding that there had been a change in the regular method of accounting employed by the assessee and the burden of proving that there had been such a change was clearly on the Department.

In the statement of the case, the Tribunal has said that, on the record, there was no evidence produced by the assessee to prove that he had valued his opening and closing stocks in earlier years at cost simply because, in all those years, the cost price was lower than the market price. Learned counsel for the Department had, however, to admit that the only fact known was that the assessee had always valued his stock at cost price but there was nothing on the record from which it could be deduced that, in those years, the market price was less. In the circumstances, it does not appear to be possible to draw an inference that the assessee had adopted the regular method of valuing his stock at cost price even if the market price was lower and, consequently, in valuing his stocks in the accounting year in question at the lower market price, it cannot be said that the assessee was changing the regular method of accounting employed by him in the past. It cannot, therefore, be held that the assessee was not entitled to value his closing stock at market rate. This is our answer to the question referred to us for decision.

(15) We do not think that this is a case in which the assessee should get his costs as the plea taken by him that he had always been valuing his stock at cost or market price, whichever was lower, had been rejected by the Tribunal and no reference was asked for specifically on that point.

B/H.G.P. Reference answered.

A.I.R. 1954 ALLAHABAD 668 (Vol. 41, C.N. 264)

(LUCKNOW BENCH) RANDHIR SINGH J.
(4-1-1954)

Rasool and others, Defendant-Appellants v. Ramzan Ali, Plaintiff-Respondent.

S. C. A. No. 647 of 1947, against decree of Civil J., Bara Banki, D/- 21-7-1947.

(a) Easements Act (1882), S. 35 — Right of privacy — (Custom (Oudh) — Right of privacy).

The custom of a right of privacy is of general prevalance and is commonly recognised and it is open to a Court to take judicial notice of such a custom in the province of Oudh under S. 57 of the Evidence Act. 10 All 358; AIR 1935 All 1002, Ref. (Para 3)

Anno: Easements Act, S. 35, N. 4.

(b) Easements Act (1882), S. 35 — Right of privacy — Question of fact — (Civil P. C. (1908), S. 100).

Where the lower appellate Court found that it has not been proved satisfactorily that the new window existed exactly at the place where a window existed previously this question of fact cannot be reagitated in the High Court. (Para 4)

Anno: Civil P. C., Ss. 100-101, N. 52, 50.

1953 Mulla: S. 100, P. 367, N. "No....fact" (8 Pts. extra in N. 52 to Ss. 100-101 in AIR Com. — Pts. (l) to (u) in Mulla taken under various appropriate notes to Ss. 100-101 in AIR Com.)

1953 Mulla: S. 100 (Topic discussed in N. 50 to Ss. 100-101 in AIR Com. extra — See however, N. "No.....fact" on P. 367 in Mulla).

Easements Act, S. 35, N. 4.

(c) Easements Act (1882), S. 35 — Right of privacy.

If the existence of an old window at the place where a new window has been opened has not been proved, and if the new window substantially invades the right of privacy of the plaintiff's house, the defendant cannot be allowed to retain the window at its present location. It is however always open to the defendant to so readjust his window, or to close up the lower portion to a height so that no part of the plaintiff's court-yard becomes visible to a person standing in front of the window on the floor of the room, and there can be no valid objection to the opposite party to this. (Para 4)

Anno: Easements Act, S. 35, N. 4.

CASES REFERRED: Paras

(A) ('88) 10 All 358: 1888 All WN 135 3
(B) (V22) AIR 1935 All 1002: 159 Ind Cas 683 3

Akhtar Husain, for Appellants; H. A. Siddique, for Respondent.

JUDGMENT: This is a defendant's second appeal arising out of a suit brought by the plaintiff for a mandatory injunction to require the defendant to close up a window opened by him in one of his rooms built on the upper storey on the ground that it overlooked the court-yard of the plaintiff's house and invaded the privacy of the occupants of the house.

(2) The defence in the case was that the window in the new room was at the place where one existed in the tiled apartment which stood at the place where the new room was built. The trial Court came to the conclusion that the new window had been opened at the place where the old one existed in the tiled apartment. The Court, therefore, dismissed the suit. The plaintiff then went up in appeal and the learned Civil Judge of Barabanki who heard the appeal reversed the finding of the trial Court and decreed the plaintiff's claim for the closure of the window. The defendant has now come up in second appeal.

(3) The question as to whether an old window existed at the place where the new window has been opened is concluded by a finding of the lower appellate Court as it is a question of fact. The learned Counsel for the appellant has, however, argued that the defendant had an absolute right to the enjoyment of air and light and as such he could not be restrained from having an

opening in the shape of a window in the wall of his new room.

The right of privacy is recognised in this province for a very long time and has been the subject of judicial pronouncements in various cases. The leading case, — 'Gokal Prasad v. Radho', 10 All 358 (A), has been followed in various other cases and in the latest pronouncement of this Court, in — 'Nihal Chand v. Mt. Bhagwan Dei', AIR 1935 All 1002 (B), the earlier cases have all been reviewed and referred to. It has been held in this reported case that the custom of a right of privacy is of general prevalence and is commonly recognised and it is open to a Court to take judicial notice of such a custom in this province under S. 57 of the Evidence Act. In view of these decisions it is not open to the appellant to successfully raise the plea that no right of privacy, such as was claimed by the plaintiff in this case, existed.

(4) The lower appellate Court found that it had not been proved satisfactorily that the new window existed exactly at the place where a window existed previously and in view of this finding of the lower appellate Court this question of fact cannot be reagitated in this Court. If the existence of an old window at the place where a new window has been opened has not been proved, and if the new window substantially invades the right of privacy of the plaintiff's house, the defendant cannot be allowed to retain the window at its present location.

It has, however, been suggested by the learned Counsel for the appellant that the defendant may be allowed to have his window readjusted or to close a part of the window so that the court-yard of the plaintiff may not be visible to any one standing in front of the window. It is always open to the defendant to so readjust his window, or to close up the lower portion to a height so that no part of the plaintiff's court-yard becomes visible to a person standing in front of the window on the floor of the room, and there can be no valid objection to the opposite party to this. There is thus no force in this appeal. It is dismissed with costs. It will be open to the defendant to close the lower portion of the window or to readjust it so that the privacy of the plaintiff's court-yard is not invaded.

B/H.G.P. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 669 (Vol. 41, C.N. 265)

MUKERJI AND ROY JJ. (9-3-1954)

State v. Dalsingar Singh and others, Opposite Party.

Reference No. 324 of 1951, against order of Asst. Sessions J., Faizabad, D/- 8-8-1951.

Criminal P. C. (1898), S. 307 — Proper method of approach in cases referred under S. 307.

In the trial of an offence before the jury, the jury are the sole judges of the facts and it is the right of the accused to have the benefit of the verdict of the jury. Even if the Sessions Judge or the High Court would, if left to themselves, have arrived at a different verdict, it is not competent to the Sessions Judge to make a reference under S. 307 nor the High Court to accept the same and substitute their own verdict for the verdict of the jury provided the verdict was such as could be arrived at by a reasonable body of men on the facts and circumstances of the case. AIR 1954 SC 173; AIR 1946 PC 151, Foll. (Para 5)

Anno: Cr. P. C., S. 307 N. 11.

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 173: 1954 Cri LJ 451 (SC) 4

(B) (V33) AIR 1946 PC 151: 47 Cri LJ 905 (PC) 4

P. C. Chaturvedi and A. G. A., for the State; Maharaja Bahadur Lal, for Opposite Party.

ROY J.:

This is a reference by the Assistant Sessions Judge of Faizabad under S. 307, Criminal P. C. Seven persons were put on trial before him under S. 435, Penal Code. The trial was by a jury. The jury returned a unanimous verdict of guilty. The learned Assistant Sessions Judge disagreed with that verdict and has made the reference on the ground that the verdict of the jury was perverse and was not sustainable upon the evidence that was produced in the case.

(2) The case for the prosecution was briefly this: Bhagwati Prasad Singh, a resident of village Pratappur, carried on fairly extensive cultivation in another village Masodha where he has his own "chhawni". The accused are his 'pattidars' who have been continuously litigating with him for several years. On the night of the 16th and 17th of April, 1950, while Bhagwati Prasad Singh had gone to another village to attend the 'tilak' ceremony of his relation, the accused at about midnight entered his 'khalyan' in village Masodha where 14 piles of wheat and other grain were stored and his men Ram Bharose, Ram Dhani and Muttur were keeping watch. They set fire to those piles intending to cause damage to the grain.

Ram Bharose got up and raised an alarm which woke up Ram Dhani and Mattur who also joined in the alarm. Subsequently other people came to the place. It was alleged that the accused standing outside the boundary wall of the "chhawni" threatened those who wanted to extinguish the fire with dire consequences. The result was that almost all the piles of grain were completely burnt down, causing a loss of about Rs. 3,000/-. It was further alleged that the accused ran away when people of village Navada turned up. The complainant returned to Jalalpur next day where he received information about this arson. He went to the spot and found that almost his entire 'khalyan' had been burnt down. He then lodged the first information report at police station Jalalpur on 17-4-1951, at 7 P.M.

(3) The prosecution examined certain witnesses in the case inclusive of Bhagwati Prasad Singh, Ram Bharose, Muttur and Chattarpal. The learned Sessions Judge discussed their evidence in the charge which he laid before the jury and wrongly specified that only three witnesses, namely, Ram Bharose, Muttur and Chattarpal "deposed that the accused actually set fire to the 'khalyan'." We have gone through the evidence of these witnesses and we have not been able to find anywhere in their testimony that they deposed that the accused actually set fire to the 'khalyan'." On the contrary what had been stated by them was that Ram Bharose who was the earliest to rise could not see how the fire was set, and the others who woke up later on only saw the accused persons going out from the 'khalyan' and standing out and threatening those who came there that they would be dealt with severely if they helped in extinguishing the fire.

This evidence was not laid in its true perspective by the learned Sessions Judge before the jury in drawing their attention to the fact that it was only a circumstantial piece of evidence. The Judge did not also direct the attention of the jury to the fact as to what is required of circumstantial evidence in order to establish a charge against an accused beyond any shadow of doubt. In fact, we find that the charge to the jury was entirely one-sided to which there was a clear misdirection as well as a non-direction. In the concluding portion of the charge the learned Assistant Sessions Judge drew the attention of the jury to the delay in the lodging of the first information report, to the fact that the prosecution had not examined a single independent witness, to the fact that it was a dark night and any miscreant who sets fire will in the normal course run away, and also to the fact that Bhagwati Singh had made repeated and futile attempts to get the accused convicted, and that it would not, therefore, be safe to convict the accused unless there was clear, convincing and independent evidence in the case. But, as we have already noticed, the learned Assistant Sessions Judge failed to mention in the charge that the whole case rested upon the circumstantial evidence, and he also erred in specifying in the charge that Ram Bharose, Muttur and Chattarpal deposed that "the accused actually set fire to the 'khalyan'." In our judgment, the verdict of the jury was considerably influenced by this mis-direction and non-direction.

(4) The proper method of approach in matters of references under S. 307, Criminal P. C. recently came to be considered by the Supreme Court in — 'Akhlakali v. State of Bombay', AIR 1954 SC 173 (A). Their Lordships in referring to the Privy Council decision in — 'Ramanugarh Singh v. Emperor', AIR 1946 PC 151 (B) where the Privy Council resolved the conflict of authorities which was till then prevalent in India and accepted the view that the High Court will only interfere with the verdict of the jury if it finds the verdict "perverse in the sense of being unreasonable", "manifestly wrong" or "against the weight of evidence" and quoted the following observation of their Lordships :

> "Under sub-s. (1), two conditions are required to justify a reference. The first, that the Judge must disagree with the verdict of the jury, calls for no comment, since it is obviously the foundation for any reference. The second, that the Judge must be "clearly of opinion that it is necessary for the ends of justice to submit the case" is important, and in their Lordships' opinion provides a key to the interpretation of the section. The Legislature no doubt realised that the introduction of trial by jury in the mofussil would be experimental, and might lead to miscarriage of justice through jurors, in their ignorance and inexperience, returning erroneous verdicts. Their Lordships think that the section was intended to guard against this danger, and not to enable the Sessions Judge and the High Court to deprive jurors, acting properly within their powers, of the right to determine the facts conferred upon them by the Code.
>
> If the jury have reached the conclusion upon the evidence which a reasonable body of men might reach, it is not necessary for the ends of justice that the Sessions Judge should refer the case to the High Court merely because he himself would have reached a different conclusion upon the facts, since he is not the tribunal to determine the facts. He must go further than that and be of opinion that the verdict is one which no reasonable body of men could have reached upon the evidence. The powers of the High Court in dealing with the reference are contained in sub-s. (3). It may exercise any of the powers which it might exercise upon an appeal, and this includes the power to call fresh evidence conferred by S. 428. The Court must consider the whole case and give due weight to the opinions of the Sessions Judge and jury, and then acquit or convict the accused.
>
> In their Lordships' view, the paramount consideration in the High Court must be whether the ends of justice require that the verdict of the jury should be set aside. In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial Court, and if the jury take one view of the evidence and the Judge thinks that they should have taken the other, the view of the jury must prevail, since they are the judges of fact. In such a case, a reference is not justified, and it is only by accepting their view that the High Court can give due weight to the opinion of the jury. If, however, the High Court considers that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then the reference was justified and the ends of justice require that the verdict be disregarded :

(5) Their Lordships went on to observe that that was the correct method of approach in references under S. 307, Criminal P. C. If the facts and circumstances of the case are such that a reasonable body of men could arrive at the one conclusion or the other, it is not competent to the Sessions Judge or the High Court to substitute their verdict in place of the verdict which has been given by the jury. The jury are the sole judges of the facts and it is the right of the accused to have the benefit of the verdict of the jury. Even if the Sessions Judge or the High Court would, if left to themselves, have arrived at a different verdict, it is not competent to the Sessions Judge to make a reference nor the High Court to accept the same and substitute their own verdict for the verdict of the jury provided the verdict was such as could be arrived at by a reasonable body of men on the facts and circumstances of the case.

(6) Having regard to the position which we have set out above as governing the present case, we are clearly of opinion that the facts and circumstances of the case and the evidence were not properly put before the jury by the learned Assistant Sessions Judge and the charge to the jury suffered both under mis-direction and non-direction which led the jury to come to a conclusion which they may or may not otherwise have arrived at if the evidence had been properly put and the circumstances properly detailed. Under these circumstances, we are led to the conclusion that there has not been a proper trial and the case must go back to the lower court for a retrial. Accordingly, we accept the reference for reasons stated by us, but not on the ground on which it has been recommended by the learned Assistant Sessions Judge, and set aside the verdict of the jury and send back the case to the lower court for trial in accordance with law.

B/V.S.B. Retrial ordered.

A.I.R. 1954 ALLAHABAD 671 (Vol. 41, C.N. 266)

HARISH CHANDRA J. (4-1-1954)

Bipat Ram and another, Applicants v. The State.

Criminal Revn. No. 1753 of 1953, against order of Sessions J., Gorakhpur, D/- 30-9-1953.

Criminal P. C. (1898), Ss. 561-A and 497(5) — Inherent power of Sessions Judge to cancel bail.

If an accused who has been granted bail misuses his liberty and absents himself without proper cause in a case proceeding before a Court, that Court has inherent jurisdiction to cancel the bail previously granted by it. A Court must have full power to enforce its orders, maintain its authority and see that the progress of the case is not hampered by anything. AIR 1951 All 836; AIR 1952 All 39, Disting. (Para 2)

Anno: Cr. P. C., S. 497 N. 7.

1949 Mitra: S. 497, P. 1520 N. 1313, "Sub-section (5) .... bail" (The fact that 41 Cri LJ 251 is impliedly overruled by AIR 1945 PC 94 (97): 46 Cri LJ 662, not indicated in Mitra).

Cr. P. C., S. 561A N. 8.

1949 Mitra: S. 561A (Topic discussed in N. 8 to S. 561A in AIR Com. not independently dealt with in Mitra).

CASES REFERRED: Paras

(A) (V38) AIR 1951 All 836: 52 Cri LJ 1505 3

(B) (V39) AIR 1952 All 39: 1952 Cri LJ 241 5

K. M. Sinha for Applicants; M. B. Bhatnagar for the State.

ORDER: This is a revision application against an order of the Sessions Judge, Gorakhpur, cancelling the bail of the applicants. It is said that he had no jurisdiction to do so.

(2) It appears that the learned Sessions Judge granted bail to the applicants in a case which was proceeding in his court against them. 17-8-1953, was fixed for the hearing of the case. They absented themselves and submitted medical certificates which were accepted and 30-9-1953, was fixed for the hearing of the case. But on 30-9-1953, they were again absent, and only a telegram was received by the court from one of them indicating that the other was ill. At the request of the District Government Counsel, the learned Sessions Judge cancelled the bail. I think he acted quite correctly. If an accused who has been granted bail misuses his liberty and absents himself without proper cause in a case proceeding before a court, that court has inherent jurisdiction to cancel the bail previously granted by it. A court must have full power to enforce its orders, maintain its authority and see that the progress of the case is not hampered by anything.

(3) My attention has been drawn to the case of — 'Bachchu Lal v. State', AIR 1951 All 836 (A) in which a Division Bench of this Court held that a Court of Session had no jurisdiction to direct the cancellation of the bail already granted by it to an accused person. But that was a case which was proceeding in the court of a Magistrate and the Sessions Judge had granted bail acting under S. 498, Criminal P. C. It was held that he could not subsequently cancel the bail which he had previously granted to the accused. The question whether the Sessions Judge had inherent jurisdiction to cancel the bail or not was considered by the Court. It was held that this inherent jurisdiction could be exercised by the High Court alone under S. 561-A of the Code and that a Sessions Judge had no jurisdiction to cancel it under that section. It being a Division Bench case it is binding on me although I feel that the view that a court cannot amend, vary or rescind any order passed by it even though the altered circumstances may justify such a step may lead to practical difficulties and that it was not the intention of the Legislature that it should be so.

No doubt, a judgment once signed cannot be altered or reviewed except to correct a clerical error (see S. 369, Criminal P. C.). But various orders are passed by a court from time to time during the progress of a case and the orders once passed have often to be amended, varied or rescinded when circumstances justify it. A court may reject an application presented on behalf of an accused person praying that his personal attendance be exempted. But it may on a subsequent application and on a consideration of certain circumstances amend the order and grant him such exemption. Other instances of a similar nature may easily be conceived. But on the view taken by the Court in the case referred to above which, as I have stated above, is binding on me, I find that there are considerations which distinguish the present case from the one referred to above.

It appears that it was urged before the Court in that case that the law recognises the existence of inherent powers in every Court even in the absence of an express provision in that behalf in the Code. Their Lordships observed:

"The principle is that whenever it is found impossible to do something which the law requires a court to do and that something is not expressly authorised in the Code the omission has to be rectified by resort to the fiction that in the absence of an express provision in the Code, the law empowers the doing of everything necessary for the doing of justice for which alone Courts of law exist, the rules of procedure being merely rules for rendering aid in achieving the eventual result and not to hinder the doing of that which is right."

But they say:

"Where, however, a case is pending before a Magistrate and the Sessions Judge admits the accused to bail, the power of cancellation of the order cannot be deemed to inhere in the Court of Session for two reasons: (1) Because he is not seized of the trial or inquiry, and (2) Because the provisions of S. 561-A do not confer any jurisdiction on the Sessions Court."

(4) In the present case, however, proceedings were going on before the Sessions Judge himself and in my view he had inherent jurisdiction to cancel the bail which he had granted to the accused persons when he found that they were absenting themselves without reasonable cause and delaying the progress of the case.

(5) Another case which has been cited before me is that of — 'Munshi Singh v. State', AIR 1952 All 39 (B). In that case also a Judge of this Court held that the Sessions Judge had no inherent power to cancel the bail which he had once granted to an accused person. The facts of the case are not clear. But it seems to me that in that case also the proceedings were going on in the Court of a Magistrate and not before the Sessions Judge himself.

(6) I, therefore, see no reason to interfere and reject the application. Let the papers be returned. The order staying the operation of the order of the learned Sessions Judge dated 30-9-1953, is discharged.

(7) It is certified that this is a fit case for appeal to the Supreme Court.

B/V.S.B. Application rejected.

A.I.R. 1954 ALLAHABAD 672 (Vol. 41, C.N. 267)

HARISH CHANDRA J. (22-1-1954)

Sita Ram, Appellant v. Mool Chand and others, Respondents.

First Appeal No. Nil of 1953, from decree of 1st Civil judge (Tribunal), Saharanpur, D/- 3-9-1953.

Court-fees Act (1870), Sch. I, Art. 1; Sch. II, Art. 11 — Applicability and Scope — (Displaced Persons (Debt Adjustment) Act (1951), Ss. 13, 14, 6, 27) — (Civil P. C. (1908), S. 2(2)).

Inasmuch as the word "decree" is not defined in the Court-fees Act, one has to look to the Act under which the order has been passed in order to determine whether the order is, in fact, a decree or a mere order for the puposes of the Court-fees Act.

Application was filed by a displaced creditor under S. 13, Displaced Persons (Debt Adjustment) Act. Out of four debtors only one who was a 'pro forma' respondent appeared and said he had no objection to decree being passed. On the date fixed for hearing of application ex parte, the Tribunal rejected the application inasmuch as the remaining three respondents were residing in a place to which the Act did not apply. The question was what court-fee was payable on the memorandum of appeal :

Held, that the definition, of 'decree' as given in Civil P. C., was no guide in such a case. As the debtors did not appear at all the case was governed by sub-section (3) of S. 13, Displaced Persons (D.A.) Act, S. 14 does not contemplate rejection of application filed under S. 13. Also the provision for rejection of applications such as one under S. 6 with respect to applications of debtors is not made with respect to applications of creditors under S. 13. Therefore, the order was a decree and not an order. The mere fact that the decision did not contemplate preparation of any schedule as required by S. 27 of the Act was no reason why it should not be regarded as a decree. Thus, the appeal being an appeal from a final decree ad valoram Court-fee under Sch. I, Art. 1 was payable and not one under Sch. I, Art. 11.

(Paras 2, 3, 5, 6)

Anno: Court-fees Act, Sch. I, Art. 1, N. 17; Sch. II, Art. 11, N. 1; Civil P. C., S. 2(2), N. 2.

Ram Lal Anand, for Appellant.

JUDGMENT : This is an appeal from the decision of a Tribunal under the Displaced Persons (Debts Adjustment) Act, 1951, on an application made by a displaced creditor under Section 13 of the Act.

(2) There were four respondents and notices were issued to them. Three of them did not appear. Only one of them appeared and said that he had no objection to the decree being passed as claimed. He was in the nature of a 'pro forma' respondent. A date was then fixed for the hearing of the application 'ex parte'. On that date the tribunal was of the view that the claim was not maintainable inasmuch as the three respondents who did not appear were residing in a place to which the Act did not apply. It accordingly rejected the application.

(3) The question is what court-fee is payable on the appeal. The appellant has paid a court-fee as on an appeal from an order not having the force of a decree under Article 11 of Schedule II of the Court-fees Act, 1870. The question is whether the court-fee paid by him is correct or whether he should be required to pay an 'ad valorem' court-fee under Article 1 of Schedule I as an appeal from a decree or an order having the force of a decree.

(4) Learned counsel for the appellant points out that section 40 of the Act provides for appeals both from a final decree and a final order and that this being an appeal from a final order no 'ad valorem' court-fee is payable. He refers me to S. 27 "Contents of decrees", which requires that "in all cases in which the Tribunal passes a decree on the application of a displaced person, it shall prepare a complete schedule of the creditors and of the assets and liabilities of the displaced person". No such schedule has been prepared in the present case and he says that the order passed by the tribunal is, therefore, not a decree. He also refers to the definition of "decree" as given in Section 2(2) of the Code of Civil Procedure and says that the order passed by the Tribunal does not amount to an "adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy" and that the order cannot, therefore, be regarded as a decree.

(5) Learned Junior Standing Counsel points out that the definition, as given in the Code of Civil Procedure is no guide in the present case inasmuch as the word "decree" is not defined in the Court-fees Act, 1870, and that it is necessary to look to the Act under which the order has been passed in order to determine whether the order is, in fact, a decree or a mere order for the purposes of the Court-fees Act. I think that his contention is correct and that it is necessary to look to the provisions of the Displaced Persons (Debts Adjustment) Act, 1951, to find out whether the present decision of the Tribunal does or does not amount to a decree.

Section 13 is followed by Section 14 which describes the procedure on the petition of a displaced person. Sub-section (1) provides for the issue of notice to the debtor calling upon him to show cause, if any, against the application. Sub-section (2) provides that if there is a dispute as to whether the applicant is a displaced creditor or not or as to the existence of the debt or as to the amount thereof, the Tribunal shall decide the matter, after taking such evidence as may be produced before it, and pass such decree in relation thereto as it thinks fit. Sub-section (3) provides for a case in which there is either no such dispute or where the debtor has not appeared or has no cause to show. The present case will be governed by sub-section (3) for, as we have seen, the debtors did not appear at all. The sub-section is reproduced below :

> "If there is no such dispute or if the debtor does not appear or has no cause to show, the Tribunal may, after considering the evidence placed before it, pass such decree in relation thereto as it thinks fit."

It would appear that under this sub-section the order which the tribunal passes would be a decree and I do not think it will be possible to say that it is only an order. It is suggested that the decision of the tribunal in the present case may be regarded as an order rejecting the application. But, as we have seen, Section 14, which provides the procedure with respect to claims by displaced creditors against persons who are not displaced debtors, does not contemplate the rejection of an application. The rejection of an application in certain cases is, in fact, provided in S. 6 with respect to applications by displaced

debtors for adjustment of debts. Such rejection of an application may amount to an order and not a decree, but no similar provision exists with respect to claims by displaced creditors made under Section 13 of the Act.

The provisions contained in S. 27 regarding the "contents of decrees" are, in my opinion, not helpful in determining whether the present decision is or is not a decree. The mere fact that the decision in the present case does not contemplate the preparation of any schedule, as referred to in that section, is no reason why the decision should not be regarded as a decree. In my view, S. 14 determines the nature of the present decision by the Tribunal which should be regarded as a decree.

(6) The present appeal being thus an appeal from a final decree of a tribunal, an 'ad valorem' court-fee is payable and there is, therefore, a deficiency of Rs. 1176/4/- in the amount of court-fee paid on behalf of the appellant.

(7) Three months' time is allowed for the payment of the balance of the court-fee due from the appellant.

B/H.G.P. Order accordingly.

A.I.R. 1954 ALLAHABAD 673 (Vol. 41, C.N. 268)

MALIK C. J. AND SAPRU J. (5-1-1954)

Shambhu Nath, Defendant-Appellant v. Hari Shankar Lal and others, Plaintiffs-Respondents.

F. A. F. O. No. 353 of 1951 against decree of 2nd Addl. Civil J., Benaras, D/- 26-9-1951.

(a) Arbitration Act (1940), First Schedule, R. 3 — Award when should be made.

If the arbitrators have entered on the reference then the award must be made within four months from such date. If they have not entered on the reference the arbitrators may be called upon by notice in writing to act and in that case the four months' period is to be counted from the date of the notice. (Para 2)

(b) Arbitration Act (1940), S. 8(1)(c) and (2) and First Schedule, R. 2 — Failure to appoint umpire — Waiver of irregularity — Estoppel — (Evidence Act (1872), S. 115).

Where the arbitrators fail to appoint an umpire and the parties do not follow the procedure prescribed by S. 8(1)(c) and S. 8(2), but appear before the arbitrators and produce all their evidence, they must be deemed to have waived the irregularity and are estopped. AIR 1951 All 474, Explained. (Para 3)

Anno: Arbitration Act, S. 8 Notes 1 and 4; Sch. I. R. 2 N. 1; Evidence Act, S. 115 N. 50.

CASES REFERRED: Paras

(A) (V9) AIR 1922 All 106: 44 All 432 2
(B) (V38) AIR 1951 All 474 4, 5

Surendra Narain Singh, for Appellant; Rajeshwari Prasad, for Respondents.

MALIK C. J.:

This is a defendant's appeal against an order passed by the lower court directing that a decree be passed in terms of an award. The parties are brothers. On 17-8-1948, they entered into an agreement along with their mother Rajwanti and the dispute was referred to two arbitrators, Girdharilal and Madho Prasad. Within 10 or 12 days of the reference the two arbitrators started the work, gave notice to the parties and started recording the evidence. On 25-7-1949 Rajwanti died. On 31-8-1950 one of the brothers, Hari Shanker Lal, gave a notice to the arbitrators that they should proceed with the reference and give an award by an early date. On 1-10-1950, the award was given. Thereafter Hari Shanker Lal applied that the award be filed and made a rule of the court. The application was registered as a suit and notice was issued to Shambhu Nath and Kedar Nath. Shambhu Nath filed the following objections:

(i) That the arbitrators had not complied with the provisions of Rule 2, Sch. 1, Arbitration Act and the award was void on that ground.
(ii) That the award was given beyond time.
(iii) That after Rajwanti's death the reference had elapsed and there was no fresh agreement of reference.
(iv) That the arbitrators were personally interested in Hari Shanker Lal and the award was therefore vitiated as it was to benefit one of the arbitrators and the arbitrators were therefore guilty of misconduct.

(2) Learned counsel has agreed that there is no substance in the third objection. It is not necessary for us to go into the fourth. The second objection of limitation must be decided in favour of the appellant. Section 3 of the Arbitration Act (Act No. 10 of 1940) provides that:

"3. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference."

Paragraph 3 of the First Schedule is as follows:

"3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

The lower court has held that the arbitrators have a right to make their award either within four months after entering on the reference or after having been called upon to act by notice in writing, and as the notice to act was given on 31-8-1950, the award was within time. We do not think that this view is sound. If the arbitrators have entered on the reference then the award must be made within four months from such date. If they have not entered on the reference the arbitrators may be called upon by notice in writing to act and in that case the four months' period is to be counted from the date of the notice.

Here the arbitrators had entered on the reference 10 or 12 days after the reference. That will be 28th or 30th August 1948. The four months expired on the 28th or 30th December 1948. Seven months after the period fixed had expired Rajwanti died and almost after a further period of one year from that date a notice was given long after the expiry of the period of four months. In the circumstances, the award had clearly been given after the expiry of the period of limitation. This view is supported by a decision of this Court in — 'Sardar Mal, Hardat Rai v. Sheo Bukhsh Rai, Sri Narain', AIR 1922 All 106 (A).

(3) As regards the first point, that the arbitrators had not appointed an umpire, reference is made to para. 2 of the First Schedule of the Act which is as follows:

"2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments."

If the arbitrators do not nominate an umpire then under S. 8(1)(c) a party has to serve the arbitrators with a notice in writing and if within 15 days they do not make the appointment then under S. 8(2) the court has the right to appoint an umpire. An umpire however is different from an arbitrator in this respect that, while the arbitrators have to sit together to make the award, the umpire is only called upon to act if the arbitrators have allowed the time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree; the umpire then has to enter on the reference in lieu of the arbitrators and to make his award within two months. (See paragraphs 4 and 5 of the First Schedule). Where, therefore, the arbitrators have agreed on all points, the umpire is not called upon to act at all.

In the circumstances, it may be that the failure to appoint an umpire is not such a breach of the above provision as to vitiate an award and might amount merely to an irregularity which it is possible to waive. As the lower court has pointed out, if the parties had so desired they could have served notice on the arbitrators to appoint an umpire and on the failure of the arbitrators to make such an appointment they could have moved the court. The parties however did not follow that procedure and in spite of the fact that the arbitrators had not appointed an umpire they appeared before the arbitrators and produced all their evidence. In the circumstances the lower court has rightly held that the parties must be deemed to have waived the irregularity and were estopped.

(4) Learned counsel for the appellant has, however, relied on a decision of a Bench of this court to which one of us was a party, viz., — 'Jawala Prasad v. Amar Nath', AIR 1951 All 474 (B) and has urged that it has been held that the provisions of paragraph 2 of First Schedule are mandatory as the arbitrators are bound to appoint an umpire; in the absence of such appointment the award is invalid. The provisions of paragraph 2 of the First Schedule impose an obligation and it cannot be denied that the arbitrators should have appointed an umpire. But the question remains, what is the effect of such failure. The question whether the parties had waived the irregularity and were estopped from questioning the award on that ground was not considered in that case as the point was not raised. The learned Judges took care to confine their decision to the facts of that particular case and have said that in the circumstances of "this particular case" the award made is not valid.

(5) The lower court has held that the agreement of reference dispensed with the necessity of appointing an umpire. The relevant portion has been quoted by the learned Judge in his judgment. We find it difficult to agree with the learned Judge that the reference either expressly or by necessary implication ruled out the necessity of the arbitrators appointing an umpire. In this connection it may be useful to quote from the judgment in — 'Jawala Prasad's case (B)' already cited above where the learned Judges commented on similar provisions in the agreement of reference:

> "What the reference recites is that the parties had agreed to refer the case for decision jointly to two arbitrators, that they had nominated those two arbitrators and that the arbitrators had been authorised by them to decide the case after making such inquiries as they liked and after satisfying themselves in such manner as suits them. The so-called wide powers given to the arbitrators under the agreement are no larger than powers generally given by arbitration agreements to arbitrators. They are not of such a nature as to make us hold that the condition requiring that the arbitrators shall appoint an umpire was dispensed with."

(6) The result, therefore, is that this appeal must be allowed, the order of the lower court be set aside and the plaintiff's suit dismissed with costs in both the courts.

B/V.R.B. Appeal allowed.

A.I.R. 1954 ALLAHABAD 674 (Vol. 41, C.N. 269)

KIDWAI J. (7-12-1953)

Mangat and others, Applicants v. State.

Criminal Reference No. 118 of 1953.

Criminal P. C. (1898), S. 350(1), Proviso (a) — "Commences his proceedings".

Where the accused does not, at the time when the new Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard, the Magistrate is not bound to accede to the demand made at a subsequent date. (Para 3)

Anno: Cr. P. C., S. 350 N. 7.

1947 Mitra: S. 350 P. 1089 N. 1015 "Proviso (a) .....Accused".

D. Sanyal, for Applicants; Gopal Behari, for the State.

ORDER: This case has been referred by the learned Sessions Judge of Meerut for directing a Magistrate to examine the witnesses 'de novo' since a request to that effect has been made and disallowed by the Magistrate. The facts upon which this recommendation has been made are that the complaint was originally filed on 14-9-1950 in the court of Sri Aizaz Ahmad who was later transferred and was succeeded by Sri Parmeshwari Dayal. Sri Bharadwaj succeeded Sri Parmeshwari Dayal and Sri R. P. Srivastava replaced Sri Bharadwaj. On 16-10-1951 Sri Bharadwaj asked the counsel for the accused whether he can claim a 'de novo' trial. One of the counsel who represented ten out of twenty accused did not claim a 'de novo' trial; the other counsel made no statement.

(2) When the matter came before Sri Srivastava on 6th of November 1951 Mr. Srivastava was not present in court on that date. The case was accordingly adjourned to 10-11-1951. Again Mr. Srivastava was not present and the case was therefore fixed for 22-11-1951. On that date the Magistrate was present and so were the accused and their counsel as well as the prosecutor. An order was passed directing the case to be put up for the production of the defence evidence on 6-12-1951 since there was no time for doing anything in the case on 22-11-1951. No 'de novo' trial was claimed by the accused on this date in spite of the fact that they and their counsel were present. On the 6th December, also the Magistrate was not present and the case was taken up on 29-12-1951, when a request was made for a 'de novo' trial. The learned Sessions Judge is of the opinion that 29-12-1951 was in fact the first day of hearing for the new Magistrate.

(3) It is clear, however, that proceedings commenced before the new Magistrate on 22-11-1951 when the court was present, the accused were present with their counsel and the prosecutor was present. On that date the order that was

passed was that the case should be taken up on the 6th of December, for the production of the defence evidence. That was the first occasion on which a demand should have been made by the defence that the prosecution witnesses or such of them as the defence desired should be resummoned because obviously the defence evidence can only be produced after the prosecution evidence had terminated. No such request was made.

It must, therefore, be held that the accused did not, at the time when the new Magistrate commenced his proceedings, demand that the witnesses or any of them be resummoned and reheard. If a demand was made at a subsequent date, the Magistrate was not bound to accede to it and his order rejecting the request made on 29-12-1951 was not against the provisions of S. 350, Criminal P. C.

(4) This reference is, therefore, rejected and will be sent back to the court below.

B/V.R.B. Reference rejected.

A.I.R. 1954 ALLAHABAD 675 (Vol. 41, C.N. 270)

M. L. CHATURVEDI J. (4-5-1954)

Lala Raj Kishore and others, Applicants v. District Board of Seharanpur and others, Opposite Parties.

Civil Misc. Writ No. 55 of 1954.

(a) U.P. District Boards Act (10 of 1922), S. 174 (2) (k) and S. 174 (1) — Bye-laws under — Bye law 6, imposing license fee for working factory for crushing sugar cane or flour mills, Saw Mills, etc., is ultra vires — Fees and taxes, distinction — (Constitution of India, Arts. 265, 13 (1), Sch. VII List I item 96, List II Item 66, List III Item 47).

Bye-law No. 6 of the Bye-laws framed by the District Board of Saharanpur, under S. 174 (2) (k), U. P. District Boards Act, which were published in the Gazette dated 28-5-1949, imposing a licence fee mentioned in bye-law 3 for working of factories (sugar factories, saw mills, rice mills, oil mills etc.) is ultra vires the Board. (Para 23)

Held that the amount of licence fee fixed under the bye-law was not fixed with the object of meeting merely the expenses of regulating the trade or of meeting the expenses that became necessary by virtue of the framing of these bye-laws, but that the fee was fixed with a view to enhance the general revenues of the District Board. Misc. Writ No. 7735 of 1951, D/- 6-3-1953 (All) Ref. (Para 22)

The main characteristics of a licence fee are, that the fee is imposed on trade or calling itself, and not on the income derived from the trade or calling; that the licence fee cannot be imposed for raising the general revenues but only for purposes of being spent over the regulation of the trade or calling; and that it must bear a relation to the expense that was expected to be incurred in doing so: AIR 1931 PC 217, AIR 1953 Bom 242, and AIR 1953 All 415, Relied on. (Para 7)

The burden of proving that the levy is not what it purports to be on the face of it, lies on the person, who says that it is not a fee but a tax. The question is really one of fact. (Para 10)

The court cannot accept that there is a rational nexus between the amount of the fee and the expenses, and the same are very close to each other because the Board, the levying authority, says that it is so. If allegations like these are accepted, it would amount to accepting the ipse dixit of the Board. (Para 21)

Where definite facts have been asserted in the affidavit filed by the petitioners along with the petitions, which have given the approximate amount of money recovered as the licence fee by the Board every year, and it is also said that not a single officer of the Board visited or inspected any of the factories belonging to the petitioners and to others, nor has the District Board spent anything on the working of the bye-law under which the licences had been issued, and there is a clear assertion that there has been no increase in the staff of the Public Health Department at all since the introduction of the bye-law, and no special staff has been employed by the Board for the purpose of regulating the petitioners' trades, nor has any additional expenditure been incurred due to the enforcement of these bye-laws, in controverting these assertions, the Board should file their accounts. (Para 21)

Mere extracts from the account-books typed on separate sheets of paper which are not even copies of the account books, cannot be of any possible assistance. The omission of the District Board to file the account books, in spite of an opportunity being given to it, goes against the District Board, and this fact can be taken into consideration in coming to a conclusion on the facts that have to be decided in the case. (Para 22)

(b) Constitution of India Art. 226 — Other remedy open — Question of general importance.

The general rule is that if another remedy is open, the High Court does not entertain a petition under Art. 226 of the Constitution, which has been filed for obtaining the same relief. But the rule is not one of universal application, and, in appropriate cases, the High Courts do entertain writ petitions, even though a regular suit may be maintainable. (Para 11)

The circumstances of each case have to be considered and then a decision taken as to whether the discretion should be exercised or not. (Para 11)

Where a large number of persons were involved and the question was of general importance, it would be a proper exercise of the discretion of the High Court to decide the petition under Art. 226 on the merits. AIR 1952 All 753 (FB); Writ Case No. 7735 of 1951 D/- 6-3-1953 (All), Relied on. (Para 12)

(c) Constitution of India, Art. 226 — Delay — Challenging validity of bye-law imposing license fees — Circumstances held outweighed delay.

The delay of four years in applying for writ and challenging a certain bye-law of the District Board imposing a licence fee on certain types of factories (Sugar crushing factory, flour and rice mills, saw mills etc.), even though they had been paying the fees for four years, without challenge, held was out-weighed by the circumstances that the constitution came into force only in 1950, that the legal position regarding the extent of power to impose license fees, was not known to the members of the public or even to the members of the bar in the Districts and that about 200 criminal prosecutions were pending at the instance of the

Board, for non-payment of the license fees, thus hampering the trade. (Paras 13, 14)

(d) U. P. District Boards Act (10 of 1922) Ss. 186 and 174 (2) (k) — Appeal under S. 186, Scope of — Challenging validity of bye-law itself — Maintainability of writ application — (Constitution of India, Art. 226).

The appeal that is provided by S. 186, is against any order or direction made by a Board under a bye-law passed under Sec. 174 (2) (k) of the Act, but it does not provide for an appeal to challenge the validity of the bye-law itself. S. 186 does not confer any right of appeal against the resolution of a Board passing a bye-law.

Consequently the writ application challenging the validity of the bye-law, cannot be attacked on ground that the applicants should have moved under S. 186. (Para 15)

(e) U. P. District Boards Act (10 of 1922) S. 174 (1) — Scope — Sub-section does not empower Board to make bye-law imposing license fees or taxes.

S. 174 (1) authorises the Board to make bye-laws consistent with the Act for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants and for the furtherance of the administration of the district under this Act, but it does not say whether a bye-law framed under this sub-section may also impose licence fees or taxes. It gives a general power to the District Board to make bye-laws for the purposes mentioned therein. The clauses contained in sub-s. (2) are really illustrations of the power contained in sub-s. (1), and they show what nature of power has been conferred on the Board by S. 174 (1). The power contained in sub-s. (1) should be read as ejusdem generis to the powers contained in the different clauses of sub-s. (2). (Para 16)

Even if it be assumed that it had the power to levy licence fees, its power should be read to be the same as contained in the different clauses enumerated in sub-section (2). If the fees imposed by this bye-law cannot be validated under S. 174 (2) (k), it cannot be validated under S. 174 (1). (Para 16).

(f) U. P. District Boards Act (10 of 1922) S. 106 — Scope — Levy of fee — Court has power to determine whether amount of fee fixed by bye-law is reasonable or not — (Constitution of India, Art. 19 (1) (f)).

The word "fee" in S. 106 by itself denotes as to what kind of levy the District Board can impose. The legal significance of the word "fee" is quite clear and its object is to recover money necessary for defraying the expenses of carrying out the purpose for which it is levied. The "fees" that a District Board can impose must be "fees" and not "tax". It cannot be said that the only restriction imposed on the District Board in determining the amount of fees is that which goes beyond the reasonable restrictions which may be imposed under Art. 19 (1) (f) of the Constitution. That restriction is certainly there, but the District Boards are statutory bodies having only those rights which are conferred upon them by the statute. The statute does not authorise them to impose taxes but only gives them a power to levy certain fees, and the courts are entitled to determine whether they are reasonable. (Para 17)

CASES REFERRED: Paras

(A) (V18) AIR 1931 PC 217: 9 Rang 440 (PC) 7
(B) (V40) AIR 1953 Bom 242: ILR (1953) Bom 1187 8
(C) (V40) AIR 1953 All 415: 1953 All LJ 60 9, 13
(D) (V39) AIR 1952 All 753: 1952 All LJ 505 (FB) 11
(E) ('53) Civil Misc. Writ No. 7735 of 1951, D/- 6-3-1953 (All) 12, 22

S. C. Khare, for Applicants; A. P. Pandy, for Opposite Parties.

ORDER: This is a petition under Art. 226 of the Constitution by eight persons, who own machine, for hulling rice, or a flour mill, or an oil crusher or a sugar-cane crusher. Respondent No. 1 is the District Board of Shaharanpur and respondent No. 2 to 5 are lessees of the right of the respondent No. 1 to collect licence fee from the petitioners and others.

(2) On 17-1-1948 the District Board of Shaharanpur (respondent No. 1) approved certain draft bye-laws by means of a resolution and directed their publication in papers. They were published in the Hindi Weekly called "Hindu", and in the English Weekly called the "Peoples General of Shaharanpur". After the publication, the matter came up before the Board on 11-11-1948 when the Board finally approved the bye-laws and resolved that they should be submitted to the Commissioner for his sanction. The Commissioner sanctioned them and the bye-laws were published in the U. P. Gazette dated 28-5-1949, when they came into operation.

These bye-laws were purported to have been framed under S. 174(2)(K) of the U. P. District Boards Act, and they directed the levy of a licence fee of Rs. 500/- per year on sugar factories propelled by petrol, steam or electricity, a fee of Rs. 100/- per year on crushers propelled by petrol, steam or electricity, a fee of Rs. 100/- on centrifugal machines propelled by engines, and a fee of Rs. 50/- each on certain flour mills, oil mills, rice making machines, sawing machines, cotton cloth mills and certain other machines.

(3) Under bye-law No. 1 the word "factory" was to include sugar factory, flour mills, oil machines, rice making machines, cotton machines and sawing machines. Sugar factory was said to include any factory in which sugar was prepared from sugar-cane juice or from molasses or in which Gur is prepared from 'shira' and which was worked by electricity, steam or oil, or by manual labour by the old Khanchi or Bojha system or by centrifugal machines.

Flour mills, oil, cotton, rice-making and sawing machines were to mean all such machines where work was done by electricity or petrol or water or wind or any other mechanical contrivance. The machines worked by all the different petitioners came within the definition of factory.

Bye-law No. 3 prohibited the starting, establishing or maintaining of any factory within the rural area of Shaharanpur district, unless a licence had been granted on payment of the prescribed fee.

Bye-law No. 4 made the Secretary of the District Board as the Licensing Officer for the purposes of these bye-laws and an appeal against his decision was to lie to the President of the District Board. Certain conditions for the grant of the licence were imposed by bye-law No. 5 and the licence fee mentioned above was imposed by bye-law No. 6.

Bye-law No. 7 provided for the procedure for making an application; bye-law No. 8 provided the

period during which a licence was to remain in force and bye-law No. 9 authorised the Licencing Officer to suspend a licence.

At the end the penalty for disobedience of the bye-laws was provided, which could extend to Rs. 100/-, and, in the event of a continuing breach, might extend to Rs. 5/- for every day after the first conviction during the period that the offender was proved to have persisted in the continuance of the offence.

(4) The petitioners had been paying the licence fee since the date of its imposition in 1949 for about four years, when disputes arose and the petitioners and other factory owners refused to pay the licence fee. The present petition was filed in this Court on 4-2-1954, and the prayers contained in this petition are that a writ or direction in the nature of certiorari be issued quashing bye-law No. 6 mentioned above, that a writ or direction in the nature of mandamus be issued to the respondents restraining them from enforcing bye-law No. 6 and that another writ or direction in the nature of mandamus be issued directing respondent No. 1 not to prosecute the petitioners for omitting to take the licence for working their machines. There was a prayer for an ad interim order also, but no such interim order was passed at the time when this petition was admitted.

(5) The petition is based mainly on the ground that the licence fee levied under bye-law No. 6 was really a tax and has been imposed in order to raise the general revenues of the Board and that it has wrongly been called a licence fee. It is said that the amount of the fee bears no relation to the expenses required for regulating the trade, nor has the District Board incurred any expense worth the name for the purpose of regulating the petitioner's trade.

(6) The learned counsel for the respondent Board has controverted the petitioners' case on the points mentioned above, and has further argued that this writ petition should not be entertained, because there was the alternative remedy of a regular suit open to the petitioners and that under the circumstances of the case, the more appropriate remedy is the remedy of a suit and not that of a petition under Art. 226 of the Constitution.

He also urged that during the pendency of this writ petition, the Board had amended the provision under which the bye-law was originally passed and it is now said that the bye-law should be deemed to have been passed under S. 174(1) of the District Boards Act, & this sub-section authorised the District Board to fix any amount of fee that it considered proper, there being no limitation imposed in this sub-section as there is in S. 174(2)(k) of the Act.

(7) Originally the position taken up by the learned counsel for the Board was that any amount could be fixed by the Board as licence fee, and that it was not necessary that the amount fixed should bear any relation to the expenses that were to be incurred in regulating the trade. But this position was subsequently given up and the learned counsel agreed that our Constitution had made a clear distinction between a 'tax' and a 'licence fee', and he referred me to items Nos. 82 to 89 in List I of the 7th Schedule attached to the Constiution and said that these items related to the imposition of taxes, and item No. 96 authorised the levy of "fees". Similar was the position with respect to item Nos. 46 to 58, 60 and 62 which related to 'tax', and No. 66 which related to 'fees' in List II.

He said that the main characteristics of a licence fee were that the fee was imposed on trade or calling itself, and not on the income derived from the trade or calling; that the licence fee could not be imposed for raising the general revenues but only for purposes of being spent over the regulation of the trade or calling; and that it must bear a relation to the expense that was expected to be incurred in doing so. I entirely agree with the propositions urged by the learned counsel subsequently, and the learned counsel for the petitioners also does not challenge their correctness.

Some of these propositions are borne out by the decision of the Privy Council in the case of — 'Pazundaung Bazar Co., Ltd. v. Municipal Corporation of the City of Rangoon', AIR 1931 PC 217 (A). Their Lordships agreed with the views of the High Court and held that the licence fee might reasonably cover the cost of all special services necessitated by the duties and liabilities imposed upon the Corporation in respect of the supervision and regulation of private markets.

(8) The Bombay High Court had to consider the point in the case of — 'Ratilal Panachand v. State of Bombay', AIR 1953 Bom 242 (B). The learned Judges quoted with approval a passage from Findley Shirras in his Science of Public Finance, which is helpful in understanding the difference between a tax and a fee. Findley Shirras says:

> "Taxes are compulsory contributions to public authorities to meet the general expenses of Government which have been incurred for the public good and without reference to special benefits. Fees are payments primarily in the public interest for special services which people must accept whether willingly or not;....Fees are for governmental services, while prices are for services of a business character. They differ also from taxes in that they are payments for special benefits enjoyed by the payer, while taxes are for general benefits, expenses which are laid, as Adam Smith says 'for the benefit of the whole society'. The essence of a tax is the absence of 'quid pro quo' between the tax payer and the public authority."

(9) The same is the principle laid down by this Court in the case of — 'Biswa Nath Singh v. District Board, Ballia', AIR 1953 All 415 (C).

(10) The nature of licence fee having thus been explained, I have to consider whether the imposition of the fee in this case was really for the purposes for which fee could be levied or it was imposed for purposes of raising the general revenues of the Board. The burden of proving that the levy is not what it purport to be on the face of it lies on the person, who says that it is not a fee but a tax, and in the present case it is for the petitioners to show that the fee levied is really a tax in the garb of a licence fee. The question is really one of fact, and will be considered after considering the other legal issues raised by the learned counsel for respondent No. 1.

(11) The learned counsel for the respondent urged that a writ petition was not maintainable as a suit for the same reliefs could have been instituted before a regular civil court. The general rule is that if another remedy is open, the High Court does not entertain a petition under Art. 226 of the Constitution, which has been filed for obtaining the same relief. The rule is not one of universal application, and, in appropriate cases, the High Courts do entertain writ petitions, even though a regular suit may be maintainable.

A Full Bench of this Court in — 'Buddhu v. Municipal Board of Allahabad', AIR 1952 All 753 (D) had to consider this question and its decision was that no hard and fast rule could be laid down

as to the class of cases in which directions, orders or writs could be issued under Art. 226 and the class of cases in which they ought not to be issued. It held that there was no inflexible rule that in every case in which a fundamental right was involved, a decision should be given by the Court on merits in an application under Art. 226 and that there are also cases in which the existence of an alternative remedy may be a ground for the rejection of the application.

The circumstances of each case have to be considered and then a decision taken as to whether the discretion should be exercised or not. They then laid down some of the principles which would justify the High Court in issuing a writ and their Lordships said:

> "Where a general question of some public importance has been raised and it is desirable that it should be speedily decided and the parties should not remain under suspense for a long time and on the determination of the question the decision of the petitioner and others of his class whether to continue in the present avocation or to take some other will depend, the High Court can entertain the petition under Art. 226, even though an alternative remedy by way of a suit for injunction is available to the petitioner".

The learned Judges had to consider the validity of a bye-law passed by the Municipal Board of Allahabad prohibiting the slaughter of cows, and they held that in a case of that kind the High Court could properly enter into the merits of the petition and come to decision thereon.

(12) A Division Bench of this Court, of which I was a member in — Civil Misc. Writ No. 7735 of 1951 D/- 6-3-1953 (All) (E)' quashed a bye-law passed by the Municipal Board of Allahabad imposing a licence fee on the owners of certain flour mills. The point was considered in that case and it was held that, where a large number of persons were involved and the question was of general importance, it would be a proper exercise of the discretion of the High Court to decide the petition under Art. 226 on the merits. These cases cover the point and conclude it against the contention of the learned counsel for respondent No. 1, and it is not necessary to go further into the matter.

(13) The question then arises whether, on the peculiar facts of the case, I should refuse to hear the petition on the merits. The learned counsel for respondent No. 1 has laid great stress on the fact that the licence fee had been paid for four years by the petitioners who have shown by this conduct of theirs, that there is no urgency in the matter and they might, therefore, very well be relegated to the ordinary procedure provided by law.

This delay on the part of the petitioners in filing the present petition is very much against the petitioners, but there are other circumstances of the case, which outweigh this consideration. The Constitution came into force in January 1950 and before that date this Court had no power of issuing writs. The question that has been raised in the present petition, namely, that the licence fee must bear some relation to the amount of expenditure incurred in regulating the trade was not generally known to the members of the Public, or even to the members of the Bar in the districts. The position was made clear, as far as this Court is concerned, in the case of — 'Biswa Nath Singh (C)' mentioned above.

(14) I also find that about 200 criminal prosecutions are pending at the instance of respondent No. 1 on account of failure to pay the licence fee, and it appears to be a bit hard that the persons be allowed to be convicted of the offence before the main question raised in the petition is finally determined. The matter also, to some extent, concerns the public at large because if the petitioners' trades are unduly hampered, it is bound to result in inconvenience to the members of the public. I, therefore, think that this is a petition which ought to be considered and decided on the merits. I may also mention that the Supreme Court has quashed a number of bye-laws passed by the Municipal Boards or the District Boards on the ground that they interfered with the petitioners' fundamental right of trade.

(15) The next point urged by the learned counsel for respondent No. 1 was that the remedies provided by the District Boards Act were not pursued by the petitioners and they, therefore, were not entitled to have the question determined in the proceedings under Art. 226 of the Constitution. He referred to S. 186 of the District Boards Act, which provides for an appeal by any person aggrieved by any order or direction made by a Board under the powers conferred upon it by S. 95 or under a bye-law made under clause (k) of sub-section (2) of S. 174, to the District Magistrate in case no other officer has been appointed by the State Government, for the purpose.

It is argued that the petitioners could have filed an appeal under this section, but they failed to seek this remedy.

I have considered the argument, but I do not agree with the contention of the learned counsel. The appeal that is provided, is against any order or direction made by a Board under a bye-law passed under S. 174(2)(k) of the Act, but it does not provide for an appeal to challenge the validity of the bye-law itself. To my mind, the wording of this section is quite clear, and it does not confer any right of appeal against the resolution of a Board passing a bye-law. I think no appeal lay to the District Magistrate at the instance of the petitioners challenging the validity of the bye-law, and this contention of the learned counsel also fails.

(16) I now come to the question of the interpretation of S. 174 (1) of the District Boards Act. The contention of the learned counsel for respondent No. 1 on this point was that S. 174(2)(k) imposes a restriction on the District Board while prescribing a licence fee on certain trades, which is to the effect that the fee can be prescribed in order to defray the expenditure incurred by the Board for purposes of regulating the trades, but it is said that there is no such restriction contained in S. 174(1) of the Act. But I think that this sub-section authorises the Board to make bye-laws consistent with the Act for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants and for the furtherance of the administration of the district under this Act, but it does not say whether a bye-law framed under this sub-section may also impose licence fees or taxes. It gives a general power to the District Boards to make bye-laws for the purposes mentioned therein. The clauses contained in sub-section (2) are really illustrations of the power contained in sub-section (1), and they show what nature of power has been conferred on the Board by S. 174(1). The power, in my opinion, contained in sub-section (1) should be read as 'ejusdem generis' to the powers contained in the different clauses of sub-section (2).

The respondent No. 1 expressly passed the resolution in 1949 under S. 174(2)(k) and it is somewhat

curious that after the institution of this petition, it passed a resolution saying that the power should be taken to have been exercised under S. 174 (1). Still if sec. 174 (1) had given it any power to impose taxes or fees, and the provision of this Sub-section had authorised the passing of the bye-law, the bye-law could not be held to have been invalid. But, in my opinion, S. 174 (1) just gives a power to frame a bye-law and I cannot read in it any general power to levy taxes and fees under the bye-laws passed under that sub-section. Even if it be assumed that it had the power to levy licence fees, its power should be read to be the same as contained in the different clauses enumerated in sub-section (2). A bye-law passed under S. 174(1) may go beyond the matters enumerated in clauses (a) to (w) of sub-section (2), and it may not strictly be justified under those clauses, but the power under sub-section (1) is similar and of the same nature as illustrated by clauses (a) to (w) of sub-section (2). If the fees imposed by this bye-law cannot be validated under S. 174 (2) (k), I do not think that it can be validated under S. 174 (1).

(17) The next section that was referred to was S. 106 of the Act, which may be called the general charging section authorising a Board to charge a fee to be fixed by the bye-law for any licence, sanction or permission. It was argued that there is no limit imposed by this section, and the Courts are not entitled to determine whether the amount of fee that has been fixed by the bye-law is a reasonable one or not.

I am unable to accept this argument either, because the use of the word "fee" by itself denotes as to what kind of levy the District Board can impose. The legal significance of the word "fee" is quite clear and its object is to recover money necessary for defraying the expenses of carrying out the purpose for which it is levied. The "fees" that a District Board could impose must be "fees" and not "tax". I am also unable to accept the argument of the learned counsel that the only restriction imposed on the District Board in determining the amount of fees is that which goes beyond the reasonable restrictions which may be imposed under Art. 19 (1) (f) of the Constitution. That restriction is certainly there, but the District Boards are statutory bodies having only those rights which are conferred upon them by the statute. The statute does not authorise them to impose taxes but only gives them a power to levy certain fees.

(18) This brings me to the question of fact as to whether it has been proved in the case that a tax has been imposed on the petitioners' trade in the garb of a licence fee.

The relevant paragraphs of the affidavit filed with the petition are paragraphs Nos. 6, 14,15,16, 17, 20, 21 and 23. The averments in paragraph 6 are somewhat general, and what is stated therein is that the licence fee levied under the impugned bye-law is a tax, though it is called a licence fee, and the same has been imposed to raise the general revenues of the Board and not to cover the expenses necessary for the purpose of supervising the factories.

In paragraph 14 it has been stated that the District Board merely takes the licence fee, but at no time has any single officer of the Board visited or inspected any of the factories belonging to the petitioners and others, and that the District Board has not spent anything out of the huge amount realised as licence fee on the working of the bye-law, excepting perhaps some insignificant amount.

Paragraph 15 gives the number of the mills and crushers tnat exist within the area of the District Board, and the total licence fee recoverable from all these mills comes to a sum of Rs. 48,250/- per annum. Paragraph 17 states that the Public Health Scheme was introduced in 1930, that there has been staff employed under the scheme since that year, that after the enforcement of the present bye-law there has been no increase in the staff of the Public Health Department and that no special staff has been employed by the Board for this purpose, nor has any additional expense been incurred due to the enforcement of these bye-laws excepting the cost of issuing licence.

Paragraph 20 says that in the budget from 1948 onwards no expense for the working of the impugned bye-laws is shown. According to the averments in paragraphs 21 the licence fee bears no relation to the expense that was likely to be incurred in the issue of licences and regulating the licensed factories. The right to collect the licence fee has been transferred to the respondents for a consideration of Rs. 38,500/- per year.

(19) As against these clear and definite allegations the counter-affidavit filed on behalf of the District Board contains merely some vague statements. These statements are contained in paragraphs 5, 6, 7, 8 and 9.

In paragraph 5 it is stated that the licence fee levied under the bye-law is just, proper and fair, and there is a rational nexus between the amount of the fee and the expenses incurred by the Board for the purpose of the subject matter of the licence.

Paragraph 6 says that the employees of the Board have to give their time to regulate and control the business and trades mentioned in the bye-laws, that they have to inspect the buildings wherein these trades are housed, and that the expenditure incurred by the Board is very close to the income earned out of the licence fee.

Paragraph 7 merely records a denial of the facts contained in certain paragraphs of the petitioners' affidavit.

Paragraph 8 is to the effect that the entire staff is employed and is maintained by the Board, and the expenses of the staff are met by the Board.

According to paragraph 9 certain officers of the Board have to discharge certain duties in connection with the running of the trades in question.

(20) A rejoinder affidavit was also filed on behalf of the petitioners, which mainly reiterates the facts contained in the first affidavit.

(21) The facts stated above would show that in the counter-affidavit no attempt has been made to actually show what expense the District Board has to incur in issuing the licence and in regulating the petitioners' trades. It is stated that there is a "rational nexus" between the amount of the fee and the expenses, and that the expenditure incurred is very close to the income earned out of the licence fee. These assertions, in my opinion, merely amount to a statement of the case of the District Board. But the counter-affidavit does not disclose what actual expenditure is incurred by the Board every year for the purpose of carrying out the duties imposed upon the Board by the bye-law in question.

The learned counsel for the Board strenuously contended that it must be accepted by the Court that there is a "rational nexus" between the amount of the fee and the expenses, and the same are very close to each other because the Board says that it is so. But accepting this argument would really amount to a failure to consider the

question. The Board has made certain allegations, and I have to see how far those allegations are borne out by the facts placed before me. If allegations like these are accepted it would amount to accepting the 'ipse dixit' of the Board. If there were any truth in the allegations contained in paragraphs 5 and 6 of the counter-affidavit, I see no reason why the Board should not have filed their accounts, because the bye-law has been in force since 1949 and the income and expenditure must have been entered in the account-books during all these years.

The facts, as they have been stated in paragraph 9 of the counter-affidavit, actually go to support the petitioners' case because they show that no separate staff has been engaged for the purpose of regulating the petitioners' trades. The paragraph merely contains an assertion that the officers, mentioned in the paragraph, regulate and control the trades for which the licence fee has been prescribed. Definite facts have been asserted in the affidavit filed along with the petition, which have given the approximate amount of money recovered as the licence fee by the Board every year, and it is also said that not a single officer of the Board visited or inspected any of the factories belonging to the petitioners and to others, nor has the District Board spent anything on the working of the bye-law under which the licence had been issued. There is a clear assertion in paragraph 17 that there has been no increase in the staff of the Public Health Department at all since the introduction of the bye-law, & no special staff has been employed by the Board for the purpose of regulating the petitioners' trades, nor has any additional expenditure been incurred due to the enforcement of these bye-laws. It has further been said that in the successive budgets from 1948 onwards no expense for the working of the impugned bye-law is shown. None of these facts have been controverted in the counter-affidavit.

(22) After the arguments were practically over, I gave an opportunity to the learned counsel to produce the account-books of the District Board, and adjourned the case for the purpose. But on the adjourned date the learned counsel informed me that the District Board had not sent the account-books to him, but had only sent him certain extracts from the account-books typed on separate sheets of paper. They are not even copies of the account-books, but merely extracts from them. These papers, therefore, could be of no possible assistance to me. The omission of the District Board to file the account-books, in spite of an opportunity being given to it, goes against the District Board, and this fact can be taken into consideration in coming to a conclusion on the facts that have to be decided in the case.

As a result of what I have stated above, I have come to the conclusion that the amount of licence fee fixed under the bye-law was not fixed with the object of meeting merely the expenses of regulating the trade or of meeting the expenses that became necessary by virtue of the framing of these bye-laws, but that the fee was fixed with a view to enhance the general revenues of the District Board. The facts of this case are very similar to the facts of the case in 'Civil Misc. Writ No. 7735 of 1951 (All) (E)' decided on the 6th March 1953 by a Division Bench of this Court, of which I was a member.

(23) For the reasons given above, I hold that Bye-law No. 6 of the Bye-laws framed by the District Board of Saharanpur, which were published in the Gazette, dated the 28th May 1949 was ultra vires the Board, and I direct the issue of a writ of mandamus commanding the respondent No. 1 to refrain from enforcing Bye-law No. 6 of the impugned Bye-laws against any one of the petitioners.

(24) The petitioners will be entitled to their costs of this petition, which I assess at Rs. 100/-.

A/R.G.D. Writ issued.

A.I.R. 1954 ALLAHABAD 680 (Vol. 41, C.N. 271)

AGARWALA AND ROY, JJ. (13-1-1954)

State v. Ram Lakhan and others, Opposite Party.

Criminal Reference No. 17 of 1952.

(a) Penal Code (1860), Ss. 149, 323, 333 — Trial by jury — Legality — (Criminal P. C. (1898), S. 536).

It is no doubt true that S. 149, I. P. C., embodies a rule of vicarious liability. Nevertheless, it is also true that it is by virtue of this section that members of the assembly who have not themselves committed any offence beyond the offence of being members of that assembly are made liable for an offence committed by others. Section 149 therefore creates a specific offence and impliedly provides for punishment of that offence. (Para 6)

Since under U. P. Govt. Notification 2038/VII-B-1583-50, D/- 7-3-1951, offences under chapter 8, I. P .C., are not to be tried by a jury, an offence under S. 149 is not to be tried by a jury. It is not correct to say that S. 149 refers to some other offence; because when a person is a member of an unlawful assembly, and is convicted of a particular offence by virtue of S. 149, he is being convicted under S. 149, though the punishment which will be awarded to him is to be awarded having regard to that other offence for which he is made liable. The trial of the offences under S. 323 read with S. 149 and S. 333 read with S. 149, or to be more accurate, of the offences under S. 149 read with S. 323 and S. 149 read with S. 333 should therefore be with the aid of assessors and not by jury. (Para 7)

Where however offences under above sections were tried by a jury instead of with the aid of assessors it remained a trial with the aid of jury, and in view of Section 536 it would not be considered to be illegal. Case law reviewed. (Para 8)

Anno: Penal Code, S. 149, N. 1, 12; S. 333, N. 1; Criminal P. C., S. 536, N. 1.

1949 Mitra: S. 536, P. 1643, N. 1405, "Sub-section (1)"

(b) Penal Code (1860), Ss. 149, 34 — Distinction.

The distinction between Ss. 149 and 34 is that while S. 34 speaks of a common intention, S. 149 speaks of a common object. AIR 1925 PC 1, Ref. (Para 6)

Anno: Penal Code, S. 149, N. 5; S. 34, N. 3;

CASES REFERRED: Paras

(A) (V20) AIR 1933 All 128: 34 Cri LJ 441 5
(B) (V13) AIR 1926 Pat 253:27 Cri LJ 512 5, 7
(C) (V12) AIR 1925 PC 1: 26 Cri LJ 431 6, 7
(D) ('03) 26 Mad 243: 2 Weir 463 8
(E) ('77-78) 3 Cal 765 8
(F) ('01) 25 Bom 680: 3 Bom LR 378 (FB) 8

Sri Ram and D. P. Uniyal Deputy Govt. Advocate, for the State; Kedar Nath Sinha, for Opposite Party.

AGARWALA, J.:

This is a reference by the learned Assistant Sessions Judge of Faizabad under S. 307, Criminal P. C.

(2) On 20-4-1948 polling was held at Iltifatganj School building in connection with the District Board Elections. The two main parties in the field were the Congress Party and the Socialist party. It appears that at first there was some quarrel between the two parties and then a riot broke out. Several persons received injuries. One Udaibhan Singh, Head Constable, was hit in the eye and lost it.

Two cross cases were challaned by the police. We are concerned with only one of the cross cases in which the accused seemed to belong to the Socialist party and in this case 18 accused were committed to stand their trial for offences under sections 147, I. P. C., 323 read with 149 I. P. C., 333 read with 149, I. P. C., and 426 read with 149, I. P. C. They were tried with the aid of five jurors who acted as assessors also. Under S. 323 read with 149, I. P. C., and 333 read with 149, I. P. C., the trial was a jury trial. For these offences, the jury by a majority of four to one gave their verdict that only the four accused, viz., Ram Lakhan Singh, Ayodhya, Hardwar Singh and Jabbar Khan were guilty.

Under S. 426 read with S. 149, I. P. C., their opinion as jurors was unanimous that none of them was guilty. The trial for the offence under S. 147, I. P. C., was by the court with the aid ..... of the same persons as assessors. As assessors, the very same jurors gave their opinion that none of the accused was guilty. The learned Assistant Sessions Judge agreed with the opinion given by the aforesaid persons as assessors and acquitted the accused of the offence under S. 147, I. P. C. He also agreed with the opinion of the jury so far as it related to the offence under S. 426 read with S. 149, I. P. C., and acquitted the accused of that offence.

So far as the trial under sections 323 read with 149, I. P. C., and 333 read with 149, I. P. C., was concerned, he partly accepted the verdict of the jury, and acquitted all the accused except Ram Lakhan Singh, Ayodhya, Hardwar, Singh and Jabbar Khan. But he did not agree with their verdict so far as these four accused were concerned. In his opinion these four persons should also have been acquitted. Consequently, he made the reference under S. 307, Cr. P. C., which is before us.

(3) The reason, according to the learned Asstt. Sessions Judge, why the accused Ram Lakhan Singh, Ayodhya, Hardwar Singh and Jabbar Khan should not be held guilty under Ss. 323/149, I. P. C., and S. 333/149, I. P. C., was that the very same jurors had already expressed their unanimous opinion as assessors that the four accused were not guilty for the offence under S. 147, I. P. C. He further held that the opinion of the jury being against the weight of the evidence was perverse.

He opined that out of the eighteen prosecution witnesses only four witnesses could be believed and the others could not be believed, and if reliance were placed on these four P. W's the jury had no material before them to discriminate between the different accused and to hold the four accused as being guilty and the rest not being guilty. For all these reasons the learned Assistant Sessions Judge considered that the verdict of the jury was perverse.

(4) It was urged that the trial of the accused under S. 323 read with 149, I. P. C., and 333 read with 149, I. P. C., should not have been with the aid of a jury. We think that the contention is sound.

(5) Under section 269:

> "the State Government may ..... by order in the official gazette, direct that the trial of all offences, or of any particular class of offences, before any court of session, shall be by jury in any district."

The U. P. Government has by notification No. 2038/VII-B-1583-50 dated 7th March 1951, prescribed that all offences except the following offences are to be tried by jury:

(a) ....

(b) ....

(c) Offences punishable under Chapters V-A, VI, VII, VIII, IX, XXI of the Indian Penal Code.

The offences under Ss. 147 and 149 fall under Ch. VIII, and assuming that S. 149 defines a substantive offence and makes it punishable, it will not be an offence triable by a jury. The question is whether S. 149 creates a substantive offences and makes it punishable also. On this point it has been held by this Court that S. 149 does create a substantive offence and that a trial under that section, read with any other section which may be triable by a jury is not to be so tried, vide — 'Dakhani v. Emperor', AIR 1933 All 128 (A).

On the other hand, a Division Bench of the Patna High Court has expressed a contrary opinion. It has held that an offence which is triable with the aid of a jury does not cease to be so triable when it is an offence only because it is to be read with S. 149, Indian Penal Code, vide — 'Ramsunder Isser v. Emperor', AIR 1926 Patna 253 (B). The view taken in — 'Dakhani's case (A)', however, appears to us to be the correct view.

(6) Chapter VIII of the Indian Penal Code deals with offences against public tranquillity. Section 141 defines an unlawful assembly. Section 143 prescribes punishment for the offence of being a member of an unlawful assembly. Section 144 prescribes punishment for being a member of an unlawful assembly when the person concerned is armed with a deadly weapon. Section 145 prescribes punishment for an offence of being a member of an unlawful assembly after the unlawful assembly has been commanded to disperse. Then section 146 defines roiting and section 147 prescribes punishment for rioting. Section 148 prescribes punishment for rioting with deadly weapons. We are then led to S. 149 which reads as follows:

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that common object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

Now this section presupposes that there is an unlawful assembly, and further that some member of the assembly has committed some offence, and it prescribes that if that offence is, committed by some member either in prosecution of the common object of that assembly or in such circumstances as the members of that assembly knew that it is likely to be committed in prosecution of that object, every other member of the assembly shall be guilty of the very same offence which

has been committed by that particular member. It is no doubt true that the section embodies a rule of vicarious liability. Nevertheless, it is also true that it is by virtue of this section that members of the assembly who have not themselves committed any offence beyond the offence of being members of that assembly are made liable for an offence committed by others .

This section, therefore, defines an offence committed by a member of an unlawful assembly in the circumstances mentioned in the section. Impliedly, though not expressly, it also lays down that the other members of the assembly shall be punished as if they have committed the very same offence committed by another member of the assembly. Section 149 is not to be confused with S. 34, Penal Code. Section 34 speaks of a common intention, whereas S. 149 speaks of a common object. The distinction between the two has been very clearly brought out by their Lordships of the Privy Council in — 'Barendra Kumar v. Emperor', AIR 1925 P. C. 1 (C). Their Lordships observed:

"There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action which is the leading feature of S. 34, is replaced in S. 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but S. 149 cannot at any rate relegate S. 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all."

Their Lordships further observed :

"S. 149 creates a specific offence and deals with the punishment of that offence alone."

It is, therefore, abundantly clear that S. 149 creates a specific offence and impliedly provides for punishment of that offence. Since offences under Chapter VIII are not to be tried by a jury, an offence under S. 149 is not to be tried by a jury. The argument that S. 149 refers to some other offence is immaterial. When a person is a member of an unlawful assembly, and is convicted of a particular offence by virtue of S. 149, he is being convicted under S. 149, though the punishment which will be awarded to him is to be awarded having regard to that other offence for which he is made liable.

(7) After referring to — 'Barendra Kumar Ghosh's case, (C),' their Lordships of the Patna High Court in — 'Ramsunder's case, (B)', observed :

"It is true S. 149 is an offence in respect of which there has been participation. It prescribes new set of conditions to which the section shall become applicable, but in the end the guilt of the person shall be the guilt attaching to the principal's crime. Now when the notification of the 11th September 1921, declares that the trial of an offence under S. 436 must be by jury and not by assessors, the assessors are incompetent to determine whether a certain set of facts constitute the offence. It follows that the disability continues where the enquiry is whether upon the additional set of facts widening the field of liability prescribed in S. 149 the accused has rendered himself punishable for the same offence. The trial remains a trial under S. 436; the court must always first determine whether that offence has been committed by an individual and next whether S. 149 makes the participators responsible."

There is an assumption in the observation quoted above that because the trial under S. 436, I. P. C., could not have been with the aid of assessors but could only be by a jury, the assessors were incompetent to try an offence under S. 149 when it was to be read with S. 436. The two offences are quite different. An offence under S. 436 will be committed by an individual person, or read with S. 34 may be committed by some persons jointly. But in order to determine that an offence under S. 149 read with S. 436 has been committed certain other facts will have to be determined, namely, whether they were members of an unlawful assembly, and further whether the commission of the offence was in prosecution of the common object of the assembly, or the offence was committed in such circumstances as the members of the assembly knew to be likely to be committed in the prosecution of the common object of the assembly.

For reasons best known to the Government, the Government did not include the trial of an offence under S. 149 as a trial by a jury and considered that such an offence should be tried by the Judge with the aid of assessors. It is not for us to find out the reasons which led the State Government to exclude the trial of offences under Chapter VIII from the purview of jury trial. The fact remains that a trial for an offence under S. 149 read with S. 436 will be different from a trial for the offence under S. 436 simpliciter.

Very often the trial for such an offence is stated as an offence "under S. 436 read with S. 149". To be accurate, the offence should be mentioned as "under S. 149 read with section 436", because the substantive offence for which a person is being tried in those circumstances is not under S. 436, but under S. 149 read with the help of S. 436. In our opinion, therefore, the trial of the offences under S. 323 read with S. 149 and S. 333 read with S. 149, or to be more accurate of the offences under S. 149 read with S. 323 and S. 149 read with S. 333 should have been with the aid of assessors and not by jury.

(8) This, however, does not conclude the matter. The question remains what is the effect of this irregularity. Upon this S. 536, Criminal P. C. is clear. It provides that if an offence triable with the aid of assessors is tried by a jury the trial shall not on that account only be invalid. In some cases, it has been held that a verdict given by a jury in a case which should have been tried by the aid of assessors can be recorded as the opinion of the assessors and the trial will not stand as a trial with the aid of a jury, but as a trial with the aid of assessors, vide — 'Pattikadan Ummaru v. Emperor', 26 Mad 248 (D) and — 'Empress v. Mohim Chunder Rai', 3 Cal 765 (E).

A contrary view has been expressed by a Full Bench decision of the Bombay High Court in — 'King Emperor v. Parbhu Shankar', 25 Bom 680 (F). We think that the view taken by the Bombay High Court should be followed. According to that court the trial should be taken as a trial by a jury, because it was in fact a trial by a jury and not a trial with the aid of assessors. We cannot on the wordings of S. 536 convert a trial by a jury into a trial with the aid of assessors. It remains a trial with the aid of jury,

and section 536 lays down that for that reason only it will not be considered to be illegal. The trial in the present case cannot, therefore, be invalidated on the ground that the offence should have been tried with the aid of assessors.

(9) This leads us to the main point in the case. The learned Assistant Sessions Judge was of opinion that the verdict of the jury is perverse. We have considered the evidence in the case, and we find that against the four accused individually against whom a verdict of guilty was given by the jury under Ss. 323/149 & Ss. 333/149, I. P. C., it was proved that they had themselves inflicted injuries on other persons.

Ram Lakhan Singh was proved to have struck Udai Bhan Singh, Head Constable. This is borne out by the testimony of Nazir Khan, Abrar Husain, Sita Ram and Udai Bhan Singh. Sita Ram and Udai Bhan Singh were themselves hurt. There can thus be no doubt that Ram Lakhan Singh was responsible for causing the grievous hurt to Udai Bhan Singh, Head Constable who was a public servant, and who at the time when he was hit was discharging a duty as such. He was, therefore, guilty under S. 333, I. P. C. It was not necessary to convict him under S. 333 read with section 149, I. P. C.

So also it was proved on the record that Hardwar Singh, Ayodhya Singh and Jabbar Khan had caused simple hurts to other persons. They were all guilty under S. 323, I. P. C. and again we may say it was not necessary to hold them guilty under S. 323 read with S. 149, I. P. C. Thus, although the verdict of jury, in so far as it held these four persons guilty of offences under Section 149 read with Sections 323 and 333, I. P. C., was erroneous, these persons could rightly be held guilty under Section 323 or 333, I. P. C., as pointed out by us above.

(10) In this view of the matter, there is no inconsistency in acquitting these persons and other accused who were tried along with them of the offences under Section 147 and yet holding these individual accused guilty of offences which they committed not as members of an unlawful assembly but as individual persons.

(11) The result, therefore, is that we convict Ram Lakhan Singh under S. 333, I. P. C. and sentence him to three years' rigorous imprisonment. We convict Hardwar Singh, Ayodhya Singh and Jabbar Khan under S. 323, I. P. C. and sentence each of them to three months' rigorous imprisonment.

(12) The reference is thus disposed of.

B/H.G.P. Order accordingly.

A.I.R. 1954 ALLAHABAD 683 (Vol. 41 C.N. 272)

(LUCKNOW BENCH) BEG J. (20-1-1954)

Ghissu, Defendant-Appellant v. Hashim Ali and another, Plaintiff-Respondents.

S. C. Appeal No. 735 of 1947, against decree of Dist. J., Unnao, D/- 9-8-1947.

(a) Easements Act (1882), Ss. 52, 60 — Licence with a profit a prendre — Right is not revocable.

Where plaintiff allowed the defendant not only to enter the grove but also to take away something from it, namely, the crops of the trees : Held that it was not a case of bare licence, because the grant of a licence was coupled with the transfer of property this property being the crop of the grove. This would be a complex right which in law would be termed as a licence coupled with a grant or licence with a profit a prendre. The rights thus created are not revocable under S. 60, Easements Act. (Paras 8, 9)

Anno: Easements Act, S. 52, N. 3; S. 60, N. 3.

(b) Co-sharers — Rights and liabilities.

It is not open to one of the co-sharers of joint property to create subsidiary rights or interests in favour of third parties in the entire property without the consent of the other co-sharers. (Para 11)

R. N. Shukla, for Appellant; Kalbe Mustafa, for Respondents.

JUDGMENT : This is a defendant's second appeal arising out of a suit for perpetual injunction and possession.

(2) The suit was brought by two persons as plaintiffs. It was brought on the allegation that plaintiff 1 had given a licence to the defendant to take away the crop of the grove on payment by the defendant of a yearly rent of Rs. 24/-. There was a further stipulation in the deed that the defendant would not be ejected so long as he continued to pay the yearly rent. The plaintiffs filed the suit alleging that the said licence had been revoked by plaintiff No. 1 and was no longer in force. In the alternative it was pleaded that plaintiff 2 who was a minor and was a co-sharer in the said grove being not a party to the said licence, the transaction was bad as a whole.

(3) The suit was resisted by the defendant on the ground that he was not a mere licensee and under the terms of the deed, he could not be ejected so long as he continued to pay the yearly rent. It was also pleaded on his behalf that plaintiff 1 was managing the property on behalf of plaintiff 2 who was a minor and, therefore, plaintiff 2 was bound by the said transaction.

(4) The trial court came to the conclusion that the transaction in question was a lease. Hence the defendant was liable to ejectment without notice at the instance of plaintiff 2 and the plaintiff 2 being not a party to the said transaction, the defendant could not resist the suit successfully. The trial Court, therefore, decreed the suit.

(5) The appellate Court did not agree with the trial court on the point that the transaction in question was a lease. The appellate Court held the transaction to be a mere licence which could be revoked at the instance of the licensor, that is, plaintiff 1. As the licence stood revoked, the plaintiff was entitled to the relief claimed. It, therefore, upheld the decision of the trial court though on a different ground.

(6) Dissatisfied with the judgment of the lower appellate Court, the defendant has filed this second appeal.

(7) The first argument advanced by the learned counsel for the appellant is that the view of the lower appellate Court that the transaction in question is a mere licence is not correct. Having heard learned counsel I am of the opinion that there is force in his argument. In my opinion, the transaction in question cannot be construed to be a bare licence. A licence is defined in S. 52 of the Easements Act as follows:

"Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do in, or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a licence."

in front of his house on a cart and his attention was attracted when the dacoits started beating the inmates. He states that he concealed himself and raised alarm. Some neighbours came up subsequently and when the dacoits found that a large number of persons were being attracted they decamped after taking away considerable property which they had looted. He definitely states that he identified Chandrapal and Banwari. The other witnesses who identified Chandrapal are Bisram and Sadhu. Bisram is a neighbour and nothing has been brought out in cross-examination to show that Bisram had any ill-will against Chandrapal.

Sadhu is an inmate of the house. He also states that he identified Chandrapal. Chandrapal does not reside in the village but resides in a purwa, at a distance of about a mile from the place of occurrence. It has been argued that Chandrapal and Gokul were not on good terms and that there was therefore reason for Gokul to have implicated Chandrapal falsely. It is not suggested that there was any litigation between Chandrapal and Gokul and all that has been brought out is that there were two factions, one led by Chetan and the other led by Bhima, and that Bhima was in jail in connection with some case between the two parties and Gokul went to interview him in jail and this annoyed Chandrapal. There is hardly a village where some people have not their leanings for a particular set of persons and to reject the testimony of a witness mainly on this ground would not be proper.

(7) Banwari is the other person who was named by Gokul in the first information report and has been identified by Lekha, Smt. Sheorani and Ganpat. (His Lordship considered the evidence against this appellant and concluded :) There is, therefore, an element of doubt in the complicity of Banwari in the affair and he should be given the benefit of that doubt.

(8) Malkhan appellant was arrested on 27-8-1951 and was put up for identification at a parade held on 19-10-1951. He was identified by five persons, Gokul, Sheorani, Ganpat, Sadhu and Ram Bhajan. Of these five persons only Gokul made two mistakes while identifying two suspects but the other four persons made no mistakes and correctly identified Malkhan. It has been urged on behalf of this appellant that the value of the evidence of identification of these witnesses should be judged with reference to the mistakes which they committed in identifying the suspects in the two other parades also. As all the accused in this case were not arrested all at once, identification had to be held on three different dates. The first one was held on 13-8-1951, the second on 5-9-1951 and the last on the 19-10-1951. Malkhan having been arrested on the 27th August, was put up for identification on 19-10-1951. He had himself surrendered in Court and there was therefore hardly any occasion for the witnesses to see him after the dacoity or before the identification. It is not necessary to take into consideration the mistakes committed by the witnesses at other identification parades unless any of the witnesses has made a palpably large number of mistakes at all other identification parades. (His Lordship discussed the evidence of identification against Malkhan as also against Debi and found them guilty under S. 395, Penal Code. His Lordship then proceeded :)

(9-10) Chiranji appellant was identified only by two persons, Gokul and Sheorani. No doubt the identification made by Sheorani was satisfactory, but it is difficult to accept the evidence of Gokul with regard to identification. It is not safe to rely on the testimony of one good witness for convicting a person of the offence of dacoity especially when there is no other circumstantial evidence to connect him with the crime. He should, therefore be given the benefit of the doubt. (His Lordship considered the case of Jangi and after finding him guilty proceeded :)

(11-13) Coming to the cases of Ram Swarup and Bhola, Ram Swarup pointed out to the Sub-Inspector the box and after taking the key from his mother took out the dhoti Ex. IX. (His Lordship held that the evidence as to identification of the dhoti was satisfactory and proceeded :)

(14) Bhola appellant did not dispute that he had sold the karas to Ram Murat Sarraf. The karas were identified by the inmates of the house and were also mentioned in the list of stolen property given to the investigating officer at the time when he reached the village. It has been argued that the weight of the karas recovered was found to be 55 tolas while the weight of the karas stolen is mentioned as 80 tolas in the list of stolen property. These karas are found as item No. 8 in the list Ex. 3, and it is mentioned that the karas were phuldari and were 80 bhar. It has been argued on behalf of the prosecution that Bhar is not the same as a tola and that the karas had been in use for four years. The weight of the karas must have been given by estimate and there must have been a loss of weight due to constant use for four years. The karas were correctly identified by several persons and there is no reason to reject their testimony only on the ground that the weight ultimately found was less than the weight given by estimate at the time when the list of stolen property was made over to the police. The defence has led no evidence to prove whence these karas were procured by the appellant. No doubt, it is not necessary for an accused to prove that the karas were not stolen property but when evidence is led on behalf of the prosecution to prove a certain fact it is open to the accused to rebut it.

(15) It has been argued that even if the two items of property which are said to have been taken away by the dacoits have been recovered from the possession of Ram Swarup Singh and Bhola they should not have been convicted under S. 412 of the Penal Code but under S. 411 of the Penal Code. There is a conflict of judicial opinion on this point and the learned Counsel for the appellants has cited a number of rulings, the last being of our own High Court, — 'Sumer v. Rex', AIR 1950 All 398 (A). In this reported case authorities of other High Courts have also been surveyed. — 'In re Dhyani Gope', AIR 1947 Pat 205 (B), it was held that if the essential facts relating to the ownership, theft and possession of the articles have been established, the Court may infer that the accused knew how they had been removed from the possession of the owner, and a presumption may be drawn that the accused knew of the manner in which the articles in question had been taken away from the possession of the owner, that is to say, in a case of ordinary theft that they had been stolen, and in the case of dacoity, that they had been stolen in the course of the dacoity.

Raghubar Dayal J. however, expressed his dissent from the view taken in AIR 1947 Pat 205 (B) and has pointed out that while it would be reasonable to draw an inference that the pro-

perty recovered was stolen property, a presumption to the effect that the possession had been obtained by the commission of dacoity could not be raised unless there was some evidence to prove that the person from whom the property was recovered knew that the possession of the articles had been obtained by the commission of dacoity. I have carefully gone through the rulings cited by the learned Counsel for the appellants. While an observation has been made in these cases that there ought to be some evidence to prove that the person found in possession of stolen property knew of the manner in which the articles had been originally acquired there is no suggestion as to what that possible evidence could be. It is well nigh impossible for the prosecution to prove the knowledge of a person found in possession of stolen goods. A presumption has therefore to be raised and if the scope of the presumption mentioned in S. 114 illustration (a) of the Evidence Act is limited to a knowledge that the property was simply stolen property, it would be difficult to make out an offence under S. 412 of the Penal Code in any case.

If a person is found in possession of stolen property so as to attract the application of S. 114 of the Evidence Act he should be deemed to be in the know of the manner in which the property was originally acquired by the thief or the dacoit and the very fact that the property is presumed to be stolen would also lead to the inference of the manner in which the theft was committed, whether it was by way of dacoity or by way of simple theft. It is no doubt possible that a person may pass on property acquired by dacoity to another person without telling him the exact manner in which he obtained the property, just as a thief could pass on property to another person without telling him that it was stolen property and in all such cases it would be open to the accused to rebut the presumption by accounting for his innocent possession or by establishing circumstances raising a reasonable doubt. But once stolen property is recovered from the possession of a person under circumstances mentioned in illustration (a) of S. 114 of the Evidence Act, the presumption of the knowledge, be it said with profound respect to all those who hold a contrary view, cannot ordinarily be limited in its scope or dissociated from the nature of the possession or the manner in which the property was originally acquired.

In some cases it has been held that if a person is not even charged with an offence under S. 395 of the Penal Code, it would not be possible to establish a case under S. 412 of the Penal Code in the absence of some evidence to prove that he knew the nature of the possession of the property. It would be difficult to lay down a rule of general application to all cases and each case will have to be judged and decided on the facts of that particular case. If a person is charged under S. 395 and also under S. 412 of the Penal Code, there are usually circumstances for presuming the knowledge of the accused. It may not, however, be appropriate to convict a man under S. 412 of the Penal Code when he is not charged under S. 395 of the Penal Code in the absence of circumstances indicating or suggesting that he had knowledge that the property for the possession of which he has been charged had been obtained by dacoity.

(16) Then again the time after which the property was recovered may also be a relevant circumstance in fixing or presuming knowledge about the nature of the possession. In the present case the property was recovered about ten days after the dacoity had been committed and in the case of Ram Swarup Singh the dhoti was taken out from a locked box and given to the Sub-Inspector. The karas were recovered from the shop of Ram Murat presumably on some information given by Bhola himself or by some other person. As Ram Swarup Singh has not been charged under S. 395 of the Penal Code, it would be safer to hold that he is guilty under S. 411 and not under S. 412 of the Penal Code. In the case of Bhola, however, he had been charged under S. 395 of the Penal Code and the property was recovered soon after the dacoity had been committed. There is, therefore, no reason to reject the presumption that he knew that the property had been acquired by dacoity.

(17) As a result the conviction and sentence of Banwari and Chiranji under S. 395 of the Penal Code are set aside and they are acquitted. The conviction and sentence of Chandrapal, Malkhan, Debi and Jangi under S. 395 of the Penal Code are maintained. The conviction of Ram Swarup Singh under S. 412 of the Penal Code is altered to one under S. 411 of the Penal Code and the sentence is reduced to one year's rigorous imprisonment and the sentence of fine is set aside. The conviction and sentence of Bhola under S. 412, I. P. C. are maintained. Banwari and Chiranji are on bail. They need not surrender to their bail and their bail bonds are cancelled. The fines, if paid, by Ram Swarup, Banwari and Chiranji shall be refunded. The appellants, Chandrapal, Malkhan, Jangi, Ram Swarup Singh and Bhola are on bail. They shall surrender to their bail to serve out the remaining part of their sentence.

B/V.R.B. Order accordingly.

A.I.R. 1954 ALLAHABAD 687 (Vol. 41, C.N. 274)

MUKERJI J. (14-12-1953)

Chhotey Lal, Appellant v. State of Uttar Pradesh.

Criminal Appeal No. 656 of 1951, from order of S. J., Pilibhit, D/- 28-6-1951.

(a) Evidence Act (1872), S. 27 — Statement of accused and discovery of object — Proof of — (Criminal P. C. (1898), S. 162).

The whole of the statement of an accused which occasions the discovery can be proved. Thus, the statement of the accused that he had thrown a pistol in such and such a ditch can be proved and not only the statement that the pistol was in the ditch. AIR 1937 All 497, Foll.; AIR 1947 PC 67, Rel. on. (Para 5)

Anno: Ev. Act, S. 27, N. 7; Cr. P. C., S. 162, N. 5. 1953 Mitra: S. 162, P. 573, N. "Or..... Act".

(b) Evidence Act (1872), S. 27 — "Custody" — Meaning of.

The word 'custody' in S. 27 does not mean formal custody. An accused is in police custody within the meaning of the section when he is under surveillance of the police and cannot break away from the company of the police officer and get away. AIR 1948 All 7, Foll. (Para 6)

Anno: Ev. Act, S. 27, N. 6.

(c) Arms Act (1878), S. 19(f) — Pistol thrown in ditch by accused.

Where an accused threw a pistol in ditch wherefrom it was discovered and nobody

could get at the pistol without the accused telling him that the pistol was inside the pond:

Held that the accused would be deemed to have the necessary possession of the pistol as contemplated by S. 19(f). AIR 1937 All 497, Foll. (Para 7)

Anno: Arms Act, S. 19, N. 10.

CASES REFERRED: Paras

(A) (V24) AIR 1937 All 497: 1937 All WR 616: 38 Cri LJ 910 5, 7

(B) (V34) AIR 1947 PC 67: 48 Cri LJ 533 5

(C) (V35) AIR 1948 All 7: 1947 All WR HC 273: 48 Cri LJ 939 6

Roop Kishore Srivastava, for Appellant; H. N. Seth, for the State.

JUDGMENT: This is an appeal by Chhotey Lal who has been convicted under S. 19(f) of the Arms Act and has been sentenced to 18 months' rigorous imprisonment.

(2) Chhotey Lal stood his trial before the learned Sessions Judge of Pilibhit along with three other persons, Ram Bharosey Lal, Rajendra Kumar and Avadh Behari Lal for offences punishable under Ss. 304/34 and S. 394, I. P. C. The facts on which the aforementioned charges were made against the four accused who stood a joint trial, before the Sessions Judge of Pilibhit were that they killed one Lala Nanhey Mal on 3-7-1950, when he was going to the railway station in the small hours of the morning to catch a train for Bareilly. Lala Nanhey Mal had on his person a large sum of money and with him there was another man named Ramesh Chandra who also carried a part of the money of Lala Nanhey Mal. These two people were surprised by some persons, according to the prosecution by the four accused, and thereafter Nanhey Mal was stabbed and Ramesh Chandra was robbed.

The prosecution tried to prove the charges against all the accused, but they were unable to satisfy the trial Judge with regard to any of the charges save the one under S. 19(f) of the Arms Act against the appellant before me. As a consequence of the findings arrived at by the trial Judge all the four accused were acquitted of the charges under Ss. 302/34 & S. 394, I. P. C. The learned Judge, however, has as already mentioned, convicted the appellant under S. 19(f) of the Arms Act because in his view the evidence in the case established the fact that the appellant possessed a country made pistol.

(3) After the outrage on Nanhey Mal the police got busy tracing the culprits and it appears that Chhotey Lal, the appellant, was one of the suspects in the crime. Chhotey Lal was taken into police custody, though not actually arrested, and he was subjected to an examination by the investigating officer. It appears that the investigating officer expected Chhotey Lal to make some startling revelations and he, therefore, had a Tahsildar Magistrate called to hear these. The accused made a statement before the Tahsildar Magistrate, namely, Sri Kailash Chandra and the police officer to the effect that he had dropped a pistol in a ditch and that he was going to take the party to the ditch so that the pistol may be discovered therefrom. The pistol was as a consequence of the statement actually discovered before the Tahsildar Magistrate and a few other witnesses as also in the presence of the investigating Officer in whose custody the accused apparently was at that time.

(4) At the trial witnesses deposed to the statement having been made by the accused and to the discovery having been made as a direct consequence of that statement.

(5) It was argued by Sri Roop Kishore Srivastava that the statement of the accused that he threw the pistol into the ditch could not be proved under S. 27 of the Evidence Act for, according to learned counsel, only the statement that the pistol was in the ditch could be proved. I am unable to accept this contention because of the view expressed by a Bench of this Court in — 'Emperor v. Chokhey', AIR 1937 All 497 (A). That was a case in which the facts were almost similar to the facts of the present case and it was there held that the whole of the statement of an accused which occasions the discovery can be proved. In the reported case the statement of the accused that was permitted to be proved was this: "I have buried a gun at such and such a place." In the present case the statement of the accused is similar, namely, that he had thrown a pistol in such and such a ditch.

If the statement of the accused in the former case could have been proved under S. 27 of the Evidence Act then I do not see why the statement of the accused in the present case cannot be so proved. A similar view was taken by their Lordships of the Privy Council in the case of — 'Pulukuri Kottaya v. Emperor', reported in AIR 1947 PC 67 (B).

(6) Learned counsel raised another argument in regard to the applicability of S. 27 of the Evidence Act to the statement of the accused, namely that S. 27 applied only where it was proved that the accused was in the custody of a police officer and not otherwise. There is no doubt that S. 27 of the Evidence Act is applicable only where a statement is made by an accused in police custody and not otherwise. What learned counsel tried to argue thereafter was that in this case the accused was not proved to have been in police custody. He relied on the statement of the Tahsildar Magistrate when he said that "the accused was not in police custody but they kept a watch over him". It must be pointed out that there is distinction between an accused being "under arrest" and an accused being in "custody". It has been pointed out by a Bench of this Court in the case of — 'Maharani v. Emperor', reported in AIR 1948 All 7 (C), that

> "the word 'custody' in S. 26 or 27, Evidence Act, does not mean formal custody, but includes such state of affairs in which the accused can be said to have come into the hands of a police officer or can be said to have been under some sort of surveillance or restriction."

I am in respectful agreement with the view expressed by the Bench in — 'Maharani's case, (C)'. On the facts as proved in this case it is clear to me that Chhotey Lal was under surveillance of the police. He was in a state in which he could not break away from the company of the police officer and get away. I have no doubt that he was in police custody within the meaning of S. 27 of the Evidence Act.

(7) On the evidence I am satisfied that the accused did make the statement ascribed to him and that a country made pistol was actually recovered from the pond which was pointed out by the accused. A question was further argued as to whether under these conditions it could be said that the accused had 'control' or 'possession' of the fire-arm. A similar question arose in the case of — 'Chokhey Lal, (A)', which has already been noticed by me and the Bench had no hesitation in answering the question against the accused. It was held that under circumstances

where an accused conceals an incriminating object although such concealment is in a place which may be accessible to others then "the accused is to be deemed in the eye of the law to be in possession and control....."

In this case Chhotey Lal had thrown the pistol inside a pond and the pistol lay there without arousing the suspicion of anybody. Nobody could get at the pistol without Chhotey Lal telling him that the pistol was inside the pond, indeed it took some time before the pistol was actually recovered from the pond. Under these circumstances I must hold that Chhotey Lal would be deemed to have the necessary possession of the pistol as contemplated by S. 19((f) of the Arms Act.

(8) In the result this appeal must fail and is hereby dismissed. The conviction and the sentence of the appellant, is affirmed. The appellant is on bail. He must forthwith surrender to his bail and serve out the rest of his sentence.

B/V.S.B. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 689 (Vol. 41, C.N. 275)

AGARWALA J. (13-4-54)

Mithai Lal and others, Applicants v. State.

Criminal Revn. No. 652 of 1954; against order of 2nd Temporary Civil and Sessions J., Allahabad D/- 6-4-54; in Cri. Appeal No. 508 of 1953.

(a) Criminal P. C. (1898), S. 233 — Simultaneous conviction of person under S. 147 and S. 323 read with S. 149 IPC is valid — (Penal Code (1860) Ss. 147 and 149).

The offence under S. 323 read with S. 149 I. P. C., and under S. 147, I. P. C. are quite different. Under S. 147, I. P. C., the offence is committed as soon as five or more persons assemble with some unlawful object. The gravamen of the charge consists in the assembly of the offenders while the offence under S. 323 read with S. 149, I. P. C. can be made out only when some one or another of that assembly commits an offence which can be punished under S. 323, I. P. C.

As soon as the other members of the assembly commit an offence under S. 323, a member of the assembly, who did not himself participate in the infliction of the injuries to the complainant, and actually did nothing else except being a member of the assembly, is saddled with the vicarious liability of the offence committed by others because of the state of knowledge of the member or because the offence was committed in pursuance of the common object of the assembly. There is, therefore, a vital distinction between a conviction under S. 147 and a conviction under S. 323 read with S. 149, I. P. C. It cannot, therefore, be said that a person cannot be convicted of both these offences, namely, under S. 147 and S. 323 read with S. 149. (Para 2)

Anno: Cr. P. C., S. 233, N. 3, Penal Code, S. 147, N. 3; S. 149, N. 2.

(b) Constitution of India, Art. 20(2) — Conviction set aside and retrial ordered — There is not double prosecution.

What Art. 20(2) contemplates is a double prosecution and punishment. No person shall be prosecuted and punished for the same offence more than once. In order that this Article may be attracted there must be a second prosecution and punishment. Where a person has been convicted and punished for an offence and the conviction has been set aside and retrial ordered, the retrial is a continuance of the same prosecution. The order setting aside the conviction washes out the effect of the previous conviction. A conviction on retrial is a conviction in the same prosecution. It is neither a second prosecution nor a second punishment. The fact that the accused, unfortunately served a sentence in jail for two or three days on account of the first conviction which was later on set aside does not render the conviction and punishment imposed upon retrial as a second punishment upon a second retrial : AIR 1954 All 116, Relied on. (Para 3)

Anno: Constitution of India, Art. 20, N. 4.

CASE REFERRED : Para

(A) (V41) AIR 1954 All 116: 1954 Cri LJ 216 3

B. N. Katju, for Applicants.

ORDER : The applicants were prosecuted under Ss. 147 and 325 read with S. 149, I. P. C. and each of them was sentenced to pay a fine of Rs. 100/- under S. 147, I. P. C., and to undergo rigorous imprisonment for six months and to pay a fine of Rs. 100/- under S. 325 read with S. 149, I. P. C.

On appeal the conviction was set aside and the case was sent for retrial. During the pendency of the appeal, however, before the applicants were granted bail they had to go to jail for two or three days. But they were released on bail. On retrial the applicants were again convicted under Sections 147, 325 and 323, I. P. C. They were ordered to pay a fine of Rs. 100/- under Section 147, I. P. C. and to undergo a sentence of six months rigorous imprisonment under Section 325 read with Section 34, I. P. C. and to pay a fine of Rs. 25/- under Section 323. The sentences of the applicants were made to run concurrently.

On appeal their conviction under Section 147 has been confirmed and they have been sentenced under S. 323 read with S. 149, I. P. C., but they have been acquitted of the offence under Section 325, I. P. C. Jawahar Lal applicant being 17 years of age was, however, given the benefit of the provisions of Section 4 of the U. P. First Offenders Probation Act and S. 5 of the U. P. Borstal Act, 1938.

(2) Two points have been argued before me. It has been urged that simultaneous convictions under Sections 147, I. P. C. and S. 323 read with S. 149, I. P. C., were not authorised by law. There is no substance in this point. The offences under Section 323 read with Section 149, I. P. C, and under Section 147, I. P. C. are quite different. Under S. 147, I. P. C. the offence is committed as soon as five or more persons assemble with some unlawful object. The gravamen of the charge consists in the assembly of the offenders while the offence under S. 323 read with S. 149, I. P. C. can be made out only when some one or another of that assembly commits an offence which can be punished under S. 323, I. P. C. No doubt, a member of the assembly, who did not himself participate in the infliction of the injuries to the complainant, actually did nothing else except being a member of the assembly. But as soon as the other members of the assembly committed an offence under S. 323, the former member, who did not himself participate in the commission of the offence, is saddled with the vicarious liability of the offence committed by the latter because of the state of knowledge of the former or because of the offence was committed in pursuance of the common object of the

assembly. There is, therefore, a vital distinction between a conviction under S. 147 and a conviction under S. 323 read with Section 149, I. P. C. It cannot, therefore, be said that a person cannot be convicted of both these offences.

(3) The second point urged is that since the applicants served the sentences in jail for about two or three days on the first conviction their subsequent retrial and conviction was contrary to Article 20, paragraph (2) of the Constitution. This contention also has no force.

What the Article contemplates is a double prosecution and punishment. No person shall be prosecuted and punished for the same offence more than once. In order that this Article may be attracted there must be a second prosecution and punishment. Where a person has been convicted and punished for an offence and the conviction has been set aside and retrial ordered the retrial is a continuance of the same prosecution. The order setting aside the conviction washes out the effect of the previous conviction. A conviction on retrial is a conviction in the same prosecution. It is neither a second prosecution nor a second punishment. It is unfortunate that the applicants served a sentence in jail for two or three days on account of the first conviction which was later on set aside. But this conviction does not render the conviction and punishment imposed upon retrial as a second punishment upon a second retrial.

A similar view was taken by my learned brother Harish Chandra in — 'Ganesh Prasad v. State of Uttar Pradesh', AIR 1954 All 116 (A). On the facts also there is no force in the revision application. It is dismissed.

A/R.G.D. Revision dismissed.

A.I.R. 1954 ALLAHABAD 690 (Vol. 41, C.N. 276)

(LUCKNOW BENCH) RANDHIR SINGH J. (5-1-1954)

Ram Shankar, Applicant v. Mst. Shyama and others, Opposite Party.

Appln. No. 50 of 1949; against order of Civil J. Unnao; D/- 6-4-1949.

Guardians and Wards Act (1890), Ss. 41 (3), 4 (2) — Scope and applicability.

The word 'guardian' in S. 4 (2) has a very wide meaning and includes all persons who have the care of the person or property of the minor. The Court has, therefore, a right to pass an order against a de facto guardian also under the provisions of S. 41 (3) and the application of S. 41 (3) is not limited to guardians appointed by the Court. AIR 1932 All 215; AIR 1934 Oudh 392; AIR 1919 Mad 189, Ref. (Para 2)

Anno: Guardians and Wards Act, S. 4 N. 1 S. 41 N. 2.

CASES REFERRED: Paras

(A) (V19) AIR 1932 All 215: 54 All 128 2

(B) (V21) AIR 1934 Oudh 392: 35 Cri LJ 1108 2

(C) (V6) AIR 1919 Mad 189: 51 Ind Cas 236 2

H. D. Srivastava, for Applicant; P. D. Rastogi and M. P. Rastogi, for Opposite Party.

ORDER: This is an application in revision against an order passed by the learned Civil Judge, Unnao in certain proceedings under the Guardians and Wards Act. It appears that one Chandika died leaving two minor girls. The police came to the village and entrusted some property of the minors to one Ram Shankar, applicant. This property included a sum of Rs. 500/-. After the property had been made over to Ram Shankar, applications were made by various persons including Smt. Shyama for appointment of a guardian of the minors. Ram Shankar, applicant was also one of those who claimed to be a guardian of the minors. He also made an application for his own appointment as a guardian of the minors. In the application which he made, he definitely mentioned that the minors and their property were in his care. The court, however, ultimately appointed Smt. Shyama as the guardian of the minors.

After the appointment had been made, Smt. Shyama made an application to the court praying that Ram Shankar, who was in possession of the property of the minors may be ordered to make over the property to her. The property which was in the possession of Ram Shankar, included Rs. 500/- in cash, a pair of bullocks and a horse. Ram Shankar contested the application made by Smt. Shyama for the delivery of the property on the grounds that he was in possession of Rs. 270/- only which had been accounted for and that the bullocks and the horse were no longer in his possession. The court made no order for the delivery of the horse and bullocks as they were not in the possession of Ram Shankar and directed Smt. Shyama to file a separate suit for the recovery of that property. It, however came to the conclusion that Ram Shankar had in his possession Rs. 500/- belonging to the minors out of which he had accounted for Rs. 270/- only and Rs. 230/- remained due by him to the minors and directed this amount to be paid by him to Smt. Shyama. It is against this order that the applicant has come up in revision.

(2) The only point which has been urged on behalf of the applicant is that the learned Civil Judge had no jurisdiction under S. 41 (3) of the Guardians and Wards Act to direct the applicant to pay Rs. 230/- to Smt. Shyama as Ram Shankar was not a duly appointed guardian of the minors. Section 41 (3) of the Guardians and Wards Act reads as follows:

> "When for any cause the powers of the guardian cease, the Court may require him, or if he is dead, his representative, to deliver, as it directs, any property in his possession or control belonging to the wards or any accounts in his possession or control relating to any past or present property of the ward".

A perusal of the section quoted above clearly shows that it is open to the court to require a person, whose powers as a guardian cease to deliver any property in his possession belonging to the minors. The word 'guardian' has been defined in S. 4(2) of the Act. "Guardian" means a person having the care of the person of a minor or of his property, or of both his person and property. The question as to whether the word 'guardian' as defined in S. 4(2) refers only to guardians under the Guardians and Wards Act or to other persons also who have the care of the person or property of a minor has come up for decision in several cases and it has been held that the word 'guardian' has a very wide meaning and includes all persons who have the care of the person of the minor or the care of the property of the minor vide — 'Mt. Siddiq-uh-Nissa Bibi v. Nizamuddin Khan', AIR 1932 All 215 (A); — 'Deputy Commr. Gonda v. Mohammad Shikoh', AIR 1934 Oudh 392 (B).

In the latter case it was held that the word 'guardian' used in section 41 of the Guardians and Wards Act does not refer merely to a guardian appointed or declared by the court but also to

other guardians. The fact that whenever it was intended that the word "guardian" should refer to a guardian appointed by the court, the words 'appointed by the court' have been mentioned in the relevant section of the Act leads to the conclusion that the word 'guardian' does not refer only to a guardian appointed by the court.

In— 'Sithabai v. Radha Bai', AIR 1919 Mad 189 (C), a point very similar to the one, which arises in this case before me, came up for decision and it was held that it was open to the court to make an order under S. 41(3) against a person who was a de facto guardian but not a duly appointed guardian by the court. It would thus appear that the court has a right to pass an order against a de facto guardian also under the provisions of S. 41(3) of the Guardians and Wards Act and the application of the section is not limited to guardians appointed by the court. The learned Civil Judge was, therefore, perfectly within his rights to make the order which has been challenged in this application for revision. I see no reason to interfere with the order passed by the learned Civil Judge.

(3) The application in revision is dismissed with costs.

B/H.G.P. Revision dismissed.

A.I.R. 1954 ALLAHABAD 691 (Vol. 41, C.N. 277)

RAGHUBAR DAYAL AND ASTHANA JJ.

(4-3-1954)

Ram Rakshpal, Appellant v. Amrit Dhara Pharmacy Ltd. and others, Respondents.

Special Appeal No. 37 of 1954, against judgment and order of Malik C. J., D/- 19-10-1953.

Letters Patent (All), Cl. 10 — Judgment— Order dismissing application for proceeding for contempt of Court is not "judgment".

An order of a Judge of the High Court dismissing, as having no force, an application for taking proceedings for contempt of Court against opposite parties is not a "judgment" within the meaning of Cl. 10 of the Allahabad Letters Patent. The necessary ingredients of a judgment are that it should affect the merits of the question, that the question be between the parties and that the decision should determine some right or liability. AIR 1953 SC 198, Rel. on. (Para 4)

The person who moves the Court for taking proceedings for contempt has no right to insist that proceedings must be taken and therefore it should follow that any order refusing to take proceedings for contempt of Court is not an order which determines the rights of the applicant and the opposite party. AIR 1936 Bom 314, Relied on. (Para 8a)

Anno: Letters Patent, Cl. 15 N. 2, 3.

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 198: 1953 SCR 1159 (SC) 4
(B) ('72) 8 Beng LR 433: 17 WR 364 4
(C) ('10) 35 Mad 1: 8 Ind Cas 340 (FB) 4
(D) (V22) AIR 1935 Rang 267: 13 Rang 457 (FB) 6
(E) (V22) AIR 1935 All 620 (2): 57 All 983 (FB) 8
(F) (V23) AIR 1936 Bom 314: 60 Bom 894 8
(G) ('98) 25 Cal 236 9

D. P. Agrawal, for Appellant.

RAGHUBAR DAYAL J.:

This is an appeal under Chapter IX, rule 10, of the Rules of Court & S. 10 of the Letters Patent, read with Arts. 225 and 372 of the Constitution of India.

(2) Ram Rakshpal, the appellant, filed an application, Criminal Miscellaneous Application No. 51 of 1953, for contempt of court proceedings against certain parties for reasons given in the affidavit accompanying the application. The application was dismissed by the Hon'ble the Chief Justice as having no force. This is an appeal against that order.

(3) We heard the learned counsel on the question about the maintainability of the appeal. He relies on clause 10 of the Letters Patent of this Court.

The relevant portion of that clause is:

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Allahabad from the judgment (not being a judgment passed in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S. 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to S. 108 of the Government of India Act.....".

(4) It is submitted for the appellant that this order of the learned Chief Justice was a judgment within the meaning of that term in Clause 10 of the Letters Patent and that this judgment was not one of the judgments excepted from appeal. It can be a judgment not open to appeal if it be made in the exercise of the power of superintendence under the provisions of S. 107 of the Government of India Act or in the exercise of criminal jurisdiction as it was not passed in the exercise of appellate jurisdiction or revisional jurisdiction.

We are of opinion that the order appealed against is not a judgment contemplated by Clause 10 of the Letters Patent. The word 'judgment' as used in the Letters Patent of the Calcutta High Court came for interpretation by the Supreme Court in — 'Asrumati Debi v. Kumar Rupendra Deb', AIR 1953 SC 198 (A). The question was whether an order for transfer of a suit, made under Clause 13 of the Letters Patent of the Calcutta High Court, was a judgment or not within the meaning of Clause 15 of that Letters Patent. It was held that such an order was not a judgment.

Their Lordships of the Supreme Court took into consideration the meaning given to the word 'judgment' in similar clauses by the Calcutta High Court in — 'Justices of the Peace of Calcutta v. Oriental Gas Co.', 8 Beng LR 433 (B) and the Madras High Court in — 'Tuljaram v. Alagappa', 35 Mad 1 (FB) (C) and found that the order of transferring a suit did not come within either of the two definitions. Sir Richard Couch C. J. said as follows in the Calcutta Case:

"We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

The necessary ingredients of a judgment, according to this view, are that it should affect the

merits of the question, that the question be between the parties and that the decision should determine some right or liability.

(5) Sir Arnold White C. J. observed thus in the Madras case:

"The test seems to me to be not what is the form of the adjudication, but what is its effect on the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending, is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

(6) The Supreme Court further referred to the judgment of the Full Bench of the Rangoon High Court in — 'Dayabhai v. Murugappa Chettiar', AIR 1935 Rang 267 (FB) (D) where it was held that the term 'judgment' in the Letters Patent meant a decree in a suit by which the rights of the parties in the suit were determined.

(7) As already mentioned their Lordships of the Supreme Court did not determine the true meaning and scope of the word 'judgment' as occurred in the various clauses of the Letters Patent of the various High Courts and decided in the appeal before them that the order under appeal could not be regarded as a judgment according to the views of either the Calcutta, Madras or any other High Court as it neither affected the merits of the controversy between the parties in the suit itself nor it terminated or disposed of the suit on any ground.

(8) In — 'Shamzadi Begam v. Alakh Nath', AIR 1935 All 620 (2) (E), the Full Bench had to consider whether an order by a single Judge dismissing an application under S. 5 of the Limitation Act and refusing to extend the time for filing an appeal or an application, as the case may be, was a judgment within the meaning of S. 10 of the Letters Patent and held that it was not a judgment. It was observed at page 624:

"It follows accordingly that where the court has some discretion in the matter and allows an appeal or application to be filed beyond time as a matter of concession on being satisfied that there is sufficient cause for the delay, it is not really deciding the right of the parties nor adjudicating upon their rights and liabilities. The order is in the form of an interlocutory order in a pending matter and the disposal of this matter does not automatically put an end to the appeal itself, which is to be dismissed subsequently.

If we were to accept the contention urged on behalf of the appellant that every order passed by a single Judge which puts an end to or terminates the proceeding, or which has by implication the necessary effect resulting in such a termination, is a judgment the result would be that appeals would be permissible from dismissal for default, or dismissal for want of prosecution, or dismissal on non-payment of costs of printing, translation, etc., or on failure to furnish security. To hold this would be going against several decisions of this Court."

It would appear, therefore, that the word 'judgment' in Clause 10 of the Letters Patent refers to a decision which determines the rights of the parties to a proceeding.

(8a) In proceedings for contempt of court the person who initiates the proceedings is not really a person who has got any right in himself in connection with the alleged commission of contempt of court. In matters of contempt he simply informs the Court of certain acts of the other party which, according to him, amount to contempt of court. It is for the Court then to take into consideration whether those acts, if proved, do amount to contempt of court and if they do whether the matter is such in which action should be taken. Contempt of court proceedings are really proceedings between the Court and the person proceeded against.

The person who moves the Court has no right to insist that proceedings must be taken and therefore it should follow that any order refusing to take proceedings for contempt of court is not an order which determines the rights of the applicant and the opposite party and therefore such an order is not a judgment for the purposes of Clause 10 of the Letters Patent. Such a view was taken in — 'Narendrabhai Sarabhai v. Chinubhai Manibhai', AIR 1936 Bom 314 (F). Beaumount C. J. observed at p. 314:

"It is difficult to see how an order of the Court refusing to commit a man for breach of an undertaking given to the Court can be said to affect the merits of any question between the parties. The undertaking is given to the Court; if it is broken, and that fact is brought to the Court's notice, the Court may take such action as it thinks fit. If it comes to the conclusion that the order has been deliberately broken, it will probably commit the defaulter to jail, but the Court is free to adopt such course as it thinks fit."

Rangnekar J. observed at page 315:

"On the notice of motion there was, in my opinion, no question between the parties. Proceedings for contempt are matters entirely between the Court and the person alleged to have been guilty of contempt. No party has any statutory right to say that he is entitled as a matter of course to an order for committal because his opponent is guilty of contempt. All that he can do is to come to the Court and complain that the authority of the Court has been flouted, and if the Court thinks that it was so, then the Court in its discretion takes action to vindicate its authority."

With respect we fully agree with these observations.

(9) The learned counsel for the appellant referred to — 'Mohendra Lall Mitter v. Anundo Coomar Mitter', 25 Cal 236 (G) where it was held that an order refusing to take action for contempt of court was appealable. The judgment gives no reasons for the view taken.

(10) In view of our opinion that the order appealed against does not amount to a judgment within the meaning of that expression in Clause 10 of the Letters Patent we hold that no appeal lies against that order. It is, therefore, no more necessary to decide whether the order was passed in the exercise of criminal jurisdiction and therefore even if it amounts to a judgment it was not appealable.

(11) We, therefore, dismiss this appeal.

B/R.G.D. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 693 (Vol. 41, C.N. 278)

MOOTHAM AND V. BHARGAVA JJ. (7-5-1954)

The Swadeshi Bima Co. Ltd., Assessee Applicant v. The Commissioner of Income-tax, U. P., Lucknow, Opposite Party.

Civil Misc. No. 55 of 1950.

(a) Income-tax Act (1922), S. 10(7) and Schedule — Moneys invested in non-insurance activities — Choice of debiting moneys to life insurance fund — Income-tax authorities if can disregard choice.

An insurance company has not the option of choosing whether the moneys which it invested in the activities other than insurance activities are to be debited to the funds of the life insurance branch or to those of the miscellaneous insurance branch; and if it chooses to debit the former with expenditure the income-tax authorities are entitled to disregard its choice and hold that the amount so expended came from the funds of the miscellaneous insurance branch. (1942) 2 KB 228, Distinguished. (Para 14)

If in the case of such activities part of the funds came from the miscellaneous branch and part only came from the funds of the life insurance branch, the profits accruing to the company from such activities must be divided between the life insurance branch and the miscellaneous insurance branch in proportion to the investments actually made from the funds of the two branches. AIR 1942 All 194 (SB), Foll. (Para 16)

Anno: Income-tax Act, S. 10, N. 18.

†(b) Income-tax Act (1922), S. 10(7) and Schedule R. 1 — Normal activity of insurance company — Running of other businesses — Funds of life insurance branch utilised in other businesses — (Insurance Act (1938), Ss. 27(1) and 27A).

The running of other businesses in order to augment its income is not a part of the normal activity of an insurance company as such. What an insurance company is expected to do is to utilise its surplus funds in making investments to get income from them. Whenever such a company engages in other business, that activity would be a separate and distinct business carried on by it apart from the business of insurance. (Para 19)

Rule 1 of the Schedule draws a distinction between a life insurance business carried on by a person and any other business carried on by him, both of which are covered by the provisions of S. 10 of the Act. If a person happens to carry on any other business besides the life insurance business, it is clear from the use of the words 'that business' in R. 1 of the Schedule that the income of the life insurance business alone is to be taxed under the Schedule whereas the income from any other business must be taxed in accordance with the general provisions of S. 10. (Para 20)

Therefore the fact that the funds of the life insurance branch of the assessee-company are utilised, wholly or in part, in certain undertakings or activities in which the company is interested is not sufficient for holding that those undertakings or activities are part of the company's life insurance business. That must depend on the nature of the undertakings and the degree of managerial control exercised by the company over them. (Para 21)

Anno: Income-tax Act, S. 10, N. 18; Insurance Act, S. 27, N. 1.

CASES REFERRED: Paras

(A) (1942) 1942-2 KB 228: 111 LJ KB 609 13, 14
(B) (V29) AIR 1942 All 194: 1942-10 ITR 267 (SB) 16
(C) (1913) 1913 AC 610: 82 LJ KB 1221 17
(D) (V33) AIR 1946 Cal 539: 1946-14 ITR 488 17
(E) (V41) AIR 1954 Bom 219: 1954-25 ITR 237 20
(F) (1940) 29 Tax Cas 1: 1940-2 KB 287 20
(G) (1922) 12 Tax Cas 503 20
(H) (1888) 2 Tax Cas 367 20
(I) (1921) 12 Tax Cas 483 20

J. Swarup, for Applicant; S. C. Das, for Opposite Party.

V. BHARGAVA J.:

This is a reference by the Income-tax Appellate Tribunal, Bombay, under S. 66(1), Income-tax Act.

(2) The reference first came before this Court on 30-10-1952. Learned counsel for both parties then stated that they were agreed that the Statement of the Case was wholly insufficient to enable the Court to answer the important question of law raised in the reference and they gave the Court detailed notes on the facts which they wanted to be mentioned in the reference and the papers which they wished to be included in the paper-book. Copies of those notes were sent to the Income-tax Appellate Tribunal which was directed to make a fuller statement of the case and send it to this Court. The Tribunal was further permitted to re-frame the questions upon which the opinion of the Court was sought and take such further evidence as might be necessary.

A fresh Statement of the Case was accordingly prepared but again it was found that the Tribunal had not given a finding on all the necessary facts. Consequently on 2-3-1954, the case was again sent back to the Income-tax Appellate Tribunal to record a finding on certain specific questions which were set out in that order. A third statement of the Case has now been received from the Tribunal, giving findings on those questions. In dealing with the reference, we have taken into account all the three Statements of the Case received from the Tribunal.

(3) The assessee is the Swadeshi Bima Company, Ltd., Agra, which was incorporated as a public limited company on 11-4-1931, and which commenced business on 16-6-1931. The purposes for which the company was incorporated are set out in the Memorandum of Association, the more important clauses of which read as follows:

"1. To carry on in India including Indian States and any part of the world, all kinds of insurance and all kinds of guarantee and indemnity business and in particular without prejudice to the generality of the foregoing words.

2. To carry on the business of life assurance in all its branches, sickness assurance, accident assurance, and annuity business in all its various forms, either alone or in combination with any other or others either with or without the right of participating in the profits of the Company including the whole life and short period life assurance, endowment assurance, loss of health assurance, joint life and survival assurance, against sickness or accident alone or in combination with life assurance the purchase of reversions and contingent life interests, and the purchase and sale and repurchase of annuities of all kinds, including the immediate, deferred permanent, joint life or survival annuities, and to make or grant assurance for payment of money by way of single payment or several payments

or by way of immediate and deferred annuities or otherwise on the happening of any contingency whatsoever; and generally to transact the business of Life Assurance Company, which may be in any way connected with or dependent on the contingencies of human life; and which may be undertaken and transacted according to Law.

3. To reinsure with other Insurance Companies, doing similar business all or any of the risk, taken by the Company, and to undertake any authorised risk from similar companies either direct or by way of re-insurance.

4. To carry on the business of Insurance on Pension Fund basis, i.e., to pay policy-holder or his dependents in way of monthly pension, instead of lump sum when the policy matures.

5. To invest the funds of the Company in any movable and immovable property, government securities, municipal debentures, co-operative societies, banks, shares of industrial companies or shares of Commercial concerns, debentures of commercial and manufacturing concerns or limited concerns or loans to the individuals.

9. To purchase, take on lease, hire or otherwise acquire any estate or interest in any lands, buildings, easements, rights, privileges, concessions or immovable property of any kind and tenure, necessary or convenient for the business of the Company in any part of the world.

10. To sell, exchange, lease, mortgage, or otherwise to make deed for any part of the Company's property or to construct, alter, maintain buildings work; machinery, necessary or convenient for the business of the Company.

14. To purchase or otherwise acquire, all or any part of the business and property, of any person, firm or Company carrying on any business, which this Company is authorised to carry on and to take over the assets or property, and liability of such persons firm or Company, on such terms as the Company may think fit.

16. To borrow, sell, exchange, lease, mortgage all or any of the movable or immovable property, present or future including Capital and to issue debenture or debenture stock, perpetual or otherwise, with or without a specific charge on all or any part of the Company's property.

18. To enter into working arrangements of all kinds, for sharing profits, co-operation, joint adventure, reciprocal conversion or otherwise with any other Company or Companies, Corporation firms or persons carrying on or about to carry on business which this Company is authorised to carry on or engaged in carrying on.

24. To act as loan and Estates Agents and to negotiate Loans for State, Estate and against other movable or immovable securities or Towns Municipalities, Port Trust etc.

25. To carry on the business of a loan Company in all its branches.

28. To undertake the sale of Swadeshi or foreign manufactures on commission or any other basis."

(4) In pursuance of the objects mentioned in its Memorandum of Association, the assessee company carried on life and other insurance business. It also engaged in certain undertakings which have given rise to the present reference, the dispute, shortly stated, being whether these undertakings or activities, to use a perhaps more neutral term, can properly be regarded as constituting part of the assessee-company's life insurance business within the meaning of the Schedule to the Income-tax Act. The activities have been mentioned in paragraphs 5 to 11 of the second Statement of the Case sent dated 15-5-1953.

(5) In paragraphs 5 to 7, the Tribunal has given the facts relating to the purchase and running of the business of the Swadeshi Bima Cotton Mills. The assessee-company advanced a loan of Rs. 40,000 to the New Krishna Mills, Ltd. upon the security of a mortgage dated 20-7-1939, of the New Krishna Mills. This mortgage was registered under the Indian Registration Act but the prescribed particulars were not filed with the Registrar of Companies pursuant to S. 109, Indian Companies Act. On 15-8-1940, the assessee-company purchased the mortgaged property for a sum of Rs. 1,24,000/-, Machinery of the value of Rs. 57,126-10-0 was purchased between January, 1941, and January 1943.

It was claimed that the whole of the machinery was second hand but the Tribunal, relying on the fact that the invoices for the purchase of the machinery had not been produced, held that it could not be said that there was no new machinery though a part of the machinery was no doubt second hand. The entries relating to the money invested in the purchase of these mills were shown in the balance sheet as having been debited in the accounts of the life insurance branch. A further debit of a sum of Rs. 50,168 was shown in this account with a corresponding entry in the revenue account in respect of appreciation of the value of the mills, so that the account of the life insurance branch of the company showed a total investment of Rs. 2,50,191/- in the mills.

This figure appeared in the balance sheet as it stood on 31-12-1940. After the purchase, the name of the New Krishna Mills was changed to Swadeshi Bima Cotton Mills. The assessee-company thereafter by working this mill earned an income for several years. This income from the mill was incorporated in the revenue accounts of the assessee company relating to the life insurance branch. This method was followed in all the three years of assessment in question, viz., 1943-44, 1944-45 and 1945-46. In the assessment year 1945-46 relevant for the accounting year ending on 31-12-1944, the mill was worked for a period of 26 days only up to 26-1-1944, and was then sold as a running business to Bharat Stores Agra.

The assessee company received a sum of ten lacs of rupees as purchase money in this sale. The entire surplus of this sale was treated as profit and was credited to the company's life insurance revenue account. While the Swadeshi Bima Cotton Mills were being run by this company, the company maintained separate account books in which transactions of the mill were recorded and only the net result was incorporated in the revenue account of the company's life insurance business.

(6) Paragraph 8 deals with the activity of purchase and sale of lands and buildings. On 27-8-1940, the company purchased free-hold rights of about 9 bighas and 12 biswas of land together with a bunglow near the Civil Courts, Agra & outhouses attached to it for a sum of Rs. 29,000/-. The land was developed and parcelled out into smaller plots and was sold to a number of persons, but the bungalow was reserved by the company for use as its own office for some time. The bungalow was also ultimately sold. The whole area thus developed by the company was known as Swadeshi Bima Nagar, Agra. On this activity, the company earned a net profit of Rs. 25,579/-. The assessee company also purchased and ran two brick kilns at Khandhari and a ginning factory at Harduaganj; it constructed houses in the Swadeshi Bima Nagar Colony and purchased land at Fatehabad for colonization.

(7) Paragraph 9 deals with the transactions relating to the Harduaganj Ginning Factory men-

tioned above. This factory was purchased in 1941 and the company started working the factory on 26-10-1941. In one of the assessment years in question, the company made a profit of Rs. 134/- and this amount was also incorporated in the company's life insurance revenue account.

(8) Paragraph 10 gives the facts relating to a contract for purchase of certain land, buildings and machinery known as the Laxmi Mills for a sum of Rs. 1,60,000/-. In the purchase of this mill, a sum of Rs. 15,000/- was paid by the assessee company as earnest money in 1940. The vendor later resiled from the contract and the company had to file a suit for specific performance. The suit was compromised and possession over the mills was taken in May, 1942. While these disputes were going on, the company had entered into an agreement with the Bharat Stores, Limited, under which the latter had guaranteed to the company a net profit of Rs. 25,000/- on the purchase of this property and had undertaken to bear the risks and expenses of the litigation. The property in the mills was finally conveyed to the Bharat Stores, Limited, Agra, through a document dated 30-12-1942, and the profit of Rs. 25,000/- was credited in the revenue account of the company's life insurance business. A special commission of Rs. 6,250/- was paid on this transaction to the Managing Director.

(9) The last activity mentioned in para. 11 is in respect of a transaction of purchase and sale of shares in the Anjewar Spinning and Weaving Mills, Ltd. On the sale of those shares the company made a profit of Rs. 56,250 during the years in question and this amount was also incorporated in the revenue account of the company's life insurance business.

(10) At the time of assessment, the Income-tax Officer held that the income received by the assessee company from these activities, namely those referred to in paras. 5 to 11 of the second Statement of the Case, was income derived from business carried on by the company other than its life insurance business and was taxable under the relevant provisions of the Indian Income-tax Act. The assessee company's claim that the income derived from these activities must be treated as part of the income from its life insurance business and must therefore be taxed under the Schedule of the Act in accordance with sub-s. (7) of S. 10, Income-tax Act was rejected by the Income-tax Officer. The assessee company appealed to the Assistant Commissioner of Income-tax and to the Income-tax Appellate Tribunal but unsuccessfully. The assessee company thereupon asked for a reference to this Court and the question, now referred, which has taken final shape in the second Statement of the Case, is as follows:

> "Whether on the facts and in the circumstances of this case the assessee company's business in Swadeshi Bima Cotton Mills, in the purchase and sale of lands, machinery, and in running other trading activities referred in the paras. 5 to 11 was not in the nature of business of insurance within the meaning of S. 10(7), Income-tax Act, and the income therefrom was not liable to be assessed under the schedule to S. 10 (7) of the Act but otherwise?"

(11) Sri Mitra, the learned counsel for the assessee company, contended that, as a matter of fact, all these activities were carried on with the funds of the life insurance branch of the company and that consequently it should be held that they were part of the life insurance business of the company and the income derived therefrom should be treated as part of the income of the company's life insurance business and assessed to tax as such. In view of this contention we considered it necessary to refer the following question to the Tribunal:

> "Out of which of the under-mentioned sources, and to what extent, did the funds utilised in each of the activities mentioned in paras. 5 to 11 of the supplementary Statement of the Case come, namely—
>
> (1) funds of the life insurance branch of the assessee, and, if so, whether from the 'life fund';
> (2) funds of the assessee other than those of the life insurance branch, and, if so, stating the nature of those funds:
>
> (3) funds of the assessee failing partly under source (1) and partly under source (2), and, if so, stating the particulars in each case?"

(12) The Tribunal returned its finding on this question on 23-3-1954. It summarised its conclusions in a statement which for the sake of convenience, is reproduced below:

Sources of the amount invested.

Nature of investment.	Total amount invested	Life fund	Misc. branch fund.	Profit from disputed activities.	Other funds of the life branch.	Total of columns 3 to 6
1	2	3	4	5	6	7
Swadeshi Bima Cotton Mills.	834491	286074	288658	231110	28649	834491
Land and buildings ...	215761	215761	—	—	—	215761
Laxmi Mills ...	55368	55368	—	—	—	55368
Harduaganj factory ...	18327	18327	—	—	—	18327
Shares from Anjawar Spinning and Weaving Mills	300000	73698	226302	—	—	300000

This finding has been challenged by learned counsel for the assessee company not on the facts but on the ground that the Tribunal was wrong in holding that any of the amounts utilised in the activities in question could be held to come from the miscellaneous branch fund when the balance sheet of the company showed that all the amounts invested in these activities were included only in the balance sheet of the life insurance branch. The Tribunal was of the view that the sum of Rs. 2,88,658 invested in the Swadeshi Bima Cotton Mills and the sum of Rs. 2,26,302 invested in shares of the Anjawar Spinning and Weaving Mills, Ltd., must be treated as having come from the funds of the miscellaneous insurance branch, on the ground that the accounts of both the life insurance branch and the miscellaneous insurance branch were kept in the same set of account books

and did not disclose from which source the amounts were being drawn by the company for the purpose of investment.

It was only in the balance sheet that these amounts were shown as having come out of the funds of the life insurance branch, and such entries could be made by the assessee at its discretion after the accounts had been closed. The balance sheets, moreover, showed that a transfer of funds was made from the accounts of the miscellaneous insurance branch to the accounts of the life insurance branch. Such transfers were shown as deposits or loans, and represented amounts which could not have been invested out of the ordinary funds of the life insurance branch unless the deposits or loans taken from the miscellaneous insurance branch were treated as part of the life insurance branch.

If there had been no such deposits or loans, the funds of the life insurance branch would not have sufficed for these investments to be made from the funds of that branch. The entry in the balance sheet was, therefore, treated as a mere paper entry and, going behind it, the Tribunal held that these sums were, in fact, investments out of the funds of the miscellaneous insurance branch and that the entires in the account books could be ignored in arriving at this conclusion. On behalf of the assessee company it was further contended that the Income-tax authorities are not entitled to disregard the entires made by the assessee in its account books and must treat the sums invested in the Swadeshi Bima Cotton Mills and in the shares of the Anjawar Spinning and Weaving Mills, Ltd., as having come out of the funds of the life insurance branch as shown in the balance sheets.

Life insurance business as well as miscellaneous insurance business were being carried on by the assessee company, and the latter could have easily debited these amounts in the accounts of the miscellaneous insurance branch direct. It appears to us that the Tribunal correctly took the view that the entries in the account books were so made for the purpose of enabling the assessee company to contend that the activities in which it was engaged were a part of its life insurance business. If the funds available in the life insurance branch of the company's business had equalled or exceeded the amounts which had been invested in the Swadeshi Bima Cotton Mills and in the shares of the Anjawar Spinning and Weaving Mills, Ltd., there could have been no doubt about the source of the moneys so invested, and it would have been immaterial from which particular account the company might have drawn the cash for the purpose of making the investment.

The cash of both the branches might have been kept together in the bank or with the treasurer of the company. In such a case, whether the amounts had been paid from the bank account or from the balance in hand with the treasurer, the source of those amounts would necessarily have been determined by the entries made in the account books in which the company would have shown a debit of the amounts in the particular fund or funds from which the company had drawn these amounts.

When however the accounts of the life insurance branch show that there was no surplus at all available the company was compelled to resort to making entries indicating that the life insurance branch had accepted deposits or loans from the miscellaneous insurance branch. It was in our view quite competent for the Income-tax authorities to disregard such entries and to hold that the real source of these amounts was the fund of the miscellaneous insurance branch and not the fund of the life insurance branch.

(13) Learned counsel for the assessee-company referred us to the case of — 'Allchin v. Coulthard', (1942) 2 KB 228 (A) and has placed reliance on certain observations of Lord Green in that case, particularly at page 236 of the Report where the Master of the Rolls says:

> "A trader may spend the whole of his profits for the year in buying himself a house, with the result that he has to borrow money to pay his mortgage interest. This does not disentitle him from saying that, as between himself and the revenue he is entitled to debit the interest paid to the fund representing the amount in which his profits for the year are assessed..... Nor can the way in which for his own convenience, he chooses to keep his accounts deprive him of this right.
>
> If he carries on two businesses and chooses to keep their accounts distinct, he may in those accounts show the profits of one business as having been wholly applied in buying capital assets for that business and charge the whole of the interest which he is liable to pay to, for example, a reserve account in the other business representing profits of past years, but, in taking the account as between himself and the revenue, he is entitled to treat the assessed profits of the first business as available for the payment of the interest. To speak of this as re-writing the trader's accounts is a misdescription. His domestic accounts stand, and there is no question of re-writing them. The account which is drawn up between himself and the revenue is a totally different account drawn up for totally different purposes and the figure representing taxed profits which appears in it is a statutory and (except in the case of profits taxed at source) not an actual figure."

(14) Learned counsel's argument is that the assessee-company had the option of choosing whether the moneys which it invested in the activities in question were to be debited to the funds of the life insurance branch or to those of the miscellaneous insurance branch; and if it chose to debit the former with expenditure the Income-tax authorities were not entitled to disregard its choice and hold that the amount so expended came from the funds of the miscellaneous insurance branch. We do not think that any such inference can be drawn from Lord Green's observations.

In 'Allchin v. Coulthard (A)' the South Sheilds Corporation paid out of their general rate fund, which consisted partly of untaxed income (the rates collected) and partly of profits from its undertakings duly assessed to income tax, interest on a loan raised for the purpose of their electricity and transport undertakings and general purposes, deducting the income-tax in the usual way. The Corporation claimed under the provisions of the South Sheilds Corporation Act, 1935, to treat the assessed profits of the electricity and transport undertakings as part of the assessed profits out of which the interest was paid and to retain the amount of tax paid on those profits.

Under the Act in question all receipts and expenditure had to be paid into and out of the general rate fund but for the purpose of the internal accounts of the Borough separate accounts showing the specified particulars had to be kept in respect of its undertaking. The Court of Appeal held that under its Act the profits of the Corporation's undertakings could lawfully be applied to the payment of the interest on the whole of

the loan, and that those profits as assessed to income tax formed part of the profits brought into charge out of which the interest was paid or deemed to be paid, notwithstanding that from the accounts of those undertakings the surplus revenues arising therefrom had been treated as applied to certain specified purposes of those undertakings.

This case is not, we think, of assistance. A wholly different question was before the Court and the facts bore no similarity to those with which we are concerned. In particular there was no question of a payment being made or purporting to be made out of one fund the assets of which had been augmented for this purpose by a book transfer of moneys available in another fund. In the case before us the Income-tax Appellate Tribunal has found that the surplus available in the life insurance fund was insufficient to cover the amount invested in the several activities in which the assessee-company was engaged and that the balance in fact came from other sources which it specifies. In our opinion no valid objection can be taken to the course taken by the Tribunal and we propose therefore to determine this reference on the footing that the finding of the Tribunal dated 23-3-1954, must be acted upon.

(15) This finding shows that at least in the case of two of the activities in question, namely the Swadeshi Bima Cotton Mills and the purchase of shares of the Anjawar Spinning and Weaving Mills, Ltd., part of the funds came from the miscellaneous insurance branch and part only came from the funds of the life insurance branch.

(16) The consequence of this finding is in our opinion this, that the profits accruing to the company from its activities in connection with the purchase, sale and running of the Swadeshi Bima Cotton Mills and the purchase and sale of the shares of the Anjawar Spinning and Weaving Mills, Ltd. must, on the principle recognised by a Full Bench of this Court in — 'Mohammad Isa v. Commissioner of Income-tax, C. P. and U. P.', AIR 1942 All 194 (SB) (B), be divided between the life insurance branch and the miscellaneous insurance branch in proportion to the investments actually made from the funds of the two branches. In the statement giving the sources of the moneys so invested, the Tribunal has, however, shown a third source, namely "profit from disputed activities".

In the case of the Swadeshi Bima Cotton Mills, a sum of Rs. 2,31,110 is shown as having been invested out of the profits of the mill itself. Since this profits accrued as a result of the investment of the funds of the life insurance branch and of the miscellaneous insurance branch, it also must in our opinion be divided in proportion to the amounts found as having been drawn out of the funds of the two branches. The amounts drawn from the life fund and the other funds of the life insurance branch have to be added together and treated as the amount drawn from the funds of the life insurance branch.

(17) We now come to the principal question that arises on this reference, namely whether the activities in question are a part of the life insurance business of the assessee-company. Sri Mitra contended that whatever activity may be carried on by the company out of the fund which appertains to its life insurance business must be held to be a part of the life insurance business of that company irrespective of the nature of that activity. His contention was that no insurance company can do business merely by doing the work of insurance and that every such company has to carry on other activities in order to earn income for the purpose of carrying on its insurance business.

Apart from the provisions of S. 27, Insurance Act, 1938, which provided (prior to its amendment in 1950) that, subject to certain exceptions every insurer incorporated or domiciled in British India should at all times invest and keep invested assets equivalent to 55 per centum of the sum of the amounts of its liabilities to the holders of life insurance policies in India, an insurance company was at liberty to invest its remaining surplus funds in whatever manner it considered would serve the interests of the company; and the income arising from such investments would be part of the income of the insurance company. We entertain no doubt that the investment of money not immediately required is part of the normal business of insurance for as Lord Mersey said in — 'Liverpool, London and Globe Insurance Co. v. Bennett', (1913) AC 610 at p 621 (C).

> "It is well known that in the course of carrying on an insurance business large sums of money derived from premiums collected and from other sources accumulate in the hands of the insurers, and that one of the most important parts of the profits of the business is derived from the temporary investment of these moneys. These temporary investments are also required for the formation of the reserve fund, a fund created to attract customers and to serve as a stand-by in the event of sudden claims being made upon the insurers in respect of losses. It is, according to my view, impossible to say that such investments do not form part of this company's insurance business, or that the returns flowing from them do not form part of its profits. In a commercial sense the directors of the company owe a duty to their shareholders and to their customers to make such investments, and to receive and distribute in the ordinary course of business, whether in the form of dividends, or in payment of losses, or in the formation of reserves, the moneys collected from them".

Referring to Cl. 3 (18) of the memorandum of association of the appellant company in the same case, Lord Parker of Waddington said:

> "It provides that moneys of the company 'not immediately required' may be invested in such manner as may, from time to time, be determined. Obviously, moneys invested under this clause are not withdrawn from the businesses of the company, but are retained for the purposes of such businesses, though temporarily invested, so as not to lie idle."

The same view was taken by the Calcutta High Court in — 'General Family Pension Fund v. Commissioner of Income-tax, Bengal', AIR 1946 Cal 539 (D). In that case a mutual life assurance company, limited by guarantee, was exempted from the provisions of the Indian Life Assurance Companies Act, 1912. The company, 'inter alia', derived income from government securities and other investments and its profits were ascertained by means of quin-quennial actuarial valuations. The question was how the company should be assessed in respect of its income from government securities and other investments for the year ending the 31st December, 1936. It was held that the company's investments and the income derived from them were part of its life assurance business.

(18) These cases clearly recognise the principle that profits accruing to an insurance company from the investment of its surplus funds form part of the company's income. They do not, however, touch the main question that arises in this case which is whether the income arising from the uti-

lisation by an insurance company of the surplus funds of its life insurance branch in carrying on a business undertaking or activity forms part of the income of the life insurance branch. The contention of Sri Mitra that, since the Indian Insurance Act nowhere lays down any limitation on the powers of an insurance company the activity of the company in carrying on any business not prohibited by law must be deemed to be a part of its insurance business, does not derive any support from the cases to which we have referred.

These cases only lay down that the earning of income by investment is a part of the normal business of insurance; they nowhere lay down that the carrying on of other business with the funds of the life insurance business is a part of the life insurance business. In this connection we examined the scheme of the Indian Insurance Act, 1938, as it was in force during the years of assessment. Section 11 of the Act laid down that every insurer shall, at the expiration of each calendar year, prepare a balance sheet in the form set forth in Part II of the First Schedule. That form is Form A and in it the nature of the assets of an insurance company is indicated by giving various heads under which the assets can be shown.

The principal heads are loans, investments, agent's balances, outstanding premiums, interest, dividends and rents outstanding, interest, dividends and rents accruing but not due, amounts due from other persons or bodies carrying on insurance business, sundry debtors, bills receivable, cash and other accounts to be specified. Then under the heading 'loans' are mentioned the various kinds of loans that are expected to be advanced by an insurance company. Similarly, under the heading 'investment' is mentioned the nature of various investments that an insurance company is expected to make.

These investments include deposits with the Reserve Bank of India, various securities including Government securities or foreign securities, bonds, debentures, stocks and other securities, debentures of any railway in India, debentures of any railway out of India, preference or guaranteed shares of any railway in India, railway ordinary stocks (i) in India (ii) out of India, other debentures & debenture stock of companies incorporated (i) in India (ii) out of India, other guaranteed and preference stocks and shares of companies incorporated (i) in India (ii) out of India, other ordinary stocks and shares of companies incorporated (i) in India, and (ii) out of India, holdings in subsidiary companies house property (i) in India, (ii) out of India, and other investments to be specified.

It is to be noticed that the form does not mention investment in any other business carried on by the insurance company itself. 'Prima facie', therefore, Form A is an indication that the carrying on of another business by an insurance company itself was not considered to be a normal activity of an insurance company as such. In the Indian Insurance Act, as now in force, S. 27A has been introduced which lays down that no insurer shall invest or keep invested any part of his controlled fund otherwise than in any of the approved investments mentioned in the section.

The controlled fund in the case of the assessee-company would mean at the present time all the funds appertaining to the company's life insurance business. An exception is made in respect of 15 per cent. of the controlled fund which can be invested or kept invested otherwise than in approved investments on certain conditions. What is, we think, significant is that the entire section 27A all the time mentions investments and not the running of other businesses with the fund of the life insurance business.

(19) So far as we are aware, the running of other businesses in order to augment its income is not a part of the normal activity of an insurance company as such. What an insurance company is expected to do is to utilise its surplus funds in making investments to get income from them. Whenever such a company engages in other business, that activity would be, in our opinion, a separate and distinct business carried on by it, apart from the business of insurance.

The contention of learned counsel for the assessee-company that source from which the funds arise determines the nature of the business in which they are employed leads to strange results. A company having successfully carried on an ordinary business embarks (its Memorandum of Association permitting it to do so) on the business of insurance; would it be possible to contend in such cases that the insurance business is a part of that other business simply because the funds utilised for the purpose of carrying on that insurance business come out of the assets of the other business?

(20) In considering the main question raised in this case, the distinction between the expressions "making investments", "acquiring ownership" and "carrying on business" must we think be kept in view. Under S. 10 of the Indian Income-tax Act, income tax is payable by an assessee in respect of the profits and gains of any business, profession or vocation "carried on by him". Rule 1 of the Schedule lays down that, in the case of any person who "carries on, or at any time in the preceding year carried on, life insurance business", the profits and gains of such person from that business shall be computed separately from his income, profits or gains from any other business.

Rule 1 of the Schedule, therefore, draws a distinction between a life insurance business carried on by a person and any other business carried on by him, both of which are covered by the provisions of S. 10 of the Act. If a person happens to carry on any other business besides the life insurance business, it is clear from the use of the words 'that business' in R. 1 of the Schedule that the income of the life insurance business alone is to be taxed under the Schedule whereas the income from any other business must be taxed in accordance with the general provisions of S. 10. In carrying on a life insurance business it would normally be necessary to make investments or to own property which may yield income.

In our opinion the dividing line occurs when the return to the company from the employment of its funds can be more accurately described as a trade profit than as investment income. It is we think difficult to lay down any hard and fast rule, for something will depend on the facts of each case, but generally speaking it can be said that the return cannot properly be described as investment income when the company itself engages in the management of the undertaking from which the return arises. The distinction between carrying on a business and earning income by investment in property was brought out in — Saifuddin Alimohamed v. Commissioner of Income-tax, Bombay City', AIR 1954 Bombay 219 (E). Dealing with S. 10 (1), Income-tax Act, Chagla, C. J., observed:

> "Therefore, looking to the plain language used by the Legislature, what has been emphasised in this section is the fact of a business being carried on by the assessee. It is the assessee who carries on a business who is liable to pay

tax under the head of business. It is rather significant to notice the difference in language in S. 10, and S. 9. Section 9 deals with tax under the head of property and that tax is payable by an assessee who is the owner of the property. So, in the case of property, what is emphasised by the Legislature is ownership. In the case of business what is emphasised is not the ownership of the business, but the fact of the business being carried on by the assessee.

Now, if the intention of the Legislature was that tax under the head of business should be paid by every assessee who owns a business, irrespective of the question whether he carries it on or not, nothing would have been simpler for the Legislature than to have reproduced the same language in S. 10 as is to be found in S. 9. The Legislature could have provided that the tax shall be payable by an assessee in respect of the profits and gains of any business owned by the assessee."

This distinction drawn between owning a business and the carrying on of a business clarifies the view that if the funds of a life insurance company are utilised in any other business, then although that business may be owned by the life insurance company it does not follow that that other business is also being carried on by the life insurance company. Lawrence, J. in — 'Commissioners of Inland Revenue v. Imperial Tobacco Co. (of Great Britain and Ireland) Ltd.', (1940) 29 Tax Cas 1 (F),while interpreting the words "income received from investment and other property" said

"In my opinion, the Paragraph contrasts investment income as opposed to trade profits. I think the words mean, as Lord Cave, L. C., seems to me to have suggested in his judgment in — 'Commrs. of Inland Revenue v. Gas Lighting Improvement Co. Ltd.', (1922) 12 Tax Cas 503 (G), income derived from sources outside the trade, income produced by money or money's worth not then used in the trade."

In — 'Smiles (Surveyor of Taxes) v. Australasian Mortgage and Agency Co. Ltd.', (1888)2 Tax Cas 367 (H), Lord Shand in the Scottish Court of Exchequer said—

" It appears to me, after a full argument on the effect of the previous cases and on the provisions of the Statute, that the fourth case in the Statute is meant to cover the case in which money is invested upon securities in the British plantations in America, or in any other of Her Majesty's dominions out of the United Kingdom. I say invested, meaning by that something quite distinct from the use of money in the ordinary trading transactions of a company.

It appears to me that if we are dealing with a company making profits by the use of its capital in mercantile transactions that should fall under the first case; but if a company which has a large rest fund laid aside for the purpose of investment makes investments in foreign stock or other foreign securities, including securities over moveable properties in the colonies that is a case in which the charge is to be made under the fourth case."

In — 'Bourne & Hollings Worth v. Commissioners of Inland Revenue', (1921) 12 Tax Cas 483 (I) Sankey, J, had to consider the nature of money placed in war loan and held:

"I do not like to hazard the opinion that in all cases money placed in War Loan would be an investment. I think you have to consider the facts of the case. It may be different in the case of an investment company, and indeed the Act provides for that because it goes on to say:' except in the case of life insurance business and businesses where the principal business consists in the making of investments."

These cases bring out the difference between investment an earning of profits by the carrying on of a trade, and support the view which we have formed that, while the process of investment is a normal part of the business of a life insurance business, the carrying on of an industrial or other undertaking is not part of the business of life insurance.

(21) In the present case, it has to be noticed that the assessee company was not incorporated solely with the object of carrying on life insurance and other business of insurance. The clauses of the Memorandum of Association quoted earlier in this judgment show that the objects of the company included the carrying on of other types of business, such as dealing in moveable or immoveable properties by borrowing, selling, exchanging, leasing, mortgaging all or any of such properties, present or future, acting as loan and estates agents and carrying on the business of a loan company in all its branches, as well as undertaking the sale of Swadeshi or foreign manufactures on commission or on any other basis.

The facts found by the Tribunal show that, even in the miscellaneous branch, deposits were accepted by the assessee company from policy-holders as well as non-policy-holders so as to augment the money available to the company for carrying out its objects. These deposits were shown in the accounts of the miscellaneous insurance branch. Various amounts from that branch were then transferred to the life insurance branch and were used for some of the activities now in question.

It is a well known commercial practice to obtain funds for carrying on a business by accepting deposits or taking loans, whereas it is not the usual practice save in the case of banks to accept deposits or take loans for the purpose of making investments. In our opinion that fact that the funds of the life insurance branch of the assessee-company were utilised, wholly or in part, in certain undertakings or activities in which the company was interested is not sufficient to enable us to hold that those undertakings or activities were part of the company's life insurance business. That must depend on the nature of the undertakings and the degree of managerial control exercised by the company over them.

(22) In applying these principles to the facts of this case for the purpose of considering the nature of the income earned from the activities mentioned in paras. 5 to 11 of the second statement of the case, we have first to take note of the agreed statement made by learned counsel for the parties that there was no need to take into account the income that might have arisen from the transactions relating to the Laxmi Mills, Ltd., and the Harduaganj Ginning Factory as the assessee-company had ceased to have an interest in these concerns prior to the assessment years in question. Learned counsel stated that we need only consider three sources of income, namely the Swadeshi Bima Cotton Mills, lands and buildings and shares of the Anjawar Spinning and Weaving Mills, Ltd.

(23) It appears to us that the income earned from the transaction relating to the Swadeshi Bima Cotton Mills can be divided into two parts: Firstly, there was the income derived from the carrying on of the Swadeshi Bima Cotton Mills which might best be described as the annual profits earned from the running of that business; and,

secondly, there was the block profit which was made when the Mills were sold as a running concern by the assessee-company. In our opinion, the former, that is the annual profits from the carrying on of the business must be held to be income earned by the assessee-company otherwise than from its business of life insurance.

On the other hand, the block profit earned by sale of the Mills would be a capital gain accruing both to the life insurance branch of the business as well as to the miscellaneous insurance branch of the business in proportion to the investments made in the purchase of these mills, and the machinery for the mills, out of the funds of the two branches of the insurance business. Consequently, the income earned by carrying on the business of the Swadeshi Bima Cotton Mills described earlier as the annual profits is taxable under the general provisions of S. 10, and not under the Schedule as part of the income of the life insurance business.

So far as the capital gains are concerned, they appertain partly to the life insurance business and partly to the miscellaneous insurance business and are taxable as income of those businesses, provided of course that they are liable to tax, a question which has not been referred to us and upon which we express no opinion.

(24) We have next to consider income derived from the transactions relating to lands and buildings, and the question which would ordinarily arise is whether the return on the money expended by the assessee company in these transactions was a business profit or investment income. The statement of the case indicates that the assessee company was engaged in the business of purchasing land, developing it and thereafter selling it at a profit; and Sri Mitra conceded that this was so. He did not contend that the land and buildings were purchased as a mere investment.

His argument was that the income from this source should be treated as income of the life insurance business solely on the ground that the money used for carrying on this activity came from the life funds of the life insurance business and, consequently, even if it be a trade, the income from it must be assessed as income of the life insurance business. This contention, as we have held above, cannot be accepted. In our opinion the assessee company's activities in connection with the purchase and sale of land buildings constituted a business distinct from the life or other insurance business of the company and the profits accruing from it cannot, therefore, be assessed to tax under this schedule.

(25) So far as the transaction of purchase and sale of shares of the Anjawar Spinning and Weaving Mills, Ltd., is concerned, the position appears to be different. The facts found nowhere indicate that the assessee-company was regularly carrying on the business of dealing in the shares by purchasing them and selling them at a profit. It appears that the directors of the company considered that an investment in the shares of the Anjawar Spinning and Weaving Mills, Ltd., would be very profitable.

The Income-tax authorities have held that this transaction was a speculative one, but we think that it was speculative only in the sense that there was no certainty that these shares would yield a good income and would be safe investment. It is nowhere suggested in the facts found by the Income-tax Appellate Tribunal that the purchase of the shares of this company was speculation in the sense of purchase of shares for the purpose of selling them at a profit in the course of a business of dealing in shares.

Further, there is no finding that there were any other dealings in any other shares by the assessee-company. We are, therefore, of opinion that the purchase and sale of the shares, of the Anjawar Spinning and Weaving Mills, Ltd., must be held to be an investment, and the income arising therefrom in so far as it appertains to the life insurance business, must be treated as income of that business and must be assessed under the Schedule to the Indian Income-tax Act.

(26) So far as the remaining minor activities are concerned, we do not consider it necessary to deal with them in view of the statement of learned counsel for the parties that, in this reference, we are only concerned with the three activities which have been mentioned above.

(26a) Our answer to the question referred to in respect of these three activities is as indicated above. Since our decision is mainly in favour of the Department, we direct that the assessee shall pay the costs of the Department which we assess at seven hundred and fifty rupees.

A/V.R.B. Answer accordingly.

A.I.R. 1954 ALLAHABAD 700 (Vol. 41, C.N. 279)

CHATURVEDI J. (3-5-1954).

Radha Raman, Applicant v. State of Uttar Pradesh and others, Opposite party.

Misc. Writ No. 7824 of 1951.

(a) Land Acquisition Act (1894), S. 40 — "Work" —(Words and Phrases — "Work").

The word "work" has a very wide meaning and therefore no useful purpose will be served by quoting the meaning as given in the dictionaries. The word is really used in two senses of bestowing labour and that upon which labour has been bestowed. The word gets its colour and complexion from the nature of the work, and when used in singular with reference to construction it is not confined to only big industrial or scientific constructions. Taking the ordinary popular meaning of the word the construction of ordinary houses for purposes of residence comes within its meaning and the Government therefore has jurisdiction to give its consent to the acquisition of land for the purpose. (1886) 54 L. T. 735 and (1892) 1 QB 344 distinguished. (Paras 5, 8)

Anno: L. Acq. Act, S. 40 N. 1.

(b) Land Acquisition Act (1894), S. 40 — "Work useful to the public" — Acquisition for Co-operative Housing Society.

The general dearth of residential accommodation in the towns and cities of Uttar Pradesh is very well known and if a Society is found to construct a number of houses and the houses are actually constructed, the construction is likely to ease the situation, as there will be an increase in the total residential accommodation in the town, and rents may also possibly go down. In spite of the fact that the bye-laws of the society as well as Co-operative Societies Act itself are mainly concerned with the interests of the members of the Society if in carrying out its objects a situation is brought out which may also help the other members of the public, the acquisition may be said to be one useful to the public. In conditions prevailing in the towns the construction of more residential houses will benefit not only the members of the

society but also the resident public of the town and therefore it is an object which is useful to the resident public of the place. AIR 1952 Mad 756, Followed. (Para 13)
Anno: L. Acq. Act, S. 40 N. 1.

(c) Land Acquisition Act (1894), Ss. 40, 6 and 5A — Power to issue writ of prohibition against Government from giving consent to acquisition or issuing notice under S. 6 — (Constitution of India, Art. 226).

Section 5A gives a right to file objections to the acquisition within 30 days of the notification made under S. 4, and that objection is to be determined after giving the objector an opportunity of being heard either in person or through a pleader. A reading of that section shows that the function of the Collector is a quasi judicial function and therefore open to the review by the Courts. If it is open to review, then the only stage at which it can be reviewed is the stage before the notification has been made under S. 6 of the Act because the decision of the Government cannot be challenged after a notification under S. 6 has been published. If the petitioner can come to Court at all to challenge the fact that the land was being acquired for a purpose useful to the public, he can do so only before the publication of the notification under S. 6. The petitioner can say that the State Government has decided to give its consent to an acquisition which cannot be for public purpose, and if he is able to establish his contention, there is no reason why the State Government should not be prohibited from giving its consent to the acquisition, or from issuing a notification under S. 6 of the Act. (Paras 15, 16, 17)
Anno: L. Acq. Act, S. 40 N. 1; S. 6 N. 6; S. 5A N. 1.

(d) Land Acquisition Act (1894), Ss. 6 and 5A — Jurisdiction of Court — Power of High Court to issue writ of certiorari — (Constitution of India, Art. 226).

Though if any provision in the Act had, by the use of express words, taken away the powers of the High Court to issue a writ of certiorari the matter might be different, as there are no such express words, the Courts are not precluded from issuing a writ of certiorari to the Government where they come to the conclusion that the notification under S. 6 should not be made as the purpose of the acquisition cannot possibly be 'useful to the public'. Even before the Constitution came into force, the power to issue a writ of certiorari, could not be meant to have been taken away by the use of the word "final" in S. 5A of the Act in regard to the decision of the Government on the objections. After the coming into force of the Constitution it is obvious that no Legislature has the authority to take away a power conferred on the Courts by the Constitution. (Para 19)
Anno: L. Acq. Act, S. 6 N. 6; S. 5A N. 1.

CASES REFERRED: Paras

(A) (1886) 54 LT 735: 50 JP 790 6
(B) (1892) 66 LT 647: 1892-1 QB 344 7
(C) (V39) AIR 1952 Mad 756: ILR (1952) Mad 982 13
(D) ('03) 30 Cal 36: 7 Cal WN 249 15
(E) ('05) 32 Cal 605: 32 Ind App 93 (PC) 15
(F) (V40) AIR 1953 All 182: 1953 All LJ 86 16
(G) (V33) AIR 1951 Bom 121: ILR (1951) Bom 656 16
(H) (V37) AIR 1950 SC 222: 1950 SCR 621 (SC) 17
(I) (1929) 1929-1 KB 619: 93 LJP 49 18

S. C. Khare, for Applicant; Jagdish Sarup and B. D. Gupta, for Opposite Party.

ORDER: This is a petition under Art. 226 of the Constitution.

(2) The petitioner, Raja Radha Raman, was the owner of two villages, Pakaria Naugawan and Mindia Panai Urf Songarhi, pargana and Tahsil Pilibhit, before the vesting order passed by the State Government. But as portions of these two villages lie within the limits of the Municipal Board of Pilibhit, those portions still continue in the ownership of the petitioner. The plots which are the subject-matter of dispute in the present petition, lie in the portion of village Pakaria Naugawan, which is still in the ownership of the petitioner and others.

In September 1948, a co-operative society was formed by a number of persons and this society is known as the co-operative Housing Society Ltd. Pilibhit. In the beginning the membership was open to all persons of good character, sound mind and above the age of 18 years, residing or carrying on any trade, business or profession in Pilibhit, and who are not members of any other housing society operating in Pilibhit. A few months later, an amendment was made & a further condition was added that only those persons could be members who owned no house or land in Pilibhit. There are about 90 members of this Society, and some of them do own houses in Pilibhit but they had become members before the amendment, and now continue to be members.

This society wanted that the land in dispute should be acquired, and on 19-4-1949 a notification was issued by the U. P. Government under Ss. 4 and 5 of the Land Acquisition Act. This notification said that the Governor was pleased to notify for general information that the land, mentioned in the schedule, was needed for a public purpose and that any person interested in it might within 30 days make an objection to the acquisition of the land in writing to the Collector under S. 5-A of the said Act. The purpose of acquisition was mentioned as the construction of residential houses for the members of the co-operative Housing Society Ltd. Pilibhit.

The greater portion of this land belonged to the petitioner and on 18-5-1949 he filed an objection before the Land Acquisition Officer under Sec. 5-A of the Act. This objection contained a number of grounds, the more important of which were that the land was not being acquired for any public purpose, that the application of the Society was not bona fide, that the members wanted to acquire the land for their own benefit, that many of these members were already owning houses in Pilibhit and that the land was needed by the petitioner for purposes of a Goshala.

(3) The Land Acquisition Officer then commenced enquiries under S. 5-A of the Act and submitted his report to the Uttar Pradesh Government in July 1950. The petitioner made a number of representations to the Hon'ble Ministers of Agriculture and Development and to the General Secretary, Co-operative Department, but these proved to be of no avail.

The present petition was filed on 20-8-1951 and at that time the report of the Land Acquisition Officer was under consideration of the Government, but the Government had started taking steps under S. 41 of the Act and had written to the Secretary, Co-operative Society, that he should

execute an agreement as contemplated by Sections 39 and 41 of the Act. During the time that the petition had been pending, the agreement contemplated by S. 41 was executed between the said Society and the Government, though no notification under Sec. 6 of the Act has yet been issued, as this Court at the time of admitting the petition had passed an interim order prohibiting the issue of the notification.

The prayer made in the petition is that a writ of certiorari be issued calling for the record of the case and quashing all proceedings under Ss. 5-A, 39, 40 and 41 of the said Act, and that a writ of prohibition be issued to the State of Uttar Pradesh (respondent No. 1) directing it not to give its consent under Sec. 39 of the Act to the aforesaid acquisition, nor to issue a notification under S. 6 of the Act.

(4) The contention of the learned counsel for the petitioner is that the State Government has no jurisdiction to give its consent to the present acquisition under S. 40 of the Act because the construction of these houses could not be said to be "work" within the meaning of the word as used in S. 40 (1) (b), nor can the acquisition be said to be "likely to prove useful to the public." It has been contended that there is a mandatory prohibition contained in S. 40, which prohibits the State Government from giving its consent to an acquisition of land which is not being made for constructing "work" or which is not "likely to prove useful to the public". I shall consider these two points separately.

(5) It is argued that the word "work" has been used in Sec. 40 of the Act with reference to the construction of large industrial or scientific establishments, and the construction of ordinary houses for purposes of residence do not come within the meaning of the word. In support of this argument the learned counsel has referred me to the meaning of the word "work" as given in the Chambers Dictionary (20th Century) and the Webster's Dictionary, Vol. 4.

No useful purpose will be served by quoting the meaning as given in these dictionaries, because the word "work" has a very wide meaning. It is really used in two senses of bestowing labour and that upon which labour has been bestowed. When used in plural, the word certainly means some outstanding or important result of the labour that has been bestowed, and large industrial and scientific establishments are called works; but in the singular the meaning is not confined in the field of construction to only large or important establishments. If a mason has constructed a wall, it is the work of that mason, and if an engineer has constructed a house it is the work of that engineer. The word really gets its colour and complexion from the nature of the work, and when used in singular with reference to constructions it is not confined to only big industrial or scientific constructions. The learned counsel relied upon two cases in support of his contention, but none of them, in my opinion, is of any real help to him.

(6) In the case of—'The Easton Estates Mining Co. v. Western Wagon Co.', (1886) 54 LT 735 (A), the facts were that an engine was seized while it was standing in a shed which the contractor rented from the appellant company and which was connected by a siding with the Railway. The question was whether the engine was rolling stock in a "work" and was, therefore, liable to distress for rent. It was held that the word "work" in S. 3 of the Railway Stock Protection Act, 1872, "means any establishment or place used for the purpose of trade or manufacture, which is connected with a line of Railway by siding along which the rolling stock may be propelled."

The word "work" was defined in the Act and Wills J. observed that it was not easy to say exactly what was meant by "a work". He then says:

> "The difficulty arises from the fact of its not being a word known to the law it is a mere word of art not being work in popular use in the sense in which it is used in the Act."

The meaning of the word was then considered with reference to the definition as given in the Act and it was held that a shed was also a work.

(7) The other case is of — 'Brannigan v. Robinson', (1892) 66 LT 647 (B). In this case the meaning of the word "works" as used in the Employer's Liability Act, 1880 was considered. The defendant in this case was a person who was doing the business of clearing sites, that is, pulling down old houses, and on one occasion he had to deal with a wall which was unsafe. He omitted to take proper precautions and the wall fell down upon one of the labourers. It was held that if the insecurity of a wall that was being built up was within the section then the insecurity of a wall which was being pulled down must also be within the section and that the injury was caused by a defect in the "works" connected with the business of the employer.

(8) I do not think that these two cases, in any way, help the contention of the learned counsel, and, taking the ordinary popular meaning of the word, a residential house would, in my opinion be included in the word "work".

(9) The other point requires a more serious consideration. Previously there were two separate Acts, one known as the "works of Public Utility Company Act, Act 22 of 1863" and the other "Land Acquisition Act, Act 6 of 1867". Subsequently both these Acts were amalgamated into one and the Land Acquisition Act, Act 10 of 1870 was passed. The present Land Acquisition Act No. 1 of 1894 has replaced this Act of 1870. Great reliance has been placed by the learned counsel for the petitioner on the Works of Public Utility Company Act of 1863, and he has referred me to the preamble and to Ss. 1, 2, 15, 34 and 35. The wordings of the preamble and these sections favour the view that under Act 22 of 1863 land could be acquired only for companies which were formed for purposes of carrying on works of public utility. Under that Act, it would be very doubtful if an acquisition of land could be made for purposes of a company merely for constructing private houses.

But what I have to see is the wording of the present Act, namely, Act I of 1894. In the preamble of this Act, it is stated that the Act was prepared for the purpose of amending the law for the acquisition of land needed for public purposes and for companies. In S. 3 the expression "company" means a company duly registered and by the amending Act 17 of 1919 it is said to include a society registered under the Societies Registration Act, 1860, and a registered society within the meaning of the Co-operative Societies Act, 1912. The expression "public purpose" is said to include the provision of village-sites in districts in which the Provincial Government shall have declared by notification in the official Gazette that it is customary for the Government to make such provision.

(10) Section 4 empowers the Government to issue a notification in the official Gazette declaring that the land in any locality is needed or is likely to be needed for any public purpose. This section applies only to cases where land is needed for any public purpose as distinguished from cases where it is needed for a company. Section 5A, however, covers both these cases and empowers any person interested in any land which has been notified under S. 4 to file objections to the acquisition of the land within 30 days after the issue of the notification. The section then provides the procedure which is to be followed by the Collector in dealing with the objections so filed and the procedure does make proceedings before the Collector judicial or quasi-judicial proceedings.

Sec. 6 provides that subject to the provisions of Part VII of the Act when the State Government is satisfied, after considering the report if any, made under Sec. 5-A, (2) that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect. This declaration is then to be published in the official Gazette and is made conclusive evidence of the fact that the land is needed for a public purpose or for a company. The next important sections are Ss. 38, 39, 40 and 41.

(11) Under S. 38 the State Government may authorise any officer of any company desiring to acquire land for its purposes to exercise the powers conferred by S. 4, and S. 4 has to be construed as if for the words "for such purpose" the words "for the purposes of the company" were substituted. Section 39 says that the provisions of Ss. 6 to 37 (both inclusive) shall not be put in force in order to acquire land for any company, unless the previous consent of the State Government has been obtained and the company shall have executed the agreement hereinafter mentioned. The relevant portion of S. 40 is to the effect that such consent shall not be given unless the State Government be satisfied that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public.

Sec. 41 says that if after considering the report, the State Government is ..... satisfied that the purpose of the proposed acquisition is the construction of a work and that such work is likely to prove useful to the public, it shall require the company to enter into an agreement, providing amongst other things for conditions on which the work shall be executed and maintained and the terms on which the public shall be entitled to use the work.

(12) The argument of the learned counsel is that the provisions of Ss. 6 to 37 of the Act are not to be put in force in order to acquire land for any company unless the previous consent of the Government has been obtained, and the company has also executed an agreement mentioned in S. 41. Section 40 prohibits the Government from giving such consent unless the acquisition is for the construction of some work which is likely to prove useful to the public and the agreement under S. 41 is to contain the terms on which the public shall be entitled to use the work. Therefore it becomes necessary to see whether the acquisition is for some work and that work is likely to prove useful to the public. It is conceded that the work need not be useful to the public at large, but it should be useful to a large class of it. It is argued that the present acquisition is being made for the members of the Co-operative Society only, that it is not useful to any class of public but is useful only to members of the Society.

The preamble to the Co-operative Societies Act, 1912, says that the object of the Act is to promote selfhelp among poorer people and, according to S. 4 importance is attached to the promotion of interests of the members of the Society. Reference was also made to the bye-laws of the Society amongst the objects of which are mentioned requirements of the members of the Society and the construction of residential houses or other buildings for the convenience of the members and development of a co-operative colony for the convenience and benefit of the members. On the strength of the preamble to the Co-operative Societies Act and the contents of Sec. 4 as well as the contents of bye-law No. 3 it is argued that the object of the Society is to benefit the members only and not any section of the public at large. Reference was also made to Nicholas on Eminent Domain, volume 2, pages 517, 518, 520 and 537.

(13) I have considered the argument with care, but I do not think any of these provisions necessarily lead to the conclusion that the acquisition of land for purposes of this Co-operative Society cannot be "useful to the public".

The general dearth of residential accommodation in the towns and cities of Uttar Pradesh is very well known, and if a Society is found to construct a number of houses and the houses are actually constructed, the construction is likely to ease the situation, as there will be an increase in the total residential accommodation in the town, and rents may also possibly go down. This will benefit not only the members of the Society but also the resident public of the town. It is true that the bye-laws of the Society as well as the Co-operative Societies Act itself are mainly concerned with the interests of the members of the Society. But if in carrying out those objects a situation is brought out which may also help the other members of the public, the acquisition may, in my opinion be said to be one useful to the public.

Sec. 4 of the bye-laws of the Society shows that the membership is open to all persons of good character and sound mind, who may be residing or carrying on any trade, business or profession in Pilibhit. Anybody in Pilibhit can, therefore, become a member of the Society and have the advantages of being a member. In America Housing Societies constituted for the purpose of clearing slumps have been held to be doing work which is of "public use". Slump clearance has been held to be a valid reason for the acquisition of land. The present case cannot be said to be a case of clearance of slumps, but in the conditions prevailing in the towns of this State at present, the construction of more residential houses is, in my opinion, an object which is useful to the resident public of the place.

The facts of the present case are similar to the facts of the case in — 'Thambiran Padayachi v. The State of Madras', AIR 1952 Mad 756 (C). If I may say so with respect the point has been elaborately considered in that judgment, and I do not think any useful purpose will be served by considering the authorities again in this judgment, which have already been considered in that case. I agree with that decision and also the reasons contained therein. The contention of the learned counsel for the petitioner on this point also does not appeal to me.

(14) In the affidavit filed along with the petition it has been stated that a large area of Government land is lying vacant and is better suited for the construction of houses and that the scheme of the present acquisition is not a bona fide one.

A counter-affidavit has been filed in the case, though it was filed after the time allowed by the Court. Still it had been filed before the case came up for hearing and as the rejoinder affidavit was also ready, I accepted both the counter-affidavit and the rejoinder. In the counter-affidavit an effort has been made to show that the scheme is a bona fide one and the acquisition of this land is necessary for the construction of additional houses, that sufficient land has already been left to the petitioner for carrying out his Goshala scheme and that there is a great dearth of residential accommodation in the town of Pilibhit.

A rejoinder affidavit has been filed to controvert these facts and to show that Pilibhit is a town where a number of houses are lying vacant and where there is no dearth of residential accommodation. I am not inclined to accept the allegation of the petitioner that there is no dearth of residential accommodation in Pilibhit or that a number of houses are lying vacant with nobody in the town to reside in them. I am not prepared to hold on the strength of this affidavit that Pilibhit is so very different from other towns in this State and that there is no dearth of residential accommodation in Pilibhit. I, therefore, accept the facts set out in the counter-affidavit on this point.

(15) The learned counsel for the respondents raised an additional point in his argument. His contention was that the writ petition was not maintainable before a notification under S. 6 of the Act was published and that this Court could not direct the State Government to refrain from issuing a notification under that section. The learned counsel referred to a case reported in — 'Ezra v. Secy. of State', 30 Cal 36 (D), and also to the decision of the Privy Council when the same case went up in appeal which is reported in — 'Eza v. Secy. of State', 32 Cal 605 (PC) (E)'. Ameer Ali and Stephen JJ. held in this case (at p. 77) that there was no provision anywhere in the Act that the owner of the land should appear before the officer deputed under S. 40, and the only persons that were concerned in the acquisition were the Government and the company for which the acquisition was being made, the Government having been constituted the sole custodian of the public interests and the sole Judge of the fact whether the work was useful to the public. This decision was upheld by the Privy Council.

But after the date of these decisions the Legislature introduced S. 5-A in the Act in 1923. This section now gives a right to file objections to the acquisition within 30 days of the notification made under Sec. 4, and that objection is to be determined after giving the objector an opportunity of being heard either in person or through a pleader.

(16) The position, therefore, has become very different since the introduction of Sec. 5-A and a reading of that section shows that the function of the Collector is a quasi judicial function. Section 40 of the Act prohibits the State Government from giving its consent to the acquisition unless it is satisfied that such acquisition is needed for the construction of such work and that such work is likely to prove useful to the public. Till the sanction has been given, Sec. 39 says that the provisions of Sections 6 to 37 shall not be put into force.

This being the state of the law, if the petitioner says that the Government is about to give its consent to the acquisition, and the acquisition is such that it cannot possibly prove useful to the public, I am of the opinion that the Court can prohibit the Government from giving its consent under Sec. 40 or from issuing a notification under Sec. 6 of the Act provided it is satisfied that the petitioner on both the points is correct. It has been held in — 'Brij Nath Sarain v. Uttar Pradesh Government', AIR 1953 All 182 (F) that a declaration made by a Government under Sec. 6 of the Act is final and once it has been notified it would be conclusive evidence of the fact that the land was required for a purpose which was useful to the public. Similar is the view expressed in the case of — 'Heman Santlal v. State of Bombay', AIR 1951 Bom 121 (G).

(17) It thus appears that the decision of the Government cannot be challenged after a notification under Sec. 6 has been published, and if the petitioner can come to Court at all to challenge the fact that the land was being acquired for a purpose useful to the public, he can do so only before the publication of the notification under Sec. 6. In my opinion, the petitioner can say that the State Government has decided to give its consent to an acquisition which cannot be for public purpose, and if he is able to establish his contention, I can see no reason why the State Government should not be prohibited from giving its consent to the acquisition, specially in view of the clear wordings of Sec. 40.

The observations of the learned Judges of the Supreme Court in the case of — 'Province of Bombay v. Khushaldas', AIR 1950 SC 222 (H), go to help the petitioner. Six out of the seven Judges were of the opinion that if the decision of the Government or of the Officer concerned was of a judicial or quasi-judicial nature, and the decision on the question of 'Public purpose' depended upon the objective determination of some facts, the Courts were certainly in a position to consider whether the decision of the Government or of the Officer was a correct one or not. But the majority were of the opinion that in that case the decision of the Government was merely an administrative one and not judicial or quasi judicial decision, and therefore the Courts could not issue a writ of certiorari quashing that decision.

The Hon'ble the Chief Justice actually said in his judgment that the Bombay Ordinance was unlike the Land Acquisition Act and there was no provision in it for issuing a notice, for making enquiries or for the determination of rival contentions. Section 5-A of the Land Acquisition Act, however makes the decision a quasi-judicial one, and therefore open to the review by the Courts. If it is open to review, then the only stage at which it can be reviewed is the stage before the notification has been made under Sec. 6 of the Act.

(18) A similar situation arose in the case of — 'The King v. Minister of Health', (1929) 1 KB 619 (I), and it was held that a rule nisi for a writ of prohibition prohibiting the Minister from proceeding further in the matter of the scheme must be made absolute and that the prohibition to him lay at that stage, inasmuch the order of confirmation by the Minister, if made, would have the effect as if it had been enacted in the Act and could not, therefore, be challenged afterwards.

(19) The other point urged in this connection was that the decision of the State Government under Sec. 5-A could not be challenged as the

last sentence of sub-section (2) of the section provides that the decision of the State Government on the objections shall be final. The learned counsel contended that it was for the State Government and the State Government alone to decide the question whether the acquisition was likely to prove useful to the public, and its decision if taken would be final. I do not agree with this contention of the learned counsel either, because the use of this word "final" is not meant to take away the jurisdiction of this Court to issue a writ of certiorari.

In Halsbury's Laws of England, Vol. IX, p. 861, it is stated:

"Certiorari can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be "finally determined" in the inferior Court, nor by a proviso that "no other Court shall intermeddle" with regard to certain matters as to which jurisdiction is conferred on the inferior Court."

Even before the Constitution came into force, the power to issue a writ of certiorari, could not be meant to have been taken away by the use of this word "final" in Sec. 5-A (2) of the Act. After the coming into force of the Constitution, it is obvious that no Legislature has the authority to take away a power conferred on the Courts by the Constitution.

The Land Acquisition Act was an existing law when the Constitution came into force and it has been protected by Art. 31 (5) of the Constitution. If any provision in this Act had, by the use of the express words, taken away the powers of the High Court to issue a writ of certiorari, the matter might have been different, but the situation, as it stands, is that there are no such express words, and I am, therefore, not prepared to hold that the Courts are precluded from issuing a writ of certiorari to the Government where they come to the conclusion that the notification under Sec. 6 should not be made as the purpose of the acquisition cannot possibly be 'useful to the public'. This objection of the learned counsel for the respondents, therefore, fails, but on the view that I have taken on both the points raised by the learned counsel for the petitioner, this petition must fail.

(20) I accordingly dismiss this petition with costs which I assess at Rs. 300/- but of the sum of Rs. 300/- awarded as costs to the respondents, the respondent No. 2, namely, the Co-operative Housing Society Ltd., Pilibhit, shall be entitled to recover Rs. 200/-, and the State Government, respondent No. 1, Rs. 100/-.

A/M.K.S. Petition dismissed.

A.I.R. 1954 ALLAHABAD 705 (Vol. 41, C.N. 280)

V. BHARGAVA J. (29-3-1954)

Lakshmi Devi Sugar Mills Ltd., Applicant v. U. P. Government and others, Opposite Party.

Civil Misc. Writ No. 224 of 1950.

(a) U. P. Industrial Disputes Act (28 of 1947), S. 3(b) and (c) — Validity — (Constitution of India, Art. 245).

Clauses (b) and (c) of S. 3 of the U. P. Industrial Disputes Act, 1947, are valid and not 'ultra vires' the legislature on ground of delegation of essential legislative power to the executive. AIR 1954 All 538 (FB); AIR 1954 All 550, Foll. (Para 2)

1954 All./89 & 90

(b) Constitution of India, Art. 226 — Laches of applicant.

The order of enforcement, which was being challenged by the writ petition, was passed by the U. P. Government on the 3rd of December, 1949. Thereafter, the petitioner wrote successive letters to the Government, making representations against that order and it was only on the 21st of June, 1950, that the Government sent its final reply, refusing the request of the petitioner to reconsider tnat order. Thereafter, the petitioner took about two months' time to obtain legal advice and prepare the petition. The petition was presented on 17-8-1950. Upto that date, the order had not been carried out and the State Government was still insisting that the petitioner should comply with it.

Held that in these circumstances, it could not be said that the petition was very much belated and that the delay in filing it would be a sufficient ground to throw it out. (Para 3)

Anno: Const. of India, Arts. 226 and 32 N. 25.

(c) Constitution of India, Art. 226 — Retrospective effect — Exercise of powers under Art. 226 in respect of orders passed before Constitution — Writ of certiorari and Mandamus — Distinction.

In cases where a writ of 'certiorari' is sought, the High Court in exercise of its powers under Art. 226 of the Constitution, has to examine the validity of a judicial or 'quasi' judicial order and if that judicial or 'quasi'-judicial order had attained finality before the Constitution of India came into force, the High Court would not be entitled to exercise the powers which are exercised to issue a writ in the nature of 'certiorari'. On the other hand, in the case of a writ of 'mandamus', the High Court only issues direction to a public servant either to act according to law or to refrain from acting against law. Such an order can be passed by the High Court whenever occasion arises and makes it necessary that such a direction be issued. If the occasion for the issue of such a direction arises after the Constitution came into force, the powers can certainly be exercised under Art. 226 of the Constitution. The occasion may arise when the order, having been passed before the Constitution came into force, is sought to be enforced after the commencement of the Constitution. If the order is not a legal and valid order, the act of enforcing it after the commencement of the Constitution would be an act of a public servant against the provisions of law and such an act sought to be committed after the commencement of the Constitution can be restrained by issue of a writ in the nature of 'mandamus' under Art. 226 of the Constitution. (Para 6)

The U. P. Government in exercise of its powers under S. 3, U. P. Industrial Disputes Act, 1947 passed an executive order on 3-12-1949 directing that the petitioner should comply with the direction given in it within six months of the Notification. The order had not acquired finality when the Constitution came into force. Subsequently, time for compliance was further extended so that the order was not complied with at least, upto 17-8-1950 when the petitioner filed an application under Art. 226 challenging that order.

Held that the order could be challenged under Art. 226 on the ground that it was not warranted by law when passed and that the opposite parties were threatening to take action against the petitioner for non-compliance of that order even after the commencement of the Constitution. AIR 1951 SC 217, Dist. Civil Misc. Writ Case No. 315 of 1950, D/- 30-4-1952 (All) and AIR 1952 Cal 891, Rel. on. Case law referred. (Para 6)

Anno: Const. of India, Art. 226 N. 14.

(d) U. P. Industrial Disputes Act (28 of 1947), S. 3 — Industrial dispute once withdrawn if can be referred afresh.

There is no provision in the U. P. Industrial Disputes Act, 1947, or in the orders passed under that Act, laying down that a dispute once withdrawn from the Regional Conciliation Board cannot be referred to it afresh. It is only in cases where there might have been a decision of the industrial dispute by an award that a question may arise whether that award is or is not valid on the ground that a previous dispute had been withdrawn. No such question would arise where there has been no award at all and the order sought to be enforced is not an award in an industrial dispute but an order of the State Government in the exercise of other powers granted to it by the Statute. (Para 8)

(e) U. P. Industrial Disputes Act (28 of 1947), Ss. 3(b) and 6 — Reference to Regional Conciliation Board regarding reinstatement of employee — Award — Appeal to Industrial Court — Court confirming findings of Board and making recommendations to Government for reinstatement of employee and payment of past wages — Order of Government, D/- 3-12-1949 directing enforcement of those findings — Validity — (Constitution of India, Art. 226).

The petitioner, a sugar company, struck off the name of R, one of its employees, from the register of employees. Opposite party No. 4 which was a registered trade union, thereupon applied to the Regional Conciliation Board (Sugar), Gorakhpur, for reinstatement of R. This reference to the Board was made under S. 3, U. P. Industrial Disputes Act, 1947, read with the general order of the U. P. Government contained in the Notification No. 781 (L)/XVIII, D/- 10-3-1948. On 6-7-1949, the Board gave a decision against the petitioner, directing the petitioner to re-instate R and to pay him arrears of salary for the period which elapsed between the order of dismissal and his re-instatement. On 13-7-1949, the petitioner filed an appeal against this order before the Industrial Court (Sugar), Lucknow. On this appeal, the findings were given by the Industrial Court (Sugar), Lucknow, on 15-9-1949, and the Court sent its recommendations to the Government. The finding recorded by the Industrial Court was to the following effect: "I, therefore, agree with the decision of the Board below that R who was a permanent hand of the factory, should be reinstated to his post with continuity of service and the entire wages paid to him for the period of his involuntary unemployment within 15 days from the date of the enforcement of this report by the Government, and I recommend accordingly". On 3-12-1949 the Government issued a notification directing that the findings of the Industrial Court (Sugar), Lucknow be enforced.

Held (i) on a consideration of the General Order dated 10-3-1948, that the Industrial Court, constituted under that order, was not given any power to give an award or even to decide the appeal filed before it against the award of the Regional Conciliation Board. What the Industrial Court did on 15-9-1949, was to record its opinion on the points in dispute, frame its recommendations and forward them to the Government for orders. It was, therefore, in the nature of a report by the Industrial Court to the State Government containing its recommendations with reasons therefor. There was no adjudication of any industrial dispute or an award in any such dispute. Consequently, S. 6 of the U. P. Industrial Disputes Act, 1947, would not apply to it at all and that report could not be enforced by the Government as an award under S. 6 of the Act. No doubt, when issuing the notification on 3-12-1949, the Government purported to exercise the powers conferred on it by S. 3 read with S. 6 of the U. P. Industrial Disputes Act, but the mere mention of the powers under S. 6 of the Act would not make that order an order under S. 6. (Paras 9, 10)

(ii) The second part of the recommendation of the Industrial Court was for payment of wages for the period of unemployment which had already expired on the date on which the findings were enforced by the State Government. This part of the order of the State Government was, therefore, clearly retrospective as it related to payment of wages for a past period which had expired before the order under S. 3(b), was passed by the Government. Such orders for payment of wages in respect of periods already expired cannot be validly passed under S. 3(b) and this part of the order was, therefore, clearly illegal and its enforcement must be restrained by issue of a writ of mandamus. AIR 1954 All 538 (FB), Foll. (Para 12)

(iii) The order passed on 3-12-1949, was not an order of the nature contemplated by S. 3(b) of the U. P. Industrial Disputes Act, 1947. It was an order of the State Government which, in effect, gave its decision on the industrial dispute relating to the enforcement of certain terms and conditions of service and not an order requiring the petitioner to observe terms and conditions of service specified in the order. This part of the order was, therefore, beyond the competence of the State Government acting in exercise of its powers under S. 3(b). Enforcement of that part of that order after 26-1-1950, would be action taken on an order which had no validity in law even when passed and such action by the opposite parties must be restrained by the issue of a writ of mandamus. (Para 14)

(f) U. P. Industrial Disputes Act (28 of 1947), Ss. 3(b) and 2 — 'Terms and conditions of service', meaning of — (Constitution of India, Art. 309).

In S. 3(b) of the U. P. Industrial Disputes Act, 1947, the expression 'conditions of employment' was used in order to cover the words 'employment, non-employment and conditions of labour' which were used in the definition of an industrial dispute. (Para 13)

The words 'terms and conditions of employment' used in S. 3(b) cannot be considered to be narrower than the expression 'conditions

of service' used in the Government of India Act, 1935, and the Constitution and, therefore, would surely cover terms and conditions relating to removal and dismissal of the workmen. Reinstatement is different from re-employment. In the case of re-employment, a person, at the time of his re-employment, is not deemed to be in service and his re-employment really amounts to a fresh recruitment or appointment. The position in the case of re-instatement is different as re-instatement implies continuance of previous service. It is true that the effect of re-instatement in one respect is the same as the effect of re-employment, viz., that the person re-instated or re-employed comes back into the service of the employer from the date on which the order for re-instatement or re-employment is made effective but there is one very important distinction. In the case of re-instatement, there is continuity with the previous service whereas, in the case of re-employment, there is a fresh start of a new service. Re-instatement and re-employment cannot, therefore, be dealt with on the same basis and even if the word 're-employment' be held to be covered by the words 're-cruitment or appointment', there is no reason to hold that the word 're-instatement' must also be similarly covered by these words. Re-instatement in service, which brings into effect continuity of the previous service, is clearly an order relating to terms and conditions of service, or, terms and conditions of employment. (Para 13)

(g) U. P. Industrial Disputes Act (28 of 1947), S. 3(b) — Nature of order that can be passed by Government.

The expression 'to observe for such period as may be specified, such terms and conditions of employment as may be determined' gives an indication that Cl. (b) of S. 3 of the U. P. Industrial Disputes Act, 1947, is meant for the purpose of passing orders by which the Government gives directions about what the terms and conditions of employment should be and not how a particular term and condition of employment already in existence should be acted upon. It appears from the language that this provision was not meant for the purpose of dealing with individual disputes arising out of the application of a term or condition of employment and no power was granted to the State Government, under this provision of law, to sit as an adjudicator to decide a dispute that might have arisen relating to the working and actual application of terms and conditions of employment already in force. The provision was for the purpose of enabling the State Government to vary the agreed terms and conditions of employment for purposes specified in S. 3 of the U. P. Industrial Disputes Act, 1947, under the pressing necessities or expediency justifying such course of action. (Para 14)

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 538: (Civil Misc Writ No. 280 of 1950, D/- 10-2-1954 FB) 2, 12
(B) (V41) AIR 1954 All 550: (Civil Misc Writ No. 7934 of 1951, D/- 5-3-1954) 2
(C) (V38) AIR 1951 SC 217: 1951 SCR 344: 52 Cri LJ 736 4
(D) (V14) AIR 1927 PC 242: 9 Lah 284 (PC) 5
(E) (V37) AIR 1950 Cal 512: 54 Cal WN 793 5
(F) (V38) AIR 1951 Cal 258: 55 Cal WN 87 (SB) 5
(G) (V38) AIR 1951 Mad 280: ILR (1951) Mad 68 5
(H) (V38) AIR 1951 Nag 443: 1952 Cri LJ 1 (FB) 5
(I) (V40) AIR 1953 Punj 16: ILR (1953) Punj 193 5
(J) (V40) AIR 1953 Orissa 274: ILR (1953) Cut 322 5
(K) (V40) AIR 1953 Assam 35: 1953 Cri LJ 395 (FB) 5
(L) ('52) Civil Misc Writ Case No. 315 of 1950, D/- 30-4-1952 (All) 5
(M) (V39) AIR 1952 Cal 891 5, 6
(N) (V39) AIR 1952 Cal 573: 56 Cal WN 156 6
(O) (V39) AIR 1952 Cal 857 6
(P) (V40) AIR 1953 Raj 185 6
(Q) (V37) AIR 1950 Madh-B 46 6
(R) (V36) AIR 1949 FC 111: ILR (1949) Bom 686 (FC) 13
(S) (V36) AIR 1949 FC 148: 1949 FCR 348 12

G. S. Pathak and S. N. Dwidi, for Applicant; Shanti Bhushan and Standing Counsel, for Opposite Party.

ORDER: The petitioner, Lakshmi Devi Sugar Mills, Ltd., Chitauni, District Deoria, is an incorporated company engaged in the manufacture of sugar at Chitauni in the district of Deoria and had, amongst its employees, opposite party No. 3, Ram Nath Koeri, during the first quarter of the year 1948. In the month of April, 1948, the services of Ram Nath Koeri were terminated by the petitioner company on the allegation that he had been deliberately absent for a long time without permission and his name was accordingly struck off from the register of employees. Opposite party No. 4, the Chini Mill Mazdoor Sangh, Chitauni, district Deoria, thereupon applied to the Regional Conciliation Board (Sugar), Gorakhpur, for the re-instatement of Ram Nath Koeri on 16-6-1948. That application was made under the U. P. Industrial Disputes Act (U. P. Act 28 of 1947) read with the order of the State Government contained in Notification No. 781(L)/XVIII, dated 10-3-1948. The Board entertained this industrial dispute. The petitioner appeared before the Board and contested the claim of opposite party No. 4 for the re-instatement of opposite party No. 3.

On 4-7-1948, the Board passed an order, requiring the Regional Conciliation Officer to make enquiries into the case and to make efforts to bring about reconciliation between the parties. Against this order of 4-7-1948, an appeal was filed by the petitioner to the Industrial Court (Sugar), Lucknow, and that Court, by its order, dated 4-8-1948, set aside the order of the Board, dated 4-7-1948, on a preliminary ground. The State Government, by its order dated 16-9-1948, enforced that order of the Industrial Court (Sugar), Lucknow.

Thereafter, in December, 1948, opposite party No. 4, the Chini Mill Mazdoor Sangh, filed another case before the Regional Conciliation Board (Sugar), Gorakhpur, on the same subject of re-instatement of Ram Nath Koeri. The petitioner put in appearance on 15-1-1949, and contested that case. On the same date, the Board passed an order, saying that an application had been received that the Union did not want to pursue that case and, consequently, the parties were to be informed to treat the notices for calling the case to the Board as cancelled.

Thereafter, on 22-4-1949, opposite party No. 4 filed one more case before the Regional Conciliation Board (Sugar), Gorakhpur, seeking to revive the previous dispute about the re-instatement of

Ram Nath Koeri. The petitioner again appeared and contested the case and, on 23-5-1949, the Board once more passed an order, referring the case to the Regional Conciliation Officer for decision at the request of opposite party No. 4. On 26-5-1949, the petitioner preferred an appeal against that order of 23-5-1949, before the Industrial Court (Sugar), Lucknow.

While this appeal was still pending, opposite party No. 4 filed yet another case with the same request for re-instatement of Ram Nath Koeri opposite party No. 3. That case was dealt with by the Regional Conciliation Board (Sugar), Gorakhpur, itself and, on 6th July, 1949, the Board gave a decision against the petitioner, directing the petitioner to re-instate Ram Nath Koeri and to pay him arrears of salary for the period which elapsed between the order of dismissal and his re-instatement. On 13-7-1949, the petitioner filed an appeal against this order before the Industrial Court (Sugar), Lucknow. On this appeal, the findings were given by the Industrial Court (Sugar), Lucknow, on 15-9-1949, and the Court sent its recommendations to the Government.

On 3-12-1949, the Government issued a notification, directing that the findings of the Industrial Court (Sugar), Lucknow, be enforced. While all these proceedings were going on, the appeal previously filed by the petitioner against the order of the Board, dated 23-5-1949, was still pending. On that appeal, the findings were given by the Industrial Court (Sugar), Lucknow, on 14-12-1949, and those findings were enforced by the Government by its order, dated 30-12-1949. By the notification of 3-12-1949, mentioned above, the Government had directed the petitioner to comply with the directions given in that order within six months of the notification of that order. Subsequently, it appears that the time for compliance was further extended so that the order was not complied with, at least, upto 17-8-1950, on which date this writ petition for issue of writs under Article 226 of the Constitution was presented on behalf of the petitioner.

Under these circumstances, the petitioner prayed for the issue of a writ in the nature of certiorari to the Industrial Court (Sugar), Lucknow, to produce the whole record of the case relating to the re-instatement of Ram Nath Koeri for the purpose of quashing its order of 15-9-1949, a writ in the nature of mandamus to the U. P. Government, commanding it to forbear from enforcing its order of 3-12-1949, and a writ in the nature of prohibition, forbidding the U. P. Government from enforcing its order of 3-12-1949. The petition has been contested by opposite party No. 1, the U. P. Government, and by opposite party No. 4, the Chini Mill Mazdoor Sangh, Chitauni, district Deoria. Appearance was not put in by opposite party No. 2, Industrial Court (Sugar), Lucknow, and opposite party No. 3, Ram Nath Koeri. Though opposite parties Nos. 1 and 4 appeared and contested the case, no counter-affidavit was filed on behalf of either of them, challenging the correctness of the allegations made on behalf of the petitioner. Consequently, the facts given on behalf of the petitioner have to be accepted as correct and the case decided on their basis.

(2) Shri Pathak, learned counsel for the petitioner, wanted to urge, in support of this petition a legal ground that the provisions contained in clauses (b) and (c) of S. 3, U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) are ultra vires as they contain delegation of essential legislative power to the executive but, on this point, he could not be heard in support of this petition because there are decisions of this Court which are binding on me, holding that cls. (b) and (c) of S. 3, U. P. Industrial Disputes Act, 1947 are valid and not ultra vires the legislature. A Full Bench of this Court in — 'Basti Sugar Mills Co., Ltd. v. State of Uttar Pradesh', AIR 1954 All 538 (A) has held that the provisions of cl. (b), S. 3, U. P. Industrial Disputes Act, 1947, are valid and not ultra vires the legislature.

Subsequently, a Division Bench of this Court in — 'British India Corporation Ltd. v. Govt. of the State of Uttar Pradesh', AIR 1954 All 550 (B) has held that cl. (c), S. 3, U. P. Industrial Disputes Act, 1947, is valid and not ultra vires. Those decisions of the Full Bench and the Division Bench on these two clauses are binding on me and, consequently, the contention of Shri Pathak that these provisions of law are ultra vires the legislature has to be rejected.

(3) When this petition was heard, two preliminary points were raised by the opposite parties against its being entertained by this Court. One objection was that the petition was belated and, on account of laches on the part of the petitioner, this Court should refuse to issue any writ as prayed by the petitioner. It, however, appears that the order of enforcement, which is being challenged by this writ petition, was passed by the U. P. Government on 3-12-1949. Thereafter, the petitioner wrote successive letters to the Government, making representations against that order and it was only on 21-6-1950, that the Government sent its final reply, refusing the request of the petitioner to reconsider that order. Thereafter, the petitioner took about two months' time to obtain legal advice and prepare the petition. The petition was presented on 17-8-1950. Upto that date, the order had not been carried out and the State Government was still insisting that the petitioner should comply with it. In these circumstances, it cannot be said that the petition was very much belated and that the delay in filing it would be a sufficient ground to throw it out.

(4) The second point, that has been urged as a preliminary objection on behalf of the opposite parties, is that, by this writ petition, the petitioner is seeking to challenge the order of 3-12-1949, which was passed before the Constitution came into force and this Court is not entitled to exercise its powers under Article 226 of the Constitution for the purpose of vacating such an order passed before the enforcement of the Constitution. In support of this proposition, reliance has been placed by learned counsel for opposite parties on a decision of the Supreme Court in — 'Janardhan Reddy v. State of Hyderabad', AIR 1951 SC 217 (C).

In that case, the matter went up before the Supreme Court by a petition under Art. 32 of the Constitution as well as by an application for special leave to appeal to the Supreme Court against an order of the High Court, rejecting a petition under Art. 226 of the Constitution. In both those proceedings, what was challenged was an order of the High Court of Hyderabad, passed before the merger of the State of Hyderabad with the Indian Union, by which the High Court had confirmed the conviction and sentences of the petitioners passed by a special tribunal. That order of the High Court was challenged on various grounds and none of them was accepted by the Supreme Court. When dealing with that case, one of the aspects, dealt with by the Supreme Court, related to the difficulty that the judgment of the

High Court confirming the convictions and sentences of the petitioners had acquired finality in the fullest sense of the term before 26-1-1950, and, by reason of that finality, no one could question the decision of that Court on the date when the Constitution came into force and, consequently, after the enforcement of the Constitution on 26-1-1950, that order of the High Court could not be challenged. Their Lordships of the Supreme Court, dealing with this point, held as follows:

"Can then a new law or a change in the old law entitle us to re-open a transaction which has become closed and final? It is common ground that the provisions of the Constitution which are invoked here, were not intended to operate retrospectively, and, therefore, something which was legally good on the 25th January, 1950, cannot be held to have become bad on the 26th January, 1950. If we had no jurisdiction to sit in appeal over the judgment of the Hyderabad High Court, can we now reinvestigate the cases and pass orders which cannot be passed without virtually setting aside the judgments of the High Court which have become final. Can we, in other words, do indirectly what we refused to do directly? It is argued that we are asked not to reopen a past transaction but to deal with the present detention of the petitioners, i.e., their detention at this moment. But, how can we hold the present detention to be invalid, unless we re-open what could not be re-opened prior to the 26th January, 1950. This is, in our opinion, one of the greatest difficulties which the petitioners have to face, and it rests not merely on technical grounds but on sound legal principles which have always been, and should be, respected."

It was submitted that this decision of the Supreme Court makes it clear that an order passed before 26-1-1950, could not be challenged by a petition for a writ under Article 226 or 32 of the Constitution subsequent to the passing of the Constitution. This contention is not, in my opinion, supported by the decision of their Lordships of the Supreme Court. It was made clear in that case that what could not be challenged after 26-1-1950, was only an order which was legally good on 25-1-1950, which had acquired finality in the fullest sense of the term before 26-1-1950, and the validity of which could not be questioned on the date when the Constitution came into force by reason of that finality.

In the case before me, it cannot be contended that the order of 3-12-1949, had acquired finality in the sense in which the order of the High Court assailed in that case before the Supreme Court had acquired finality. Further, it cannot be said that the order of 3-12-1949, was a legal and good order on 25-1-1950. In fact, this petition is based on the contention that this order was not a valid and legal order even on 3-12-1949, when it was passed by the Government. The present case is, therefore, in no way, governed by the decision of the Supreme Court cited above.

(5) Reliance was placed on a decision of the Privy Council in — 'Delhi Cloth and General Mills Co., Ltd. v. Income-tax Commr., Delhi', AIR 1927 PC 242 (D). There the only question, that came before their Lordships of the Privy Council, was whether the provisions of a statute, which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force, were final, should be interpreted to be retrospective in the absence of express enactment or necessary intendment. There is no question of that principle being applied to the present case because it has not been contended on behalf of the petitioner that Art. 226 or 32 of the Constitution should be read as having retrospective applicability.

Learned counsel for the opposite parties also cited a number of decisions of the Calcutta, Madras, Nagpur, Punjab, Orissa and Assam High Courts reported in — 'Rishindra Nath v. Sakti Bhusan', AIR 1950 Cal 512 (E); — 'Bimala Prosad v. State of West Bengal', AIR 1951 Cal 258 (SB) (F); — 'Mahamad Beary v. Hassan Kutty', AIR 1951 Mad 280 (G); — 'Rajaram Dadu v. The State', AIR 1951 Nag 443 (FB) (H); — 'Mahabir Parshad v. Commr. of Income-tax', AIR 1953 Punj 16 (I); — 'Jagahandhu Das v. Babaji Jena', AIR 1953 Orissa 274 (J) and — 'The State v. Judhabir Chetri', AIR 1953 Assam 35 (FB) (K). It does not appear to be necessary to discuss these cases individually. In all these cases, the prayer was for issue of writ under Art. 226 of the Constitution or an order of superintendence under Art. 227 of the Constitution for the purpose of vacating a judicial or quasi-judicial order passed before the Constitution came into force, by a judicial or quasi-judicial tribunal which had acquired finality under the law as it existed before the Constitution came into force. None of these cases, therefore, deals with the point that arises in the present case in which the order challenged is not a judicial or quasi-judicial order but an order of the executive Government in exercise of its powers granted to it by S. 3 of the U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947), which order had not acquired finality before the commencement of the Constitution and which is challenged on the ground of not being valid in law at the time when it was passed. On the other hand, there is a series of decisions of various High Courts where it has been held that such an order can be challenged by a petition under Art. 226 of the Constitution. I was referred by learned counsel for the petitioner to an unreported decision of a Division Bench of this Court, of which I was a member in — 'Shri Sri Nath Das v. U. P. Govt.', Civil Misc. Writ Case No. 315 of 1950, D/- 30-4-1952 (All) (L), where it was held:

"In judging whether the order, dated 12th February 1949, was or was not in accordance with law, we can, of course, only look at the state of law as it existed on the date on which that order was passed. If that order was then not in accordance with law and the petitioner's rights are being affected by that order even after the Constitution has come into force, the petitioner can certainly invoke the powers of this Court under Article 226 of the Constitution. The effect of that order of refusal dated 12-2-1949, continues even to-day because the petitioner has not yet been granted a licence and the U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1948, still continues in force. We have, therefore, only to see whether that order of 12-2-1949, was validly passed at that time."

The view taken in that case was also taken by a learned Judge of the Calcutta High Court in — 'the Calcutta Pinjrapole Society v. S. Banerjee', AIR 1952 Cal 891 (M). Dealing with this question, the learned Judge observed:

" It has been submitted by the learned Advocate appearing for the opposite parties that inasmuch as the Notifications under sections 4 and 6 were made before the Constitution of India came into force, the petitioner cannot take advantage of Art. 226 of the Constitution of India for the purpose of challenging the validity of

those Notifications, because Article 226 is not made expressly retrospective and, therefore, it cannot have retrospective operation. If the Notification had been otherwise a good and a valid notification, and had been made after complying with the requirements of R. 5(2), then there can be no doubt that such a Notification would not be open to challenge, but, as pointed out before by me, the Notification under S. 6 was ultra vires and any step taken to enforce such Notification or any action taken pursuant to such Notification, in my view, can be challenged under Art. 226 of the Constitution of India. Being an ultra vires Notification, it gives a recurring cause of action to the petitioner, and, therefore, this Court has power under Art. 226 to give relief to the petitioner in this case."

(6) At this stage, I may take notice of the distinction that arises in cases where a writ of certiorari is sought & in cases where relief is sought by issue of a writ of mandamus. In cases where a writ of certiorari is sought, this Court in exercise of its powers under Art. 226 of the Constitution, has to examine the validity of a judicial or quasi-judicial order and it is obvious that, if that judicial or quasi-judicial order had attained finality before the Constitution of India came into force, this Court would not be entitled to exercise the powers which are exercised to issue a writ in the nature of certiorari. On the other hand, in the case of a writ of mandamus, this Court only issues direction to a public servant either to act according to law or to refrain from acting against law. Such an order can be passed by this Court whenever occasion arises and makes it necessary that such a direction be issued. If the occasion for the issue of such a direction arises after the Constitution came into force, the powers can certainly be exercised by this Court under Art. 226 of the Constitution. The occasion may arise when the order, having been passed before the Constitution came into force, is sought to be enforced after the commencement of the Constitution. If the order is not a legal and valid order, the act of enforcing it after the commencement of the Constitution would be an act of a public servant against the provisions of law and such an act sought to be committed after the commencement of the Constitution can be restrained by issue of a writ in the nature of mandamus under Art. 226 of the Constitution. The case before me is exactly of this type. The order challenged was passed on 3-12-1949, before the Constitution came into force but the opposite parties have been insisting on its enforcement and its compliance by the petitioner even after the commencement of the Constitution. The threat against the petitioner, if he fails to comply with that order, of prosecution or other action is continued even after the Constitution has come into force. The petitioner can, therefore, seek protection of this Court under Art. 226 of the Constitution against the opposite parties on the ground that they are seeking to have an order enforced which is not warranted by law and which was not warranted by law when passed and are threatening to take action against the petitioner for non-compliance with that order. Learned counsel for the petitioner also referred me to two other decisions of the Calcutta High Court in — 'Rajendra Kumar v. Govt. of West Bengal', AIR 1952 Cal 573 (N) and — 'Hurdeodas Agarwala v. State of West Bengal', AIR 1952 Cal 857 (O), a decision of the Rajasthan High Court in — 'Manohar Lal v. Custodian, Rajasthan, Jodhpur', AIR 1953 Raj 185 (P) and a decision of the Madhya Bharat in — 'Harendranath Sharma v. State of Madhya Bharat', AIR 1950 Madh-B 46 (Q). It is not necessary to examine these cases in detail. They all follow or lay down the same principle which was laid down by the Calcutta High Court in — 'AIR 1952 Cal 891 (M)' mentioned above. This preliminary point taken against the petition also, therefore, fails.

(7) One of the grounds, on which the order, dated 3-12-1949, was challenged by the petitioner, was that the Government was not competent to pass such an order during the pendency of an earlier appeal against an earlier decision of the Regional Conciliation Board (Sugar), Gorakhpur, in respect of the same dispute and further that the order of 3-12-1949, was in conflict with the order passed on that earlier appeal subsequently on 30-12-1949, so that the order of 3-12-1949, had been nullified and its effect cancelled by that subsequent order dated 30-12-1949. When the case came up for hearing before me, this point was not pressed by learned counsel for the petitioner and was given up. Further, it could not be properly dealt with in the absence of a copy of the order of the 30th of December, 1949, and no proper copy of that order was produced before the Court. I need not, therefore, deal with this ground and reject it as it was not pressed.

(8) One other point, that was taken in the petition and which can be disposed of quickly, is that relating to the effect of the order passed by the Regional Conciliation Board on 15-1-1949. It was contended on behalf of the petitioner that, on that date the Chini Mill Mazdoor Sangh opposite party No. 4 had withdrawn its complaint against the petitioner, claiming re-instatement of Ram Nath Koeri from the Regional Conciliation Board and, consequently, no fresh industrial dispute in respect of that matter could have been referred by opposite party No. 4 to the Regional Conciliation Board. This point also could not be seriously pressed by learned counsel as there is no provision in the U. P. Industrial Disputes Act (U. P. Act 28 of 1947) or in the orders passed under that Act, laying down that a dispute once withdrawn from the Regional Conciliation Board cannot be referred to it afresh. Further, this point loses its force altogether when the nature of the order, dated 3-12-1949, is examined which shall be done by me hereafter. It is only in cases where there might have been a decision of the industrial dispute by an award that a question may arise whether that award is or is not valid on the ground that a previous dispute had been withdrawn. No such question would arise where there has been no award at all and the order sought to be enforced is not an award in an industrial dispute but an order of the State Government in the exercise of other powers granted to it by the statute.

(9) This takes me to the next point which raised the question of the nature of the order, dated 3-12-1949, and the nature of the powers that this State Government could exercise for passing such an order. The facts narrated above show that the proceedings, which culminated in the order of 3-12-1949, started with the reference of the industrial dispute by opposite party No. 4 to the Regional Conciliation Board (Sugar), Gorakhpur, on 16-6-1948. This reference to the Board was obviously made under the provisions of the order of the Government of U. P. contained in Notification No. 781 (L)/XVIII, dated 10-3-1948, which was published by the U. P. Government in exercise of powers conferred by cls. (b), (c), (d) and (g) of S. 3, U. P. Industrial Disputes Act, 1947. Clause (5) of that notification provided that a registered trade

union of employers or workmen would move the Board to enquire into any industrial dispute.

In this case, the move was made by opposite party No. 4 which is a registered trade union of workmen. Under cl. (6), the Board was required to make an endeavour to bring about a settlement of the dispute and, under cl. (7), if the dispute could not be settled, the Board was enjoined to make such enquiry as may appear to the Board necessary for the purpose of determining the issues upon which the parties may be at variance. After the enquiry, the Board was required to record its findings on each issue. Even thereafter there is a provision mentioning that the Board, if successful in bringing about amicable settlement between the parties on all or any of the questions at issue, should prepare memorandum which was to be signed by all the members of the Board. Where no amicable settlement could be reached on one or more issues, the Board was required to record an award and the reasons for such an award.

Section 6 of the U. P. Industrial Disputes Act, 1947, lays down the effect of such an award. Under sub-s. (1) of S. 6 of the Act, the authority, to which an industrial dispute has been referred for adjudication, has, on completion of enquiry, to submit its award to the State Government within such time as may be specified. Sub-section (2) of that section lays down that the State Government may either enforce, for such period as it may specify, all or any of the decisions in the award; or, either of its own motion or on application made to it, remit the award for re-consideration. The power of the State Government under sub-s. (2) of S. 6 of the U. P. Industrial Disputes Act, 1947, for enforcing an award has been partly exercised by a general order contained in cl. (16) of the Government Notification, dated 10-3-1948, mentioned above. That clause lays down:

> ".....or where no settlement has been reached but an award has been made under subclause (4) of clause 7 and no appeal has been filed under clause 12, both the employer and the workmen concerned shall observe the terms and conditions of employment specified in such ..... for six months next following in the first instance and thereafter until such time as either party determines the whole or any part of such settlement or award by twenty-one days' notice given to the other party in writing."

The effect of this clause is that as soon as an award is made and in case no appeal is filed, parties to the award become bound to comply with the terms of the award for a period of six months in the first instance and even subsequently until the terms of the award are determined by a notice by one party to the other party under cl. (16). This clause does not, however, deal with a case where an appeal against an award is filed. Clause (12) of that order permits any party, feeling aggrieved by an award, to file an appeal against the award in a court having jurisdiction. In this case, the Industrial Court (Sugar), Lucknow, had jurisdiction and an appeal against the award, dated 6-7-1949, was actually filed before that court on 13-7-1949. Consequently, the award did not become binding under clause (16) of the notification. What would happen on the filing of an appeal is laid down under other clauses of that notification. Clause (13) of the order, which follows cl. (12) granting the right of appeal to one party aggrieved, lays down that

> "the court shall then within ten days (excluding gazetted holidays) from its being filed, hear the appeal and shall, within a further period of ten days (excluding gazetted holidays), record its findings and forward the same immediately to the Provincial Government."

It was under these clauses that the Industrial Court (Sugar), Lucknow, in the present case, recorded its findings on 15-9-1949, and forwarded them to the State Government. Neither the Act nor the order of 10-3-1948, clearly lays down what the State Government is to do when it receives the findings of the Industrial Court under cl. (13) mentioned above. It was contended by learned counsel for the opposite parties that the findings, recorded by the Industrial Court under cl. (13) and forwarded to the State Government, must be deemed to be an award which would also have the same effect as an award given by the Regional Conciliation Board (Sugar), Gorakhpur, under sub-cl. (4) of cl. (7) and would be binding on the parties under cl. (16), of the General Order of 10-3-1948.

It was also contended that, even if the award is not binding under cl. (16), the State Government would be competent to pass an order, enforcing the decisions in the award under sub-s. (2), S. 6, U. P. Industrial Disputes Act, 1947. These contentions cannot, however, be accepted because it is clear from the General Order, dated 10-3-1948, that the Industrial Court, constituted under that order, was not given any power to give an award or even to decide the appeal filed before it against the award of the Regional Conciliation Board.

(10) Clause (7), which deals with the proceedings before the Regional Conciliation Board, envisages two stages where no settlement is reached. The first stage is when the Board is required to frame issues, make necessary enquiries and record its findings on each issue. The second stage comes when, after the recording of the findings, the Board is required to record an award and the reasons for such an award. It is clear that this order itself makes a distinction between the findings and an award. When dealing with the powers granted to the Industrial Court constituted under that order, the order merely requires the Court to record its findings and does not go on to mention that the Court has to give an award or record an award or a decision.

Further, a perusal of the actual report of the Industrial Court dated 15-9-1949, which is sought to be interpreted as an award by learned counsel for the opposite parties, shows that the order was worded in such a manner that it cannot possibly be interpreted to be an award. In that order, the Industrial Court mentioned two issues which had been framed by the Regional Conciliation Board and, after dealing with the preliminary points raised in the appeal, proceeded to discuss those issues. We are only concerned with the first issue which was to the following effect:

> "Issue No. 1: Is Shri Ram Nath Koeri entitled for re-instatement? If so, subject to what terms and conditions?"

The Industrial Court discussed the material which had come before it in connection with the appeal relating to this issue and, finally, recorded its finding in the following words:

> "I, therefore, agree with the decision of the Board below that Shri Ram Nath Koeri, who

> was a permanent hand of the factory, should be reinstated to his post with continuity of service and the entire wages paid to him for the period of his involuntary unemployment within 15 days from the date of the enforcement of this report by the Government, and I recommend accordingly."

It would be seen that the Court purported to record its finding relating to the right of Shri Ram Nath Koeri to be reinstated and to be paid wages for the period of his involuntary unemployment and all that the Court did was to make a recommendation in those terms to the State Government. In an award, the adjudicator lays down the directions for the parties, directly calling upon them to carry out those directions. The adjudicator does not make a recommendation to some authority to pass the order. In this case, the Industrial Court (Sugar), Lucknow, merely gave its findings on issues without giving any directions and left it to the State Government to make the directions or pass the orders which were to be carried out by the parties to the dispute.

It is, therefore, clear that what the Industrial Court did on 15-9-1949, was to record its opinion on the points in dispute, frame its recommendations and forward them to the Government for orders. It was, therefore, in the nature of a report by the Industrial Court to the State Government containing its recommendations with reasons therefor. There was no adjudication of any industrial dispute or an award in any such dispute. Consequently, S. 6, U. P. Industrial Disputes Act, 1947, would not apply to it at all and that report could not be enforced by the Government as an award under S. 6 of the Act. No doubt, when issuing the notification on 3-12-1949, the Government purported to exercise the powers conferred on it by S. 3 read with S. 6 of the U. P. Industrial Disputes Act (U. P. Act No. XXVIII of 1947) but the mere mention of the powers under S. 6 of the Act would not make that order an order under S. 6. As has been shown by me above, there was no award before the Government .made by the Industrial Court in respect of which an order under S. 6 could have been passed by the State Government and, consequently, the mention of section 6 in that notification of 3-12-1949, was entirely inappropriate. The powers under section 6 could not be invoked for the purpose of enforcing the findings which had been recorded by the Industrial Court (Sugar), Lucknow. The notification, however, mentions that the Governor exercised powers conferred by S. 3, U. P. Industrial Disputes Act, 1947. The only clause of S. 3, which can be applied to an order of the nature of the order of 3-12-1949, is clause (b). It was not contended on behalf of the opposite parties that if this order could not be passed under S. 6, there was any other provision, besides clause (b) of section 3, under which the Government could have purported to pass that order. Consequently, for the purpose of examining the validity of that order, all that need be seen is whether that order is in proper exercise of the powers conferred by cl. (b) of S. 3, U. P. Industrial Disputes Act, 1947, and is within the scope of that provision of law.

(11) At this stage, I may also take notice of another alternative argument, which was advanced by learned counsel for the opposite parties, that, by the order and notification, dated 3-12-1949, what the Government actually did was to enforce the award of the Regional Conciliation Board to which the dispute had been referred for adjudication and not to pass an independent order under clause (b) of S. 3 of the Act. This contention has no force in view of the plain language of that order. The order does not even purport to lay down that the award of the Regional Conciliation Board is being enforced by that order. In the preamble of the order, it is mentioned that the Industrial Court had heard the industrial appeals preferred by the petitioner against the award of the Regional Conciliation Board (Sugar), Gorakhpur, in the matter of the industrial dispute between the said concern and its employees and had given its findings in the said appeals and, in the opinion of the Governor, it was necessary, for purposes mentioned in the order, to enforce the said findings of the Court contained in its report of 15-9-1949.

This language of the preamble makes it perfectly clear that, at the time when the order was passed, the Governor was only considering the findings of the Industrial Court (Sugar), Lucknow, contained in its report and was of the opinion that it was necessary to enforce those findings. There was no mention at all that any award was required to be enforced by the Government. Further, in the actual order itself, all that is stated is that "the said findings of the Industrial Court contained in the schedule annexed herewith are hereby enforced." This again makes it clear that what the Government, by that order, did was to enforce the findings of the Industrial Court and not the award of the Regional Conciliation Board. In this connection, it may be noticed that the report of the Court, dated 15-9-1949, dealt with several matters including the matter in dispute of the petitioner. There was issue No. 2 relating to the dispute of another employee, Shri Bunna Gond.

In this case also, an award had been given by the Regional Conciliation Board, and in its report, the Court recommended that that award given by the Board should be set aside. When the Government passed the order, dated 3-12-1949, it enforced the findings of the Court with the result that, in the case of opposite party No. 3, the decision, which had been given in his favour by the Regional Conciliation Board and which was also recommended by the Industrial Court in its report, was enforced but, in the case of Bunna Gond, the decision given by the Regional Conciliation Board in its award was not enforced and the recommendation of the Industrial Court that the case be decided against him was enforced. It is impossible to hold that, when the report of the Industrial Court in one case concurred with the award and, in another case, recommended the setting aside of the award of the Board, that report can be held to be an order enforcing the award of the Conciliation Board because if that be so, then, in the case of Bunna Gond, it would mean that the award was enforced even though the findings of the Industrial Court were against the award. Obviously, therefore, this contention of learned counsel would lead to an absurd position and must be rejected.

(12) For the purpose of examining whether the order impugned could or could not be passed validly within the provisions of cl. (b) of S. 3 of the U. P. Industrial Disputes Act, 1947, this order may be divided into two parts. The order of the State Government contained in the notification of 3-12-1949, is to the effect that the

findings of the Industrial Court (Sugar), Lucknow, are enforced and, as has been said above. the finding of the Industrial Court was that Ram Nath Koeri opposite party No. 3 should be reinstated to his post with continuity of service and the entire wages paid to him for the period of his involuntary unemployment within 15 days from the date of the enforcement of the report by the State Government. The second part of the recommendation of the Industrial Court is for payment of wages for the period of unemployment which had already expired on the date on which the findings are enforced by the State Government.

This part of the order of the State Government was, therefore, clearly retrospective as it related to payment of wages for a past period which had expired before the order under S. 3 (b) of the U. P. Industrial Disputes Act, 1947, was passed by the Government. According to the view taken by a Full Bench of this Court in AIR 1954 All 538 (A), such orders for payment of wages in respect of periods already expired cannot be validly passed under S. 3(b) of the U. P. Industrial Disputes Act, 1947, and this part of the order is, therefore, clearly illegal and its enforcement must be restrained by issue of a writ of mandamus.

(13) The other part of the order relates to the reinstatement of opposite party No. 3 to his post with continuity of service with effect from the date of the order. So far as this part of the order is concerned, the submission of learned counsel for the petitioner was that, under cl. (b) of S. 3 of the U. P. Industrial Disputes Act, 1947, even a prospective order, that can be passed by the State Government, must relate to the observance of "such terms and conditions of employment as may be determined in accordance with the order" and an order, directing reinstatement of an employee, is not covered by these words used in the statute. It is argued that an order of reinstatement is an order relating to non-employment or re-employment of an employee and not an order relating to terms and conditions of employment and, consequently, the order impugned could not be passed by the State Government in exercise of its powers under S. 3(b) of the Act.

In support of this contention, learned counsel referred me to the definition of the word 'industrial dispute' in the Industrial Disputes Act, 1947 (Central Act No. 14 of 1947) which definition has been adopted in the U. P. Industrial Disputes Act, 1947 (U. P. Act No. 28 of 1947) also. 'Industrial Dispute' has been defined to mean

> "any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour of any person."

This definition uses the various words, employment, non-employment, terms of employment and conditions of labour, and learned counsel submitted that the use of these different words and expressions was an indication that each expression conveyed a different meaning not conveyed by other expressions. Since the words, 'employment' and 'non-employment', were also used in addition to the expression 'terms of employment', the legislature must be deemed to have laid down that employment and non-employment are not covered by the expression 'terms of employment.'

In support of this contention, learned counsel referred me to a decision of the Federal Court in — 'Western India Automobile Association v. Industrial Tribunal, Bombay', AIR 1949 FC 111 (R). The Federal Court, in that case, had to consider the question whether a dispute as to reinstatement was outside the jurisdiction of the Industrial Tribunal under the Industrial Disputes Act, 1947. It was held:

> "Employment or non-employment' constitutes the subject-matter of one class of industrial disputes, the other two classes of disputes being those connected with the terms of employment and the conditions of labour. The failure to employ or the refusal to employ are actions on the part of the employer which would be covered by the term 'employment or non-employment'. Reinstatement is connected with non-employment and is therefore within the words of the definition."

This decision was further followed by the Federal Court in the case of — 'India Paper Pulp Co., Ltd. v. India Paper Pulp Workers' Union', AIR 1949 FC 148 (S), where, relying upon the earlier case, the Federal Court held that a claim for compensation for wrongful dismissal is clearly a dispute in connection with non-employment. Learned counsel wanted to draw an analogy in order to support his argument that the words, 'terms and conditions of employment' used in S. 3(b) of the U. P. Industrial Disputes Act, 1947, must be held not to include employment or non-employment because these words were considered necessary in the definition of 'industrial dispute' where the other two expressions used were 'terms of employment, and 'conditions of labour'. I do not consider that such an analogy exists or that this argument can be accepted. Section 3(b), U. P. Industrial Disputes Act, 1947, uses the words 'terms and conditions of employment' and not 'terms of employment' and 'condition of labour'. Extending the argument advanced by learned counsel himself, it would be necessary to hold that the words 'terms of employment' cover a field of interpretation which is not covered by the words 'conditions of employment' and vice versa and so the two are complementary to each other and and do not overlap.

In the definition of the word 'industrial dispute', the expression 'conditions of employment' was not used and, obviously, the expression 'conditions of labour' is different from the expression 'conditions of employment'. It would appear to me to be more appropriate to hold that, in S. 3(b) of the U. P. Industrial Disputes Act, 1947, the expression 'conditions of employment' was used in order to cover the words 'employment, non-employment and conditions of labour' which were used in the definition of an industrial dispute. In this connection, it may be profitable to take an example. If a workman is employed and, at the time of his employment, conditions of employment are agreed upon between the employer and the workman which also lay down that the service of the workman are not to be dispensed with except under certain conditions, I do not think any one would contend that such a term in the agreement would not be held to be a term or condition of employment. Once a man has been employed, his removal from employment would always be subject to the terms and conditions of employment and, similarly, if he has been wrongly removed from service, his re-instatement would also be clearly a matter to be dealt with

in accordance with the terms and conditions of employment.

It does not appear to be necessary for me to go any further and examine the question whether the conditions regulating the employment of a workman for the first time, or, his re-employment would also be 'terms and conditions of employment' within the meaning of this expression used in S. 3(b) of the U. P. Industrial Disputes Act, 1947. Even, under the Government of India Act, 1935, and the Constitution, the provisions, dealing with the civil services, usually mentioned recruitment or appointment and conditions of service. It may be that conditions regulating recruitment or initial appointment may not be treated as being parts of conditions of service but once recruitment or appointment has taken place and a person has entered into the civil service of the state, all disciplinary matters, including terms relating to removal from service and dismissal, would be governed by conditions of service applicable to that person subject, of course, to the special provision that has been made in the Government of India Act or the Constitution, specifically, for the purpose of placing limitations on the powers of removal and dismissal.

In my opinion the words 'terms and conditions of employment' used in S. 3(b) of the U. P. Industrial Disputes Act, 1947, cannot be considered to be narrower than the expression 'conditions of service' used in the Government of India Act, 1935, and the Constitution and, therefore, would surely cover terms and conditions relating to removal and dismissal of the workmen. Re-instatement is different from re-employment. In the case of re-employment, a person, at the time of his re-employment, is not deemed to be in service and his re-employment really amounts to a fresh recruitment or appointment. The position in the case of re-instatement is different as re-instatement implies continuance of previous service. It is true that the effect of re-instatement in one respect is the same as the effect of re-employment, viz., that the person re-instated or re-employed comes back into the service of the employer from the date on which the order for re-instatement or re-employment is made effective but there is one very important distinction. In the case of re-instatement, there is continuity with the previous service whereas, in the case of re-employment, there is a fresh start of a new service. Re-instatement and re-employment cannot, therefore, be dealt with on the same basis and even if the word 're-employment' be held to be covered by the words 'recruitment or appointment', there is no reason to hold that the word 're-instatement' must also be similarly covered by these words. Re-instatement in service, which brings into effect continuity of the previous service, is clearly an order relating to terms and conditions of service, or, terms and conditions of employment. Learned counsel's contention that an order relating to re-instatement is not an order relating to terms and conditions of employment cannot, therefore, be accepted.

(14) The case has, however, to be examined in an entirely different aspect and that is whether the particular order now impugned can be said to be an order directing the petitioner

> "to observe, for such period as may be specified in the order, such terms and conditions of employment as may be determined in accordance with the order."

The expression 'to observe for such period as may be specified, such terms and conditions of employment as may be determined' gives an indication that clause (b) of S. 3 of the U. P. Industrial Disputes Act, 1947, is meant for the purpose of passing orders by which the Government gives directions about what the terms and conditions of employment should be and not how a particular term and condition of employment already in existence should be acted upon.

It appears from the language that this provision was not meant for the purpose of dealing with individual disputes arising out of the application of a term or condition of employment and no power was granted to the State Government, under this provision of law, to sit as an adjudicator to decide a dispute that might have arisen relating to the working and actual application of terms and conditions of employment already in force. The provision was for the purpose of enabling the State Government to vary the agreed terms and conditions of employment for purposes specified in S. 3, U. P. Industrial Disputes Act, 1947, under the pressing necessities or expediency justifying such course of action.

For cases, in which there might be a dispute relating to the enforcement or manner of application of any specific term or condition of employment, provision was made separately in cls. (c) and (d) of S. 3, U. P. Industrial Disputes Act, 1947, under which that particular dispute could be referred for conciliation or adjudication and industrial Courts could be appointed in order to deal with such dispute. It, however, appears that the State Government, while it did grant powers to the Regional Conciliation Board by its notification dated 10-3-1948, to settle industrial disputes by conciliation or to adjudicate upon industrial disputes by giving an award, did not, for some reason or the other, consider it appropriate to grant a similar power to an industrial Court before which the dispute might go up in appeal.

The function of the industrial Court was limited to giving findings on the points in dispute without adjudicating upon them. The State Government itself had no power of adjudicating on such industrial disputes either under the U. P. Industrial Disputes Act (U. P. Act No. 28 of 1947) or under the Central Industrial Disputes Act, 1947 (Central Act No. 14 of 1947). The State Government had, therefore, to fall back upon the provisions of S. 3(b), U. P. Industrial Disputes Act, 1947, and, in doing so, obviously, it went wrong as S. 3(b) was not so framed by the legislature as to permit the State Government to appropriate to itself the functions of the appellate authority deciding appeals from awards by the Regional Conciliation Board. It may be noticed that the State Government was itself aware of this difficulty and, in cl. (25) of the notification of 10-3-1948, the State Government laid down that

> "for the purposes of this order, an appeal shall be deemed to have been decided on the date on which the Provincial Government shall notify the orders therein passed by it under S. 3(b) of the United Provinces Industrial Disputes Act, 1947."

Obviously, the State Government could have no power to pass orders in the appeal which lay to the Industrial Court (Sugar), Lucknow, and not the State Government. Further, no order in the appeal need be notified under S. 3(b), U. P. Industrial Disputes Act, 1947. By framing cl. (25) in this manner, the State Government intended to convey that, though the appeal would not be decided by the Industrial Court at all and could not be decided by the State Government, the appeal must be deemed to be disposed of as soon as the State Government after perusing the find-

ings, chose to pass its orders under S. 3(b), U. P. Industrial Disputes Act, 1947.

The whole scheme adopted by the State Government shows that the Government wanted to keep to itself full powers of passing whatever order it liked whenever there was an appeal from an award given by the Regional Conciliation Board and, consequently, preferred to act under S. 3(b), U. P. Industrial Disputes Act, 1947, however inadequate may be the power granted by that provision of law. It is obvious that there can be industrial disputes which might not relate to terms and conditions of employment at all. For example, if there be a dispute between employers and employers, or, between workmen and workmen, such a dispute is not likely to be a dispute relating to terms and conditions of employment. Even, in such cases, according to the order dated 10-3-1948, the dispute has to be settled by conciliation or adjudicated upon by an award by the Regional Conciliation Board, but once an appeal is filed against the award made by the Regional Conciliation Board, there can be no decision of that dispute at all.

The State Government has no power to decide the appeal and can only pass orders under S. 3(b) of the U. P. Industrial Disputes Act, 1947, on the basis of the findings of the Industrial Court (Sugar), Lucknow, and this power does not cover cases where the dispute does not relate to terms and conditions of employment. A great lacuna was left in this order. Whatever be the reason for this defect in the order, the effect of it is that, after an appeal from an award of a Regional Conciliation Board has been filed before the Industrial Court, the matter ceases to be dealt with as an industrial dispute which is to be decided, and final orders can be passed only in those cases in which the dispute if of such a nature that orders passed by the State Government under S. 3(b), U. P. Industrial Disputes Act, 1947, would meet the requirements for disposing of the dispute.

In the present case, as I have said earlier, the order passed on 3-12-1949, was not an order of the nature contemplated by S. 3(b) of the U. P. Industrial Disputes Act, 1947. It was an order of the State Government which, in effect, gave its decision on the industrial dispute relating to the enforcement of certain terms and conditions of service and not an order requiring the petitioner to observe terms and conditions of service specified in the order. This part of the order is, therefore, beyond the competence of the State Government, acting in exercise of its powers under S. 3(b) of the U. P. Industrial Disputes Act, 1947. Enforcement of that part of that order after 26-1-1950, would be action taken on an order which had no validity in law even when passed and such action by the opposite parties must be restrained by the issue of a writ of mandamus.

(15) As a result, I allow this petition and direct that a writ of mandamus shall issue to the opposite parties not to take any action to enforce the order dated the 3rd of December, 1949. The petitioner shall be entitled to its costs which I assess at Rs. 300/-.

A/K.S.B. Petition allowed.

A.I.R. 1954 ALLAHABAD 715 (Vol. 41, C.N. 281)

GURTU, J. (21-1-1954).

Ram Bharosey and others, Appellants v. Lachmandas and others, Respondents.

Second Appeal No. 92 of 1950; against decision of Civil J. Farrukhabad; D/- 30-11-1949.

Hindu Law — Will — Construction — Life or absolute estate — (Words and Phrases — Malik) — (Deed — Construction — Will) — (Succession Act (1925), Ss. 74, 82, 95).

A bequest to a woman as 'Malik' imports a full proprietary right, unless there is some thing in the context to qualify it. (Para 5)

The will ran as follows: "Bad mere musammat Gopi.....Malik howe, aur usko harek tarah ka ikhtiyar hoga ki jo chahe so khairat den wa dan waghirah karen. Koi uska Mazahim na howe ....." The will then made certain provisions of the testator's sister and her husband. Lastly, it recited that upon the death of Smt. Gopi, the testator's property would go according to his directions to his two daughters.

Held, that the words did not expressly refer to the right to alienate. They referred only to the making of religious or charitable gifts of income. The words, therefore, did not imply limited power of alienation and hence the word 'Malik' conferred full proprietary rights. The intention of the testator that after the death of Gopi the testator's property would go to his daughters does not affect the position because where the dispositive words are clear and they indicate the creation of an absolute estate in the first devisee, all subsequent devisees must fail whatever the intention of the testator may have been. The fact that the testator must have known what kind of estate a Hindu female inherits would not also affect the full proprietary rights of Gopi. (Paras 3, 4, 5a)

Anno: Succession Act, S. 74 N. 1, 3; S. 82 N. 1; S. 95 N. 2, 4.

K. C. Saksena for Appellants; J. N. Chatterji and J. N. Agarwala for Respondents.

JUDGMENT: The main question which arises in this appeal is as to the nature of the estate which passed on to Smt. Gopi under the will of Nanak Chand.

(2) It is conceded before me that if Smt. Gopi was given an absolute estate then the plaintiff will be out of court and the suit would have to be dismissed.

(3) The will in question, after reciting the testator's interest in the properties bequeathed, states as follows:

"Bad mere Musammat Gopi ..... Malik howe, our usko har ek tarah ka ikhtiyar hoga ki jo chahe so khairat den wa dan waghirah karen. Koi uska Mazahim na howe..... ....".

The will then makes certain provisions of the testator's sister and her husband.

(4) Lastly, the will recites that upon the death of Smt. Gopi, the testator's property would go according to his directions to his two daughters.

(5) From the discussion on the subject in Mulla's Hindu Law, 10th Edition (1946) at pages 486 to 489 it appears that a bequest to a woman as 'Malik' imports a full proprietary right, unless there is something in the context to qualify it. It has, therefore, to be considered whether the words "aur usko har ek tarah ka ikhtiyar hoga ki jo chahe so khairat den wa dan waghairah karen. Koi uska mazahim na howe" qualify the import of the word "Malik" and cut down the absolute estate imported by the word. It appears to me that the words quoted above do not expressly refer to the right to alienate. They rather appear to refer only to the making of religious or charitable gifts of income.

It cannot, therefore, be said that the qualifying words used imply a limited power of alienation. If the power of alienation is not cut down by these words, as appears to be the case, then the word "Malik" would carry its full import and confer full proprietary rights on Smt. Gopi. The qualifying words would, thus, not affect the full import of the word 'Malik'.

(5a) It is true that the intention of the testator appears to have been that after the death of Smt. Gopi, the daughters would get his estate. However where the dispositive words are clear and they indicate the creation of an absolute estate in the first devisee, all subsequent devisees must fail whatever the intention of the testator may have been. The fact that Smt. Gopi was a female and the testator must have known what kind of estate a Hindu female inherits, has no doubt to be kept in view, but when the word 'Malik' is used without any clear qualifying words showing that the power of alienation has been cut down, there is no reason why the female should not be considered to have been granted full proprietary rights. Accordingly, in my view, Smt. Gopi acquired an absolute estate under the will of her husband, Nanak Chand.

(6) In this view of the matter, the appeal is allowed. The decrees of the courts below must be vacated and the plaintiff's suit must be dismissed. Since a question of interpretation of the will was involved in this case I think that this is a fit case in which the parties should bear their own costs throughout and I order accordingly. Leave to appeal allowed to a Division Bench.

B/H.G.P. Appeal allowed.

A.I.R. 1954 ALLAHABAD 716 (Vol. 41, C.N. 282)

MALIK C. J. AND SAPRU J. (15-12-1953)

Mohan Lal and others, Appellants v. Gokaran Singh and others, Respondents.

Letters Patent Appeal No. 15 of 1950, from judgment of Seth J., reported in AIR 1950 All 87.

(a) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), Ss. 2(a) and 4 — Debtor having no personal liability — Application by.

A debtor is a person who has any pecuniary liability; it does not mean that the pecuniary liability must be personal liability and will not include a liability recoverable only from his property. Therefore, even a debtor who is not personally liable but whose property is liable to be taken in satisfaction of his debts can apply under the Encumbered Estates Act. (Para 3)

(b) Civil P. C. (1908), O. 34 R. 1 — Effect of non-joinder.

Unless the integrity of the mortgage has been broken the mortgage is one and the liability of the mortgagors is joint and several and a second suit cannot be brought against some of the mortgagors who were not impleaded in the first decree for sale. (Para 4)

Anno: Civil P. C., O. 34 R. 1 N. 19, Pt. 18.

1953 Mulla: O. 34 R. 1, P. 1083 N. "Consequences .... non-joinder (various conflicts noticed in N. 19 to O. 34 R. 1 in AIR Com., not noticed in Mulla, for example see Pts. 8 to 10 in N. 19 to O. 34 R. 1 in AIR Com. — Discussion in AIR Com. note exhaustive and illustrative).

(c) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 7 — Mortgage suit against landlord not applying under Act — Running of limitation — (Limitation Act (1908), Art. 132).

If a mortgage debt gets so split up that the mortgagee has a right to file a separate suit against each mortgagor, there is no reason why the limitation against those who did not apply under the Encumbered Estates Act should not continue to run. (Para 5)

Anno: Limitation Act, Art. 132 N. 25.

(d) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 11 — Application under section granted — Effect.

By granting an application under S. 11 the Special Judge must be deemed to have held that the property claimed by the objector was not liable for the debts of the landlord applicant and after that decision it is no longer open to the creditors to claim that the objector was a co-debtor and there should be apportionment of the debt. (Para 6)

Baleshwari Prasad, for Appellants; Prem Mohan Varma, for Respondents.

MALIK C. J.:

This is a Special Appeal against the decision of a learned single Judge. The facts of the case are that Bhola Singh and his son Hakim Singh had mortgaged certain properties to Mohan Lal and others in the year 1926. On 1-2-1932, Bhola Singh sold his half share in one of the villages to Subedar Singh. A suit, No. 35 of 1932, was filed by Mohan Lal and others against the mortgagors but Subedar Singh was not impleaded. The preliminary decree was passed on 21-4-1932, and the final decree on 4-3-1933. In the year 1936 Bhola Singh and Hakim Singh applied under the Encumbered Estates Act. Mohan Lal and others claimed that they were creditors and they proved their debt. On 11-3-1939 a decree under S. 14 of the Encumbered Estates Act was passed in their favour against the landlord applicants. In the year 1940 Subedar Singh sold the 8 Biswansi share purchased by him in 1932 to Gokaran Singh.

This share had been included by Bhola Singh and Hakim Singh in the list of properties belonging to them. Gokaran Singh filed an objection under S. 11 of the Encumbered Estates Act in the year 1944. His objection was allowed and the 8 Biswansi share was excluded from the list of properties belonging to the landlord-applicants. Mohan Lal and others then filed an application under S. 9(5)(a) of the Encumbered Estates Act for apportionment of the debt on the ground that Gokaran Singh, being in possession of a part of the mortgaged property, was liable to pay a portion of the debt and the debt should, therefore, be apportioned between the landlord-applicant and Gokaran Singh. The trial court granted the application and held that Gokaran Singh was liable to pay Rs. 741/-. Gokaran Singh filed an appeal and the learned District Judge allowed the appeal and set aside the order of the trial court on the ground that Gokaran Singh was not a joint debtor. On a further appeal to this Court the learned Judge affirmed the decision of the lower court and dismissed the appeal but for different reasons.

(2) The learned Judge, however, gave leave to file a special appeal and this appeal has been filed against his decision. The appeal was rightly dismissed by the learned single Judge though in our view the appeal should have been dis-

missed for reasons other than those given by the learned single Judge. The learned Judge was of the opinion that a debtor under the Encumbered Estates Act was a person who was personally liable for the payment of a debt and the apportionment of a debt could, therefore, be made only between co-debtors personally liable for payment. The learned Judge relied on the first part of S. 4 of the Encumbered Estates Act in support of the proposition. Relevant portion of S. 4 is as follows :

> "At any time within one year after the date on which this chapter (chapter 3) comes into force any landlord who is subject to or whose immovable property or any part thereof is encumbered with private debts...."

The learned Judge from this deduced that a landlord "is subject to" a debt for which there is personal liability, and if, however, there is no personal liability, he is not "subject to" the debt and the debt is only recoverable from the property.

(3) We do not think that this reasoning was, with great respect to the learned Judge, sound. All that the section means is that the landlord should be liable for secured or unsecured debts before he can apply under the Encumbered Estates Act. Even a debtor who is not personally liable but whose property is liable to be taken in satisfaction of his debts can apply under the Encumbered Estates Act. The word 'debtor' has not been defined but 'debt' includes (see S. 2 (a), Encumbered Estates Act) "any pecuniary liability except a liability for unliquidated damages." A debtor, therefore, is a person who has any pecuniary liability; it does not mean that the pecuniary liability must be personal liability and will not include a liability recoverable only from his property. We, therefore, do not agree with the reasoning of the learned Judge but there are other reasons why this appeal must fail.

(4) We have already pointed out that when the mortgagees filed the suit on the basis of the mortgage in the year 1932 they did not implead Subedar Singh and the decree obtained by them was only against the original mortgagors, Bhola Singh and Hakim Singh, or their heirs. The mortgagees had no right to file a second suit on the basis of the same mortgage and obtain a decree against Subedar Singh. Order 34, R. 1, Civil P. C. provides that

> "Subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

The Rule does not say what would be the consequence of non-joinder of some of the persons interested in the mortgage security or in the right of redemption. There has been considerable difference of opinion in the High Courts on the point whether the result of such non-joinder must prove fatal to the suit or it is possible to apply to it the provisions of O. 1, R. 9 of the Code. If the defect is detected during the pendency of the suit and the period of limitation has not expired, it is always possible to remedy the defect by impleading those who had been wrongly left out, but unless the integrity of the mortgage has been broken the mortgage is one and the liability of the mortgagors is joint and several and it is difficult to see how a second suit can be brought against some of the mortgagors who were not impleaded in the first decree for sale. Even if, however, it be assumed that a second suit against Subedar Singh could be filed, the period of limitation for such a suit expired in the year 1938 on the expiry of twelve years from the date of the mortgage.

(5) Sri Baleshwari Prasad, learned counsel for the appellants, has urged that limitation ceased to run after 1936, as a suit on the basis of a joint debt could not be filed by reason of the provisions of S. 7 of the Encumbered Estates Act. If there was a joint debt and Bhola Singh, Hakim Singh and Subedar Singh were co-debtors, it was not open to the mortgagees to file separate suits against each co-debtor for sale of the mortgaged property and obtain separate decrees. They should have, in accordance with the provisions of O. 34, R. 1, Civil P. C., impleaded all the co-debtors as parties to the suit. If, on the other hand, by some process of reasoning, not clear to us, the debt got so split up that the mortgagees had a right to file separate suits against each mortgagor, then there was no reason why the limitation against those who had not applied under the Encumbered Estates Act should not continue to run.

(6) There is one more reason for dismissing this appeal. Gokaran Singh had filed an objection under section 11 of the Encumbered Estates Act and his objection was allowed. In a proceeding under S. 11 of the Encumbered Estates Act the learned Special Judge has to determine whether the property claimed by an objector is liable to be sold or mortgaged in satisfaction of the debts of the landlord applicants. By granting the application under S. 11 of the Encumbered Estates Act the learned Special Judge must be deemed to have held that the property claimed by Gokaran Singh was not liable for the debts of the landlord-applicants. After that decision it was no longer open to Mohan Lal and others to claim that Gokaran Singh was a co-debtor and there should be apportionment of the debt.

(7) The appeal has, therefore, no force and is dismissed with costs.

B/V.R.B. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 717 (Vol. 41, C.N. 283)

AGARWALA J. (26-11-1953)

Choteylal and others, Plaintiffs-Appellants v. Gajadhar Prasad and another, Defendants-Respondents.

Second Appeal No. 2084 of 1948, against order of Civil J., Agra, D/- 20-9-1948.

(a) Hindu Law — Joint family — Presumption — Parties removed further and further.

The presumption of jointness which arises in the case of the members of a Hindu family becomes weaker and weaker as the parties are removed further and further from the common ancestor. The modern tendency in Hindu families, in the State of Uttar Pradesh at any rate, is towards separation rather than jointness and a presumption of jointness can hardly be drawn when the parties are removed by four or five degrees. If, in addition to this, the names of the parties are recorded over separate shares in the Khewat or other records a presumption of jointness should not at all be drawn and the plaintiff must prove allegation of jointness by evidence. (Para 7)

(b) Hindu Law — Joint family — Presumption — Family consisting of major as well as minor members.

Under the Hindu Law, a major member of a joint family may separate himself by his mere volition. A partition does not require the consent of the other members of the family even where the family consists of major as well as minor members.

So far as a minor member is concerned, as he is not capable of exercising his volition or giving his consent the law requires that in a suit by his guardian the Court will order partition only if it is for the benefit of the minor and not otherwise. In the case of a minor, therefore, there is a difficulty in obtaining partition at will. But that difficulty does not exist in the case of a major member of a family. When two major members of the family have separated, there is left no presumption either way about the rest of the members whether they remained joint or they too became separate. The presumption of jointness in such a case is destroyed and it is for the plaintiffs to establish their case. If the plaintiffs say that the family was joint, they have to prove jointness. If they say that the family has become separated, they have to prove separation.

(Para 7)

Brij Lal Gupta, for Appellants; S. N. Singh, for Respondents.

JUDGMENT: This is a plaintiffs' appeal arising out of a suit for a declaration or in the alternative for recovery of possession by the ejectment of the defendants-respondents from certain zamindari property and a house.

(2) One Ram Gopal who was arrayed as defendant No. 5 and who is in this appeal arrayed as respondent No. 2 and the plaintiffs-appellants are members of a family whose common ancestor was one Pitambar. Pitambar had three sons, Shib Lal, Ram Lal and Khiyali Ram. Plaintiffs 3 and 4 are great grandsons of Shib Lal. Plaintiff 1 is grandson of Ram Lal and plaintiff 2 is greatgrandson of Ram Lal. Ram Gopal is greatgrandson of Khiyali Ram. The plaintiffs and Ram Gopal are, therefore, removed by several degrees from each other. Ram Gopal executed a mortgage in 1937 of the property in dispute in favour of one Dwarka Prasad, father of defendant-respondent Gajadhar Prasad. In 1938 Ram Gopal executed a deed of gift of the property in suit in favour of the same Dwarka Prasad.

The present suit was instituted by the plaintiffs in the year 1945 for a declaration that the aforesaid deeds of gift and mortgage were invalid because Ram Gopal was a junior member of the joint Hindu family and the property was joint ancestral property and as such he had no right to make a mortgage or gift of the same.

(3) The defence was that Ram Gopal was a separated member of the family and the property was his own which he would gift or mortgage as he liked.

(4) The trial court held that it was not shown that Ram Gopal had separated and therefore the two deeds in question were declared to be void and the suit for possession was decreed.

(5) There was an appeal by the defendant Gajadhar Prasad. The lower appellate court held that in a case of this kind when the members of a family are removed by several degrees the presumption of jointness is very weak and that it was rebutted by the entry of the names of the members over defined and different shares in the Khewat. In this view the lower appellate court held that Ram Gopal was a separated member and he could mortgage and make a gift of the property in dispute.

(6) In this second appeal by the plaintiffs it is urged that mere entry of the names of the members of the family over different shares in the Khewat does not amount to evidence of separation and that the presumption of jointness remains intact.

(7) As already stated, Ram Gopal and the plaintiffs are removed by several degrees. The presumption of jointness which arises in the case of the members of a Hindu family becomes weaker and weaker as the parties are removed further and further from the common ancestor. For instance, it is strong in the case of brothers. In the case of grandsons it becomes weaker and in the case of greatgrandsons it becomes still weaker. As may be judged from the recent census report, the modern tendency in Hindu families, in this State at any rate, is towards separation rather than jointness. In modern times, a presumption of jointness can hardly be drawn when the parties are removed by four or five degrees. If, in addition to this, the names of the parties are recorded over separate shares in the Khewat or other records I do not think that a presumption of jointness should at all be drawn. In such an event the plaintiff must prove his allegation of jointness by evidence.

In the present case, however, there is a piece of evidence which the lower appellate court has overlooked and which also is destructive of the presumption of jointness. There was a partition in the village in the year 1931. In that partition two of the plaintiffs, viz. Raghubar Dayal and Prabhu Dayal applied that their shares in the Khewat be formed into a separate patti. That was done. This would show that, so far as at least these two plaintiffs were concerned, they were separated from the rest of the family in the year 1931. The trial court remarked that at that time Ram Gopal was a minor and therefore there could be no partition. This is a mistaken notion of the law.

Under the Hindu Law, a major member of a joint family may separate himself by his mere volition. A partition does not require the consent of the other members of the family even where the family consists of major as well as minor members. The major member can separate at any moment by a mere declaration of his will. So far as a minor member is concerned, as he is not capable of exercising his volition or giving his consent the law requires that in a suit by his guardian the court will order partition only if it is for the benefit of the minor and not otherwise. In the case of a minor, therefore, there is a difficulty in obtaining partition at will. But that difficulty does not exist in the case of a major member of a family. When Raghubar Dayal and Prabhu Dayal, two major members of the family, had separated, there was left no presumption either way about the rest of the members whether they remained joint or they too became separate. The presumption of jointness in such a case is destroyed and it is for the plaintiffs to establish their case. If the plaintiffs say that the family was joint, they have to prove jointness. If they say that the family has become separated, they have to prove separation.

In the present case it was for the plaintiffs to prove that the family was joint as no presumption of jointness could be raised in their favour. They failed to establish this fact.

(8) There is no force in this appeal. It is dismissed with costs.

B/H.G.P. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 719 (Vol. 41, C.N. 284)

MALIK C. J. AND GURTU J. (29-3-1954)

Hubraj Singh and others, Defendants-Appellants v. Mst. Rama Dasi Kuer and another, Plaintiffs-Respondents.

Second Appeal No. 1287 of 1948 from order of Dist. J., Azamgarh, D/- 29-7-1948.

Civil P. C. (1908), O. 7, R. 11 and S. 151 — Order rejecting plaint under Cl. (c) — Restoration of suit under inherent powers.

Even in cases where it is not possible to review an order under O. 47, R. 1 the Court can under its inherent powers restore a plaint dismissed under O. 7, R. 11(c) if good cause is shown: Case law discussed. (Para 9)

A suit was instituted in the civil Court on 25-4-1947 when that Court had jurisdiction to take cognisance of suits of that nature. The plaint however was rejected because the court-fee paid was insufficient. The suit was restored to its original number on 26-7-1947 and the plaintiff paid the deficiency on 28-7-1947. No question of limitation arose on either of the dates so that it could be said that the defendant was deprived of any valuable right by the order of restoration. It was contended that as the U. P. Tenancy (Amendment) Act, 1947, had come into force on 14-7-1947 the suit had become cognisable by the revenue Court only.

Held that the Court had inherent power to restore the suit. As a result of its order of restoration the suit, on payment of the court-fee, was to be deemed to have been instituted on 25-4-1947 and that therefore the contention of the defendant was not tenable. (Para 9)

Anno: C. P. C., S. 151 N. 2; O. 7, R. 11 N. 13.

CASES REFERRED: Paras

(A) (V22) AIR 1935 All 985: 1935 All LJ 1127 3, 6
(B) ('37) Civil Revn. No. 367 of 1936, D/- 19-8-1937 (All) 4
(C) (V26) AIR 1939 All 452: 1939 All LJ 335 5
(D) (V31) AIR 1944 Oudh 327: 20 Luck 268 6
(E) (V34) AIR 1947 Mad 84: ILR (1947) Mad 220 7
(F) (V22) AIR 1935 Cal 336 (2): 62 Cal 61 8

Kanhya Lal Misra, for Appellants; Mukhtar Ahmad, for Respondents.

MALIK C. J.:

This appeal was referred to a Bench by a learned Single Judge on 8-5-1951. The only point raised by learned counsel for the appellant is that the suit was not cognizable by the civil Court.

The respondents here had filed Suit No. 20 of 1947 in the Court of the learned Civil Judge, Azamgarh on 25-4-1947. It is admitted by learned counsel for the appellant that on the date when the suit was filed it was cognizable by the learned Civil Judge. On 3-6-1947, however, the plaint was rejected as the court-fees paid was insufficient. On 5-7-1947, the plaintiff applied for restoration and was granted time to pay the deficiency up to the 14th July.

Again, on the 14th July the deficiency in court-fees not having been made good the plaint was rejected. On the 26th July, however, the previous order was set aside, the plaint was restored to its original number, and on 28-7-1947 the deficiency was made good. On 15-6-1947, however, the U. P. Tenancy (Amendment) Act, 1947 had come into force and it is submitted by learned counsel that any suit of this nature became cognizable by the revenue Court.

(2) The point, therefore, that arises for decision is whether this suit should be deemed to have been instituted on 25-4-1947 when it was originally filed, or on 28-7-1947 when the deficiency was made good after the order restoring the plaint to its original number was passed on 26-7-1947.

(3) Our attention has been drawn to several decisions of this Court. In — 'Bachan Singh v. Dasrath Singh', AIR 1935 All 985 (A), a learned single Judge of this Court held that it was open to the Court to treat the application for restoration as a fresh plaint and under Ss. 149 and 151, Civil P. C., extend the time for payment of court-fee and treat the court-fee paid on the former plaint as part of the court-fee on the fresh plaint, and the court is not compelled to require the plaintiff to pay full court-fee on the fresh plaint.

The point raised before the learned Judge was that the lower Court had no jurisdiction to entertain an application for restoration after a plaint had been rejected under O. 7, R. 11(c) and the proper remedy of the plaintiff was to apply for review of judgment. It may be mentioned that if a fresh plaint had been filed under O. 7, R. 13 it would have been barred by limitation.

Though the learned Judge has said that the application for restoration should be treated as a fresh plaint the fact that he held that S. 149, Civil P. C., was applicable and the Court must be deemed to have extended the time for payment of court-fee goes to show that he treated the plaint as having been filed on the date when the plaint, which was deficiently stamped, had been filed.

(4) The second case that has been brought to our notice is an unreported decision of a Bench of this Court in — 'Ramnath Misir v. Deota Man Misir', Civil Revn. No. 367 of 1936, D/- 18-8-1937 (All) (B), by Sulaiman, C. J. and Harries, J. The plaint in that case was rejected under O. 7, R. 11(c) on 13-2-1936. By that date the period of limitation for filing the suit had expired. The very next day the plaintiffs made an application offering to pay the deficiency and prayed that the learned Judge may be pleased under his inherent jurisdiction to set aside his previous order and to accept the court-fee. It was urged that the learned Judge had no jurisdiction whatsoever to make the order restoring the suit and accepting the court-fee. The learned Judges, however, held that the lower Court had jurisdiction reserved under S. 151, Civil P. C.

(5) The third case to which reference has been made is again a judgment of a learned single Judge in — 'Anant Prasad Singh v. Chunnu Tewari', AIR 1939 All 452 (C). The suit in that case was instituted on 29-7-1936. The promissory note on the basis of which the suit was filed was dated 30-7-1933. The plaint, however, was written on a paper insufficiently stamped and the court dismissed the suit under O. 7, R. 11(c). This dismissal order was passed after the period of limitation had expired.

Sometime later the plaintiff made an application to the court that he would have paid the

court-fee within the time allowed but he fell ill and was unable to do so. He, therefore, prayed that the order passed under O. 7, R. 11(c) be set aside and the additional court-fee be accepted.

This application was granted on 1-5-1937. A revision was filed against the order on the ground that the only remedy left to the plaintiff was a fresh suit and the trial Court had no jurisdiction to review its order passed under O. 7, R. 11(c) and restore the case. The learned single Judge, Allsop J. held that the learned Judge of the Court of Small Causes who passed the order of restoration had jurisdiction under S. 151, Civil P. C., but even if he had not he would not like to exercise his discretion under S. 115, Civil P. C.

(6) The only other decision of this Court is — 'Munshi Ram v. Sun Life Assurance Cc. Canada', AIR 1944 Oudh 327 (D). The learned Judges in that case followed the line indicated by Bennet J in — 'Bachan Singh's case (A)' and held that though the application for restoration may be treated as a fresh plaint yet it was possible for the court to restore the plaint already rejected and extend the time for payment of court-fee under S. 149, Civil P. C. Reliance was placed on the inherent powers of the Court under S. 151.

(7) In — 'Kumaraswamiah v. Krishna Reddi', AIR 1947 Mad 84 (E), it was held that under O. 47, R. 1, Civil P. C., the Court had power to review its order under O. 7, R. 11(c) and grant further time. The facts of that case are, however, peculiar. The order rejecting the plaint was not passed till 30-1-1945, when the learned Subordinate Judge purported to reject the plaint with a back date from 25-1-1945, and on 29-1-1945, the plaintiff had filed two applications, one for review and the other extension of time to pay the court-fee.

(8) One other case to which reference was made in the course of argument is — 'Saratchandra Sen v. Mrityunjay Ray', AIR 1935 Cal 336 (2) (F), where an order under O. 7, R. 11(c) was passed rejecting the plaint. The plaintiff did not file an appeal against that order. The period of limitation expired and then the Court acting under S. 151, Civil P. C., restored the suit to its original number. The learned Judges in that case held that the Court had no power under S. 151, Civil P. C., to deprive a defendant of the right obtained by him by the operation of the law of limitation on account of the rejection of the plaint and to order the litigation to be revived.

(9) Where, therefore, it is not possible to review an order under O. 47, R. 1, Civil P. C., whether it is open to a Court to set aside an order under O. 7, R. 11(c) under its inherent powers so as to deprive the defendant of his right to plead limitation is a point on which there is some difference of opinion. Two Benches of this Court have, however, taken the view that even in such a case the Court has inherent powers, if good cause is shown, to restore a plaint dismissed under O. 7, R. 11(c), Civil P. C. In the case before us it is admitted that no question of limitation arose on 26-7-1947, when the second application was granted or even on 28-7-1947, when the deficiency was made good. It cannot, therefore, be said that the defendant was deprived of any valuable right. The argument advanced is that in spite of the restoration order the suit must be deemed to have been instituted on the 28th July and not on 25-4-1947. In view of the decisions of this Court already cited, by which we are bound, we do not feel disposed to accept this contention. No other point having been raised by learned counsel the appeal fails and is dismissed with costs.

B/M.K.S. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 720 (Vol. 41, C.N. 285)

RAGHUBAR DAYAL AND V. BHARGAVA JJ. (13-11-1953)

Tula Ram Ram Rakshpal, Appellant v. Amritdhara Pharmacy Ltd., Dehra Dun, Respondent.

F. A. F. O. No. 267 of 1953, from order of Registrar Trade Marks, Bombay, D/- 29-8-1953.

(a) Trade Marks Act (1940), Ss. 15 (4), 76 — Registrar refusing registration of trade-mark — Appeal.

Application for registration of trade-mark— Registrar after hearing objection of the other party deciding under S. 15 (4) that trade-mark should not be registered on account of its similarity to another registered trade-mark — Proceeding held did not amount to suit because decision did not relate to any right of parties — Decision held was not conclusive and therefore did not amount to a decree — Appeal under S. 76 against such order held was first appeal from an order and not from a decree. (Para 3)

(b) High Court Rules and Orders — Allahabad High Court Rules, Chap. V, Rr. 2, 8 — Jurisdiction of single Judge.

When it is not possible to assess the valuation of the appeal it cannot be said that its valuation is less than Rs. 2000 and that therefore it is within the cognisance of a single Judge. Such an appeal, therefore, is within the cognisance of a Bench of two Judges. (Para 4)

D. P. Agarwal, for Appellant.

ORDER: This is an appeal against the decision of the Registrar under S. 15, sub-s. (4) of the Trade Marks Act, 1940, refusing to register the trade mark sought to be registered by the appellant. Section 76 of the Act gives the right of appeal against any decision of the Registrar under the Act to the High Court having jurisdiction. The appeal has been filed as an appeal against an order and Court-fee paid is Rs. 3/12/-.

(2) The Stamp Reporter made a report to the Taxing officer requiring direction on certain points. The Taxing Officer seems to have ordered verbally that it be laid before Court. One of the points is whether this appeal should be treated to be a regular first appeal or as a first appeal from order. If it is treated as a first appeal from order the other point raised was whether it should be cognizable by a single Judge or a Bench of two Judges. The third question was about the amount of court-fee necessary on this appeal. According to the office note once the nature of appeal is decided there would not be any difficulty about considering the proper provision of the Court-fees Act applicable to this case. Any way the question of proper court-fees would be for the decision of the Taxing Officer or the Taxing Judge on a reference by the Taxing Officer.

(3) We have heard learned counsel for the appellant on the question as to whether this appeal should be treated to be a regular appeal, that is an appeal against a decree or it should be treated to be an appeal from an order and we agree with his submission that this should be treated as an appeal from an order.

The proceedings in which this order was passed arose out of an application requesting the registration of the trade mark. The Registrar after hearing the objection of the other party gave a decision that the trade mark should not be registered on account of its similarity to another registered trade-mark. The proceedings cannot, therefore, be said to amount to a suit and it is difficult to say that the decision related to any rights of the parties. Rights will arise in the party whose suggested trade mark is registered after such registration. It is also not clear that any decision of the Registrar on the point in dispute will have any finality in the sense that, in any future dispute in a regular suit or otherwise, this order of the Registrar, will be taken to be conclusive between the parties with regard to the point decided. There is nothing in the Act which makes such an order conclusive.

In the circumstances we hold that this order under appeal does not amount to a decree and is simply an order and therefore the appeal should be treated as a first appeal from an order.

(4) As it is not possible to assess the valuation of the appeal it cannot be said that the valuation of this appeal is less than Rs. 2000 and that therefore it is within the cognisance of a single Judge. It follows that this appeal is within the cognisance of a Bench of two Judges. The office will take further action.

H.G.P. Order accordingly.

A.I.R. 1954 ALLAHABAD 721 (Vol. 41, C.N. 286)

MUKERJI J. (15-12-1953)

Chhatkun and others, Complainants-Applicants v. The State.

Criminal Revn. No. 416 of 1952, against order of S. J., Faizabad, D/- 15-3-1952.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 85 (1) and (5) — Order cancelling jurisdiction — Revision to High Court — Competency of — (Criminal P. C. (1898), S. 439).

An order made under S. 85, U. P. Panchayat Raj Act, 1947, cancelling the jurisdiction of the Panchayati Adalat cannot be made the subject-matter of a revision to the High Court under the provisions of the Code of Criminal Procedure. Consequently, it is not competent for the High Court to investigate into the question whether or not the order made by the Sub-Divisional Magistrate, cancelling the jurisdiction of the Panchayati Adalat, was a good or a bad order. (Para 3)

Anno: Cr. P. C., S. 439 N. 1 Pt. 12.

1949 Mitra: S. 439 (Topic discussed in N. 12, covered in various notes in Mitra).

(b) U. P. Panchayat Raj Act (26 of 1947), S. 85 (2) — Jurisdiction of Panchayat Adalat cancelled — No fresh complaint is necessary — Prosecution does not terminate.

On the cancellation of the jurisdiction of a Panchayati Adalat under S. 85(1), the trial of the case of the original complaint can proceed in the Court of a Magistrate competent to try it without the necessity of a fresh complaint being filed. The law does not contemplate the termination of a prosecution, either initiated on a complaint or otherwise by the jurisdiction of the Court, which had seizin of the case, being cancelled. The Sub-Divisional Magistrate, when he cancels the jurisdiction of the Panchayati Adalat, gets jurisdiction to try the complaint himself or to transfer the case to the file of some other Magistrate competent to try the same. (Para 5)

(c) Criminal P. C. (1898), S. 4(1)(k) and S. 190 — Prosecution once started how terminates — (Criminal trial).

The law does not contemplate the termination of a prosecution by the jurisdiction of the Court, which has seizin of the case, being cancelled. A complaint under the law can only terminate by a dismissal of the complaint, a discharge of the accused, or by a conviction or an acquittal of the accused; the law knows of no other way of terminating a complaint except possibly by the quashing of the proceedings by an order of a superior Court. (Para 5)

Anno: Cr. P. C., S. 4(1)(k) N. 4.

1953 Mitra: S. 4(1)(k), P. 38 N. "Trial when begins" (5 Pts. extra in N. 4 to S. 4(1)(k) in AIR Com. — Trial when ends, not indicated in Mitra).

Surajnath Singh, for Applicants; H. N. Seth, for the State.

ORDER: This is a revision by four persons who have been convicted under S. 323, I. P. C. by a Special Magistrate of Faizabad and have been sentenced to pay a fine of Rs. 100/- each, or in default to undergo rigorous imprisonment for three months each. Out of the fines, if realized, a sum of Rs. 150/- was ordered to be paid to the complainant as compensation under the provisions of S. 545, Criminal P. C. for the loss which he had suffered.

(2) The complaint was originally filed in the court of the Sub-Divisional Magistrate, who transferred the case to the file of a Special Magistrate for disposal. The Special Magistrate apparently discovered that the case was triable by the Panchayati Adalat and he, therefore, sent the case to the District Panchayat Officer so that he may allocate the case to the file of the proper Panchayati Adalat for disposal. After the case had gone on to the file of the Panchayati Adalat, the complainant moved the Sub-Divisional Magistrate for the cancellation of the jurisdiction of the Panchayati Adalat under the provisions of S. 85 of Panchayat Raj Act (26 of 1947). The Sub-Divisional Magistrate after hearing the parties cancelled the jurisdiction of the Panchayati Adalat.

(3) Mr. Surajnath Singh, appearing for the applicants has contended in the first instance that the order of the Sub-Divisional Magistrate cancelling the jurisdiction of the Panchayati Adalat was bad in law, inasmuch as, the Sub-Divisional Magistrate gave no reasons for cancelling the jurisdiction of the Panchayati Adalat. The validity of the order of the Sub-Divisional Magistrate is not the subject-matter of this revision as such an order cannot be made the subject-matter of a revision under the provisions of the Code of Criminal Procedure. Consequently, it is not competent for me to investigate into the question whether or not the order made by the Sub-Divisional Magistrate, cancelling the jurisdiction of the Panchayati Adalat, was a good or a bad order. I must accept that order as an order properly made whereby the jurisdiction of the Panchayati Adalat was cancelled. The jurisdiction of the Panchayati Adalat having been cancelled by the Sub-Divisional Magistrate, he thought it proper to send the case to the file of the same Special Magistrate to whom the case had once been sent. The Special Magistrate thereafter tried the case and convicted the applicants in the manner already indicated.

(4) An appeal was filed against the aforementioned order of the Special Magistrate to the Sessions Judge and one of the points that was argued before the appellate Judge was that the Special Magistrate who tried the case had no jurisdiction to try it. The same point has again been reiterated by the applicants before me in this revision. The contention advanced by Mr. Singh is that once the jurisdiction of the Panchayati Adalat was cancelled, the Sub-Divisional Magistrate could not thereafter make any further order in regard to that matter unless there was another complaint in regard to it. I am unable to accept this contention in view of the provisions of S. 85(2) of the Panchayat Raj Act. The provisions of that subsection are as follows:

> "When an order has been passed by the Sub-Divisional Magistrate under sub-s. (1) in respect of any case, trial on complaint or otherwise in respect of the same offence, may be started in the court of a Magistrate having jurisdiction to try the case."

(5) In this case an order was made by the Sub-Divisional Magistrate under S. 85, sub-s. (1) (a), quashing the jurisdiction of the Panchayati Adalat. After the jurisdiction of the Panchayati Adalat was quashed that Adalat or that court ceased to have jurisdiction over the case, but that did not mean that there was an end of the case, for sub-s. (2) of S. 85 of the Panchayati Raj Act does not speak of the case coming to an end in any shape or form. The words "in respect of any case, trial, on complaint or otherwise in respect of the same offence" do not mean that there has necessarily to be a fresh complaint before a Magistrate having jurisdiction to try that complaint can so try it. The words "may be started in the Court of a Magistrate having jurisdiction to try the case do not necessarily mean the restarting of the case on a fresh complaint.

In my view the trial of the case on the original complaint could proceed in the court of a Magistrate competent to try it without the necessity of a fresh complanit being filed. If the intention of the Legislature was that after the jurisdiction of a Panchayati Adalat had been cancelled, there was to be an end of that case and another case on the same facts could only start if there was a fresh complaint made in respect of it then the Legislature would have used different words to convey this sense. Sub-section (2) of S. 85 of the Panchayat Raj Act unfortunately has not been very happily worded and it is this unhappy phraseology of the sub-section that, to my mind, is the reason for the misconception that led to the argument which was advanced on behalf of the applicant in this case.

I feel fortified in the view that I have taken for the additional reason that the law does not contemplate the termination of a prosecution, either initiated on a complaint or otherwise by the jurisdiction of the court, which had seizin of the case, being cancelled. A complaint under the law can only terminate by a dismissal of the complaint, a discharge of the accused, or by a conviction or an acquittal of the accused; the law knows of no other way of terminating a complaint except possibly by the quashing of the proceedings by an order of a superior court. In this view of the matter, it is not possible, in my opinion, to say that the order of the Magistrate transferring the case to the file of the Special Magistrate was an order without jurisdiction.

The Sub-Divisional Magistrate, when he cancelled the jurisdiction of the Panchayati Adalat, got jurisdiction to try the complaint himself because under the law he was competent to try the case—the Magistrate also had as a Sub-Divisional Magistrate, jurisdiction under the law, to transfer the case to the file of some other Magistrate competent to try the same. The Sub-Divisional Magistrate had acted in accordance with the aforementioned jurisdiction and no exception can be taken to it.

(6) In view of what I have stated above, I see no force in this application and I accordingly dismiss it.

V.S.B. Application dismissed.

A.I.R. 1954 ALLAHABAD 722 (Vol. 41, C.N. 287)

FULL BENCH.

(LUCKNOW BENCH) MALIK C. J. V. BHARGAVA AND HARI SHANKAR JJ. (28-4-1954)

Onkar Mal and others, Plaintiffs-Appellants v. Ram Sarup and others, Defendants-Respondents.

Second Appeal No. 383 of 1946, against decree of D. J., Sitapur, D/- 30-3-1946.

(a) Court-fees Act (1870), S. 7 — Rule that allegations in plaint determine court-fees — Applicability and scope of.

The general rule that the Court must base its decision as to the court-fee payable on the allegations and prayers in the plaint is correct only to this extent that the general rule is invoked primarily for the purposes of classification of suit; in other words, in order to find out the nature of the suit and the category it belongs to, the Court must examine the allegations and reliefs claimed in the suit for the simple reason that it is the allegations made in the plaint which determine the nature of the suit. In making this classification about the category of the suit it is not permissible to call in aid the allegations made in the written statement. Even in the matter of classifying the suit the general rule is ignored where it appears, on the construction of the plaint, that the real relief sought is something different than what is asked for in the disguised form. The Court must then intervene and ignore the ostensible form and language adopted in the plaint. (Para 13)

In the matter of computation of court-fee the aforesaid general principle cannot have so wide a scope as it has in determining the nature of the suit.

After the category of the suit has been ascertained, the Court has to find out whether the plaintiff has correctly valued the relief for purposes of court-fees in the manner laid down in S. 7, Court-fees Act. This process also involves the examination of the plaint allegations and, if there is nothing to indicate otherwise, the plaintiff's valuation prima facie is accepted as correct. Ordinarily, the Court would accept court-fee paid in the first instance as correct, but if it transpires subsequently that an allegation of fact on the basis of which the court-fee was computed is not correct, then it is within the power of the Court to demand additional court-fee before the judgment is pronounced.

It is thus evident that the general rule that the payment of the court-fees must abide by the allegations in the plaint in all circumstances cannot be accepted as correct. Where the Court has reason to think on the material placed before it that the plaintiff has made false or incorrect allegations with a view to

avoid payment of court-fee, the Court has power to intervene and realise court-fee at any stage of the proceedings in the case. If, however, the mistake is not detected by the trial Court and also by the appellate Court, the power of the High Court to require payment of the court-fees that should have been paid in the lower Courts is expressly recognised in the second part of S. 12, Court-fees Act. (Para 14)

Anno: Court-fees Act, S. 7 (Gen.) N. 3, 4.

(b) Court-fees Act (1870), S. 7 (viA) (U. P.) — Suit for partition on allegation that plaintiffs are in joint possession — Finding that plaintiffs are not in possession — Court-fee in appeal.

A partition suit contained an allegation in the plaint that the plaintiffs were in possession of their share. Court-fee paid was according to one quarter of the value of the plaintiffs' share, in accordance with the 1st part of S. 7(viA) (U. P.). This was accepted as correct. Plaintiffs' possession and title were denied by the defendants. Issue was framed and it was found that the plaintiffs were not in joint possession. Instead of demanding court-fee upon full value of the share in accordance with the second part of S. 7(viA) before pronouncing final orders, order dismissing the suit was passed. The fact that additional court-fee could be demanded escaped the notice of the Court. When the matter went up before the first appellate Court, the point that the plaintiffs should be asked to pay the court-fee under the latter part of sub-s. (vi-A) was not pointed out and therefore no court-fee was charged in that Court also. In second appeal:

Held that in view of the findings of the two Courts below it could not be disputed for the purpose of court-fee that the plaintiffs were out of possession of their share at the date when they brought the suit, and as such the court-fee should have been levied according to the valuation prescribed under the latter part of sub-s. (vi-A) of S. 7., i.e., on the full value of the plaintiffs' share. (Para 15)

Held further that the realisation of the deficiency could not be postponed because the question whether the plaintiffs were in joint possession or not was a matter to be decided in the appeal. The decision of the lower Court on the question of possession for the purpose of court-fee under the circumstances must be regarded as prima facie correct and the appellants must pay the deficiency according to the full value of the share which they claimed on partition. To enable the Court to consider the appeal on merits the memorandum of appeal must be a document which was properly stamped. The question whether a memorandum of appeal was properly stamped or not must be decided first before the appellant could claim a hearing on merits. The question of court-fee therefore had to be decided on the basis of facts, as they stood at the time when the memorandum of appeal was filed in the Court. AIR 1945 Oudh 207, Rel. on. (Para 18)

Held also that the presumption that possession of one co-sharer was in the eye of law the possession of all the co-sharers in the property was not available to the plaintiffs as the two Courts below had found against them on the question of their title to a share in the house. (Para 16)

Anno: Court-fees Act, S. 7(v) N. 7a; S. 7(iv) (b) N. 7.

CASES REFERRED: Paras

(A) (V26) AIR 1939 Oudh 90: 14 Luck 346 7, 17
(B) (V32) AIR 1945 Oudh 207: 1945 Oudh WN 114 7, 18
(C) (V21) AIR 1934 Lah 563: 15 Lah 531 (FB) 10
(D) (V30) AIR 1943 Oudh 456: 209 Ind Cas 442 13

Ram Bharose Lal, Rajeshwari Prasad and R. B. Shrivastava (absent), for Appellants; Niamatullah and S. C. Das (absent), for Respondents; B. N. Roy, Junior Standing Counsel, for the State.

HARI SHANKAR J.:

This is a court-fee matter in a second appeal by the plaintiffs.

(2) In order to appreciate the question of court-fee raised before us it is necessary to state a few facts. The plaintiffs brought a partition suit in respect of a house in which they claimed a moiety share. It was alleged in the plaint that the plaintiffs were in joint possession of their half share ever since its purchase on 11-1-1937, from the father of the defendants for a sum of Rs. 1,500/-

(3) The above suit was contested by the defendants-respondents. They denied the fact that the plaintiffs were co-owners of the house. They further denied that the plaintiffs were in possession of the share claimed by them. The question whether the plaintiffs were in joint possession of the house was the subject-matter of issue No. 3, which ran thus:

"Are the plaintiffs in possession of the house? If not, what is the effect?"

Both sides led evidence on this issue. On the evidence produced in the case the trial Court held that the plaintiffs had not established their joint possession over the house.

(4) On the question of title also, the trial court held that the plaintiffs had failed to establish that they were co-owners in the property in suit.

(5) Dissatisfied with the decision of the trial Court the plaintiffs went in appeal before the District Judge of Sitapur, who dismissed the appeal and affirmed the findings of the trial Court.

(6) The plaintiffs have now come up in second appeal. On the presentation of the memorandum of appeal the Stamp Reportor of this Court made a report about the deficiency in court-fee not only in this court but in the two Courts below also.

In the report it was pointed out, on the basis of the findings of the two Courts below, that as the plaintiffs were not in joint possession of the house and as the title to the house was also denied, the case falls under the second part of sub-section (vi-A) of the Court-fees Act, which requires the payment of 'ad valorem' court-fee on the full value of the share claimed. Since the plaintiffs had paid court-fee on one-fourth value of the share claimed under the first part of sub-section (vi-A) of S. 7 a deficiency of Rs. 414/6/- was found due against the plaintiffs as the total deficiency payable by them in the three Courts.

(7) When the report was placed before the Taxing Judge of this Court, it was urged on behalf of the appellants that the question whether the plaintiffs were in joint possession of the share was still an open question to be decided in second appeal, and until that question was decided the plaintiffs could not be asked to pay 'ad valorem' court-fee on the full value of the plaintiffs' share.

In support of this contention the appellants relied on the case of — 'Parmeshur Din v. Hargobind Prasad', AIR 1939 Oudh 90 (A).

Learned counsel for the State, however, relied on a later decision in — 'Muneshwar Bakhsh v.

Har Prasad', AIR 1945 Oudh 207 (B) for the contrary proposition that where on the finding of the two Courts below it appears that the plaintiff was out of possession of the share claimed in a partition suit, he should be asked to pay 'ad valorem' court-fee on the full value of his share before the appeal could be admitted for hearing on merits.

In view of the general importance of the question the Taxing Judge referred the matter for consideration by a Full Bench.

(8) It is not disputed that the question of court-fee in this partition suit is governed by sub-section (vi-A) of S. 7, Court-fees Act, which was inserted by S. 11 of the U. P. Amending Act 19 of 1938, which runs thus:

"7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:

(vi-A) In suits for partition.....according to one quarter of the value of the plaintiffs share of the property, and according to the full value of such share if on the date of presenting the plaint the plaintiff is out of possession of the property of which he claims to be a co-parcener or co-owner, and his claim to be a co-parcener or co-owner on such date is denied.

'Explanation'. The value of the property for the purposes of this sub-section shall be the market value which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B) as the case may be."

(9) The aforesaid sub-section contemplates two modes of valuation.

If in a partition suit, the plaintiff is in joint possession of his share in the property, he has to pay a court-fee equivalent to one-fourth of the value of the plaintiff's share. If, however, the plaintiff is out of possession of the property and if his claim to be a co-sharer or his title as co-parcener or co-owner is denied, then the plaintiff is required to pay court-fee on the full value of his share. It is not disputed that if this case falls under the second part, then the plaintiffs have to pay the court-fee on the full value of their share which is Rs. 1500/-.

(10) Learned counsel for the appellants has challenged the correctness of the report of the Stamp Reporter. His contention is that the question relating to the payment of court-fee must be governed by the allegations and prayers in the plaint and, on the allegations made in the plaint, the court-fee is payable on the basis of the first part of sub-s. (vi-A) of S. 7.

In support of this contention learned counsel for the appellants relied upon the case of — 'Asa Ram v. Jagan Nath', AIR 1934 Lah 563 (FB) (C), where it was held that in determining the provisions of the Court-fees Act applicable to a particular suit the allegations made by the plaintiff alone must be considered and the pleas raised by the defendant do not affect the question. The decision arrived at in the aforementioned Lahore case cannot be of such assistance, as in the case before us we have to consider the applicability of the particular provision in the Court-fees Act which was inserted by the U. P. Amending Act 19 of 1938.

(11) As regards the general rule that the Courts must base their decision as to the court-fee payable on the allegation and prayers in the plaint it seems to us that there is a certain amount of mis-apprehension as to the true meaning and real scope of this general rule. It is, therefore, necessary to consider the real import of the general rule that the court-fee should be made payable on the allegations and prayers as contained in the plaint.

(12) An examination of the law of Court-fee will reveal that when a plaint is presented, two questions ordinarily arise for scrutiny. In the first place, the plaint has to be examined to find out the real nature of the suit, that is to say, as to under which of the several categories of suits mentioned in the Court-fees Act the particular suit falls. This is what is generally called the classification of the suit in the first instance.

After this is done, the next stage is to find out the relevant provision in the Court-fees Act for the purpose of computation of court-fees. No difficulty arises in those classes of cases where a fixed fee has been provided in Sche. II, but if a suit is of the category where 'ad valorem' court-fee is leviable, as in the present case, the court will proceed to value the subject-matter according to the rules for computation, as set out in the various parts of S. 7.

(13) Coming back to the contention of learned counsel for the appellants, the general rule that the Court must base its decision as to the court-fee payable on the allegations and prayers in the plaint is correct only to this extent that the general rule is invoked primarily for the purpopses of classification of suit; in other words, in order to find out the nature of the suit and the category it belongs to, the Court must examine the allegations and reliefs claimed in the suit for the simple reason that it is the allegations made in the plaint which determine the nature of the suit. In making this classification about the category of the suit it is not permissible to call in aid the allegations made in the written-statement. See — 'Safdar Husain v. Mt. Achcham Begam', AIR 1943 Oudh 456 (D).

The general principle, which is a rule of prudence, is followed strictly in the matter of determining the category of the suit and for that purpose attention must be confined within the four corners of the allegations in the plaint. Even in the matter of classifying the suit the general rule is ignored where it appears, on the construction of the plaint, that the real relief sought is something different than what is asked for in the disguised form. The Court must then intervene and ignore the ostensible form and language adopted in the plaint.

(14) In the matter of computation of court-fee the aforesaid general principle cannot have so wide a scope as it has in determining the nature of the suit. After the category of the suit has been ascertained, the Court has to find out whether the plaintiff has correctly valued the relief for purposes of court-fees in the manner laid down in S. 7 of the Court-fees Act. This process also involves the examination of the plaint allegations and, if there is nothing to indicate otherwise, the plaintiff's valuation 'prima facie' is accepted as correct. Ordinarily, the Court would accept court-fee paid in the first instance as correct, but if it transpires subsequently that an allegation of fact on the basis of which the court-fee was computed is not correct, then it is within the power of the Court to demand additional court-fee before the judgment is pronounced.

Section 6, Court-fees Act directs that no document (which term includes a plaint) which is not properly stamped shall be received unless it bears proper court-fee paid according to the provisions of the Court-fees Act. It was with a view to recognise the power of a Court to realise additional

court-fee that the Legislature thought it proper to enact O. 7, R. II (c) as also S. 149, Civil P. C. Take for instance a case in which the plaintiff sues for possession of a house which he values at Rs. 500/-. If the defendant contests this valuation, the Court must first determine the market value of the house in the manner laid down in S. 10, Court-fees Act, and if it comes to the conclusion that the market value of the house for the purpose of court-fee is Rs. 1,000/-, it has the power to demand the additional court-fee which if not paid would entitle the Court to reject the plaint.

It is thus evident that the general rule that the payment of the court-fee must abide by the allegations in the plaint in all circumstances cannot be accepted as correct. Where the court has reason to think on the material placed before it that the plaintiff has made false or incorrect allegations with a view to avoid payment of Court-fee, the Court has power to intervene and realise court-fee at any stage of the proceedings in the case. If, however, the mistake is not detected by the trial Court and also by the appellate Court, the power of the High Court to require payment of the court-fees that should have been paid in the lower Courts is expressly recognised in the second part of S. 12, Court-fees Act. It is, therefore, not correct to say that even in the matter of computation of court-fee, plaint allegations should be accepted as the last word on the question of the payment of court-fee.

(15) Coming to the case before us, the allegations in the plaint show that it is a partition suit which is governed by sub-s. (vi-A) of S. 7, Court-fees Act for computing the proper court-fee. The court-fees paid by the plaintiffs was accepted as correct because the plaintiffs had asserted in the plaint that they were in joint possession of the property to the extent of their share. In the initial stage it could not be said with any certainty whether the allegation was false or correct. The defendants having denied this assertion of the plaintiffs, a specific issue on the question of joint possession of the plaintiffs was framed in the case. The Court, after evidence was gone into, recorded a finding that the plaintiffs were not in the joint possession of the property. In view of this finding it was open to the first Court to demand court-fee under the second part of sub-s. (vi-A) of S. 7, Court-fees Act before pronouncing final order in the case. It appears, however, that it escaped the notice of the trial Court to demand court-fee under the second portion of the aforesaid sub-section.

When the matter went up before the first appellate Court, it appears that the point that the plaintiffs should be asked to pay the court-fee under the latter part of sub-section (vi-A) was not pointed out and therefore no court-fee was charged in that Court also. In view of the findings of the two Courts below it cannot be disputed for the purposes of court-fee that the plaintiffs were out of possession of their share at the date when they brought the suit, and as such the court-fee should have been levied according to the valuation prescribed under the latter part of sub-s. (vi-A) of S. 7.

(16) Learned counsel for the appellants has relied upon the general proposition of law that possession of one co-sharer is in the eye of law the possession of all the co-sharers in the property. Even this presumption is not available to the plaintiffs as the two Courts below have found against them on the question of their title to a share in the house.

We do not, however, consider it proper to enter into this question at this stage because this will be a matter for consideration when the appeal comes up for hearing on merits. At present for the purposes of court-fees, we must accept the finding of the two Courts below which is to the effect that the plaintiffs were out of possession of their share at the date when the suit was brought.

(17) Now remains the second question whether the deficiency in court-fee as reported by the office can be demanded before the appeal is decided. It has been urged before us that the question whether the plaintiffs were in joint possession of their share or not at the date of the suit is a question which will have to be decided in second appeal and until the appeal is decided on merits the appellants should not be asked to pay the Additional court-fees.

We find it difficult to accept this contention. Learned counsel for the appellants has relied on the following observation in — 'AIR 1939 Oudh 90 (A)':

> "The plaintiff was not liable to make good the alleged deficiency in the court-fee until the question of joint possession was not finally settled in appeal."

It may be pointed out with advantage that the aforesaid case was decided before the Court-fees Act was drastically amended by the U. P. Amending Act 19 of 1938, and as such the above remarks cannot be of any assistance in deciding the question before us.

(18) The point which has been raised in this case came up for decision before a Bench in — 'AIR 1945 Oudh 207 (B)'. The facts in that case were on all fours with the facts of this case. It was argued that the realisation of the deficiency should be postponed as the question whether the plaintiffs were in joint possession or not was a matter to be decided in the appeal.

The learned Judges rejected the contention and made the following observations:

> "The decision of the lower Court on the question of possession for the purpose of court-fee under the circumstances must be regarded as 'prima facie' correct and the appellants must pay the deficiency according to the full value of the share which they claim on partition."

The prohibition against the reception of a document which is not properly stamped is contained in Ss. 4 and 6, Court-fees Act. The result of this prohibition is that unless a plaint or a memorandum of appeal is properly stamped, no Court can proceed to dispose of the case on merits. To enable the Court to consider the appeal on merits the memorandum of appeal must be a document which is properly stamped. It follows, therefore, that the question whether a memorandum of appeal is properly stamped or not must be decided first before the appellant can claim a hearing on merits.

Apart from this, the levy of court-fee is a sort of tax, which the State requires a litigant to pay before his cause can be heard and decided. If the contention of the appellants is accepted, then it would amount to giving a decision on merits without payment of proper court-fee.

We might usefully refer to Cl. (3) of S. 6 of the Court-fees Act, which runs thus:

> "If a question of deficiency in court-fees in respect of any plaint or memorandum of appeal is raised by an officer mentioned in S. 24-A the Court shall, before proceeding further with the suit or appeal, record a finding whether the court-fee paid is sufficient or not. If the court

finds that the court-fee paid is insufficient, it shall call upon the plaintiff or the appellant, as the case may be, to make good the deficiency within such time as it may fix, and in case of default shall reject the plaint or memorandum of appeal."

This clause was inserted with a view to make it clear that it was the bounden duty of Courts to decide all questions of court-fee as a preliminary question before entering into the merits of the case. The question of court-fee therefore, has to be decided on the basis of facts, as they stand at the time when the memorandum of appeal is filed in the Court. The decision of the two Courts below that the plaintiffs were never in joint possession must be accepted as correct for levying the proper court-fee, and in view of the finding of the Courts below it cannot be doubted that the case is covered by the second part of sub-s. (vi-A) of S. 7. The report relating to deficiency is correct, and the deficiency must be made good first before the memorandum of appeal can be admitted.

(19) We, therefore, accept the report of the Stamp Reporter and direct the appellants to pay the deficiency in court-fee of Rs. 414-6-0 within three months from to-day. If the deficiency is not made good within the time allowed, the memorandum of appeal shall stand rejected.

V. BHARGAVA J.:

(20) I have had the benefit of reading the judgment of my brother Hari Shankar J., and I entirely agree with him but I would like to add a few comments on the question of applying the general rule that the courts must base their decision as to the court-fee payable on the allegations and prayers in the plaint.

It is obvious that this general rule can only be applied in cases where the language of the Court-fees Act does not expressly or impliedly require that, besides the allegations and prayers in the plaint, the court-fee should be determined on other considerations also. Section 7 (vi-A), Court-fees Act, which prescribes the court-fee in suits for partition, has two parts:

There is the general rule that the court-fee is payable according to one-fourth of the value of the plaintiff's share of property but this is qualified by the second specific rule that the court-fee is payable according to the full value of such share if, on the date of presenting the plaint, the plaintiff is out of possession of the property of which he claims to be co-parcener or co-owner, and his claim to be a co-parcener or co-owner, on such date is denied.

To apply this second alternative, courts have to go into the question whether the plaintiff is or is not out of possession on the date of presenting the plaint and whether his claim to be a co-parcener or co-owner on such date is denied. It is obvious that the legislature could not have intended that on these points, the plea taken by the plaintiff must be accepted finally for purposes of working out the valuation to determine the court-fee payable because if that were so, the plaintiff in every case could make this clause ineffective by pleading in the plaint that he is in possession, or, by alleging that his claim to be a co-parcener or co-owner is not denied.

The language used clearly indicates that it is not the plaintiff's assertion on these points which must be accepted. In such cases, therefore, though the court-fee may initially be accepted as correct according to the allegations made by the plaintiff in the plaint, the court is required to revise its opinion and ask for the requisite court-fee under the second part of that clause on coming to the view that the plaintiff is out of possession of the property and that his claim to be a co-parcener or co-owner is denied. The general rule of ascertaining the valuation, for purposes of court-fee, from the allegations and prayers in the plaint must, therefore, in such cases, be modified and I agree with my brother Hari Shankar, J., about the procedure that the courts should adopt in order to do so.

(21) MALIK C. J.: I agree and have nothing to add.

R.G.D. Order accordingly.

A.I.R. 1954 ALLAHABAD 726 (Vol. 41, C.N. 288)

MALIK C. J. AND V. BHARGAVA J. (7-5-1954)

Kesar Sugar Works Ltd., Applicant v. The Union of India and another, Opposite Party.

Civil Misc. Writ No. 460 of 1954.

Constitution of India, Arts. 226 and 132 — Jurisdiction — Allahabad High Court cannot quash notification issued by Ministry of Food, Govt. of India, enforceable throughout India — Certificate under Art. 132 granted.

The power under Art. 226 is to be exercised throughout the territories in relation to which a High Court exercises jurisdiction. The person or authority to whom the writ is issued must be amenable to its jurisdiction either by location or residence within those territories. AIR 1954 SC 207, Foll. (Para 3)

The Ministry of Food and Agriculture, Government of India, cannot be said to have its location within the territories of U. P. subject to the jurisdiction of the Allahabad High Court. From the mere fact that the notifications issued by it are to be enforced and can be enforced in all parts of India, it cannot be said that it is located within the State of U. P. Consequently the Allahabad High Court cannot quash the notifications issued by the Ministry of Food and Agriculture, Government of India, New Delhi. (Para 5)

It may be possible to hold (though no final opinion was expressed on the point) that a writ in the nature of a writ of mandamus can be issued to an authority within the jurisdiction of the High Court, but a writ for quashing a notification issued by a Ministry of the Union Government which is situate at New Delhi can be filed only in a Court having territorial jurisdiction there: AIR 1953 All 477 (FB), Ref. (Para 6)

(There were other difficulties also in granting the petition (1) since the notifications applied to the large number of States, and there might be difference of opinion amongst the various High Courts, the granting of the petition might lead to confusion; (2) interim stay could not also be granted since the petition was filed on the last day when the Court was about to rise for vacation and no notice could be issued on the opposite party. In such circumstances granting of interim stay would mean virtually granting the petition.) (Para 8)

Since the question involved an important question relating to the interpretation of the Constitution, certificate under Art. 132 was granted. (Para 10)

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 207: 1954 SCA 264 (SC) 3

(B) (V40) AIR 1953 SC 210: 1953 SCR 1144 (SC) 4

(C) (V40) AIR 1953 All 477: 1953 All LJ 148 (FB) 6

Brij Lal Gupta, for Applicant; Standing Counsel, for Opposite Party.

MALIK C. J.:

This is a petition filed by Messrs Sugar Works, Limited, Baheri, Bareilly, who have claimed the following reliefs under Art. 226 of the Constitution:

(1) An order, direction or writ may kindly be issued quashing the notifications, dated 9-3-1954 and 29-3-1954;

or

an order, direction or writ in the nature of a writ of 'mandamus' be issued commanding the opposite parties not to enforce the said notifications.

(2) An interim order, direction or writ in the nature of writ of 'mandamus' be issued, restraining the opposite-parties from taking action against the petitioner or its officers for non-compliance with the provisions of the said notifications or the allotment orders issued thereunder.

(3) Such other order, direction or writ as may be necessary in the ends of justice and in the circumstances of the case may kindly be issued.

(4) The costs of the above writ petition be allowed to the petitioner.

The opposite-parties to this petition are (1) the Union of India through the Secretary, Ministry of Food and Agriculture, New Delhi and (2) the Hon'ble the Minister for Food and Agriculture, Government of India, New Delhi.

(2) It appears from the affidavit filed in support of the petition that the Minister for Food and Agriculture issued certain notifications under the Sugar and Gur Control Order, 1950. By the notification, dated 9-3-1954, the price of sugar was fixed at Rs. 27/2/- per maund as ex-factory price for Indian sugar produced in 1953-54 season by vacuum pan sugar factories in the areas of East Uttar Pradesh, North Bihar and West Bengal.

By the notification, dated 29-3-1954, the ex-factory price of sugar was fixed in the areas of West Uttar Pradesh, South Bihar, Punjab, Pepsu, Orissa, Rajasthan, Madhya Bharat, Bhopal, Bombay, Madras, Andhra, Hyderabad, Mysore and Travancore-Cochin.

By the order issued by Government of India, Ministry of Food and Agriculture, New Delhi, under the Sugar and Gur Control Order, 1950 contained in Annexure 'D' to the affidavit, directions were given to the mill owners as regards the despatch of sugar, the price to be charged for the same and the mode of realisation.

On 21-4-1954, a telegram was issued to the various factories that serious action will be taken if any factory delays despatches of controlled sugar on any untenable plea.

(3) Shri Pathak has appeared on behalf of the petitioner and he has urged that the two notifications and the order mentioned above are 'ultra vires' and that his client is not bound to obey any of them. He has, therefore, prayed that the said notifications be quashed and a writ of 'mandamus' be issued, restraining the Union of India and the Minister for Food and Agriculture from taking action against the petitioner or its officers for non-compliance of the provisions of the said notifications. The other reliefs asked for by the petitioner cannot, however, be granted unless the first relief is granted and the notifications are declared to be invalid and are quashed.

In — 'K. S. Rashid & Son v. Income-tax Investigation Commission', AIR 1954 SC 207 (A), their Lordships of the Supreme Court pointed out that though the powers conferred on the High Courts under Art. 226 are very wide yet there are two limitations placed upon the exercise of those powers. One limitation is that the power is to be exercised throughout the territories in relation to which a High Court exercises jurisdiction and the other limitation is that the person or authority to whom the writ is issued must be amenable to its jurisdiction either by location or residence within those territories.

The facts of that case were that the Central Government had referred certain cases to the Income-tax Investigation Commission for enquiry and report under S. 5 of Act 30 of 1947. Petitions were filed in the High Court of Punjab that a writ of prohibition might be issued to the Commission and the authorized official directing them not to proceed with the investigation of cases referred to the Commission under S. 5 of Act 30 of 1947 and for a writ in the nature of certiorari for quashing the proceedings already commenced and for other reliefs.

(4) In — 'Election Commission, India, v. Saka Venkata Rao', AIR 1953 SC 210 (B), it was held that the High Court of Madras could not issue any writ under Art. 226 to Election Commission having its offices permanently located at New Delhi.

(5) The question for consideration in the case before us is whether this Court can quash the two notifications that were issued by the Ministry of Food and Agriculture, Government of India, New Delhi. The decision will depend on the answer to the question whether the Ministry of Food and Agriculture can be said to have its location within the territories of U. P. subject to the jurisdiction of this Court. From the mere fact that the notifications are to be enforced in all parts of India and the Ministry of Food and Agriculture, Government of India, can issue orders and directions which can be enforced in any part it cannot be said that it is located within this State. In view of the two decisions of the Supreme Court cited above, we find it difficult to hold that this writ petition is entertainable by this Court.

(6) Learned counsel for the petitioner has relied on a Full Bench decision in — 'Maqbulunissa v. Union of India', AIR 1953 All 477 (C).

In that case an application was filed for a writ in the nature of 'mandamus' or alternatively for directions or orders directing the opposite-parties to forbear from giving effect to the order asking the petitioners to leave India or get their order executed by their subordinate officers.

It may be possible to hold, though we do not express any final opinion on the point, that a writ in the nature of a writ of mandamus can be issued to an authority within the jurisdiction of this Court, but a writ for quashing a notification issued by a Ministry of the Union Government which is situate at New Delhi can be filed only in a Court having territorial jurisdiction there. If the notifications cannot be cancelled by this Court, the rest of the relief claimed by the petitioner cannot be granted.

(7) In this connection a further practical difficulty may be pointed out. The notifications issued by the Central Government apply to a large number of States in India. There may be difference of opinion between the various High Courts, some quashing the notifications and others not, which will lead to a great deal of confusion.

(8) There is one other difficulty. This petition has been put up for orders on the last date at a time when the Court is about to rise for the vacation. Notice of the petition has not been given to the other side.

Learned counsel for the petitioner has prayed for an interim stay and has pointed out that if stay is not granted, the petition will become infructuous and the petitioner will suffer irreparable loss. If, however, the operation of the notifications is stayed pending consideration whether this Court has jurisdiction after notice to the other side, it would virtually amount to allowing the petition.

(9) In all the circumstances of this case, we feel that it is not possible to admit this writ petition and we, therefore, dismiss it.

(10) Sri Pathak has prayed for a certificate under Art. 132 of the Constitution. Apart from any other question that may be raised on the merits, the question whether this petition is entertainable by this Court is a question of some importance and raises questions relating to the interpretation of the Constitution. We, therefore, grant the necessary certificate.

R.G.D. Petition dismissed.

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*A.I.R. 1954 ALLAHABAD 728 (Vol. 41, C.N. 289)

DESAI AND B. MUKERJI JJ. (22-10-1953)

Durgeshwar Dayal Seth, Applicant v. Secretary, Bar Council, Allahabad and others, Opposite Parties.

Writ Appln. No. 53 of 1953.

(a) Constitution of India, Art. 246 — Concurrent List — Exclusive power of Parliament — State cannot make laws.

The power of a State to make laws with respect to any of the matters enumerated in Sch. VII, List 3 is subject to the exclusive power of Parliament, if it has any, to make laws with respect to the same matters. If Parliament has the exclusive power, a State cannot make laws even if the matters are enumerated in List 3. (Para 9)

(b) Constitution of India, Art. 246 (2) — Matter falling within one or other list of Sch. VII.

The decision of the problem whether a legislation comes within an entry of one list or an entry of another list always involves two questions, one of the interpretation of the entries of the two lists and the other of what the legislation purports to do. As regards the construction to be placed upon the entries in the rival lists, it is to be assumed that the Union and the State Lists do not conflict and every attempt should be made to avoid a conflict. If necessary, the meaning given to one entry should be restricted in order to avoid overlapping. The meaning given to a general power in one entry may be restricted to give sense and efficacy to a power given by way of exception under an entry of another list. At the same time general language ought not to be cut down by far-fetched and impertinent limitations. The words "with respect to" mean the whole field of legislation. Case law Ref. (Para 10)

(c) Constitution of India, Art. 246(2) — Pith and substance of enactment.

The pith and substance or the true nature and character of an Act is to be ascertained for the purpose of determining whether it is with respect to matters in this list or that list. (Para 15)

†*(d) **Constitution of India, Art. 246(2), Sch. VII, List 1, Entry 78 and List 3, Entry 26 — Indian Bar Councils (U. P. Amendment) Act, 1950 falls within Sch. VII, List. 1, Entry 78 — Act is ultra vires — (Bar Councils (U. P. Amendment) Act (24 of 1950), S. 1).**

The provision in Entry 78 of List 1 is by way of an exception to Entry 26 of List 3. The power conferred by Entry 26 of List 3 is general but since there is a power conferred by Entry 78 of List 1 with respect to persons entitled to practise before the High Courts, the general power must be read subject to that power and a legislation with respect to Advocates must be held to come within Entry 78 of List 1 regardless of whether it comes within Entry 26 of List 3 or not. Thus, the Indian Bar Councils (U. P. Amendment) Act, 1950 is a legislation with respect to "persons entitled to practise before the High Courts" in Entry 78 of List 1. Hence the U. P. Amendment Act is 'ultra vires' the U. P. State Legislature. (Paras 16, 22)

(e) Constitution of India, Art. 246 — Adopting law made by another Legislature.

A State Legislature has power to make laws with respect to only those matters that are exhaustively enumerated in Lists 2 and 3 and has no power whatsoever to make laws with respect to any matter that cannot be found in them. A State Legislature has no residuary powers at all. Adopting a law made by another Legislature is not a matter to be found in Lists 2 and 3. Therefore no law made by a State Legislature can be justified on the ground that though it is not with respect to any of the matters dealt with in Lists 2 and 3, it is simply adopting a law validly made by another Legislature. (Para 20)

If a Legislature cannot do anything directly, it cannot do it indirectly: if a State Legislature cannot directly enact a law with respect to a certain matter, it cannot do so indirectly by simply adopting a law made with respect to it by another Legislature. (Para 20)

(f) U. P. High Courts Amalgamation Order (1948), Cls. 17(c) and 8(2) — Creation of new Bar Council and preparation of new roll — (Bar Councils Act (1926), S. 3).

Clause 17(c) does not contemplate the creation of a new Bar Council and preparation of a new roll of Advocates of the new High Court. As a new roll is not to be prepared, there arises no question of payment of any fee. As advocate's right to practise in the new High Court continues by the proviso to Cl. 8(2), it cannot be made dependent upon his paying any fee. (Para 23)

CASES REFERRED: Paras

(A) (V26) AIR 1939 FC 1: 1939 FCR 18 (FC) 10, 14, 15
(B) (1881) 7 AC 96: 51 LJ PC 11 10
(C) (V29) AIR 1942 FC 17: 43 Cri LJ 481 (FC) 11
(D) (V32) AIR 1945 PC 98: 49 Cal WN 381 (PC) 13, 14, 15
(E) (V37) AIR 1950 FC 69: 51 Cri LJ 1018 (FC) 14, 15
(F) (V38) AIR 1951 SC 318: 52 Cri LJ 1361 (FC) 14, 15
(G) (1912) 1912 AC 571: 81 LJ PC 210 15
(H) (V38) AIR 1951 SC 332: 1951 SCR 747 (SC) 21
(I) ('77) 3 Cal 63: 1 Cal LR 161 (FB) 21

Gopal Behari and S. K. Verma, for Applicant; Advocate General, U. P., for Opposite Party.

DESAI J.:

This is an application by Shri Durgeshwar Dayal Seth for the issue of a writ of mandamus to the opposite-parties directing them to include his name in the new roll of Advocates without his paying any sum of money. The application is opposed by all the three opposite parties.

(2) The applicant, who was called to the Bar on 18-11-35, was enrolled as an Advocate of the High Court of Judicature at Allahabad on 23-2-38 and his name was duly entered on the roll of Advocates of the same High Court under S. 3(2)(b) of the Indian Bar Councils Act, 1926. He has been practising regularly in the High Court. In 1948 the Governor-General issued the United Provinces High Courts Amalgamation Order, 1948, amalgamating the High Court of Judicature at Allahabad and the Chief Court of Avadh and establishing a new High Court, though bearing the old name of the High Court of Judicature at Allahabad, and giving a right to all Advocates, who were entitled to practise either in the High Court at Allahabad or the Chief Court of Avadh to practise in the new High Court. The State Legislature of Uttar Pradesh amended the Indian Bar Councils Act, 1926, in 1950. The effect of the amendment was that the old Bar Councils of Allahabad and Avadh were dissolved and provision was made for the creation of a new Bar Council for the new High Court. The State Government purporting to act under S. 1(3) of the Indian Bar Councils Act, issued a notification on 24-5-1952 applying the provisions of Ss. 7 to 16 of the Bar Councils Act, to the new High Court with immediate effect.

The State Amendment Act provided that until a Bar Council had been established for the new High Court, the Chief Justice could establish an 'ad hoc' Bar Council. Accordingly an 'ad hoc' Bar Council was established by the Chief Justice. Its Secretary issued a notice on 5-1-1953 demanding a sum of Rs. 10/- from the applicant and other Advocates for entering their names in the new list of Advocates to be prepared by the new High Court. Another notice was issued by the Joint Registrar of the new High Court informing the applicant that unless he paid the sum of Rs. 10/- his name would not be placed on the new roll of Advocates. The petitioner contends, through this application, that he has already paid the sum of Rs. 10/- when he got his name entered on the roll prepared for the old High Court of Judicature at Allahabad, that he cannot be required to pay the sum again, that it is the duty of the new High Court to include his name on the new roll of Advocates without demanding any payment from him and that he is entitled to be recognized as an Advocate of the new High Court and to practise there. It was further contended that the State Amendment Act of 1950 was 'ultra vires' the State Legislature.

(3) The Secretary of 'ad hoc' Bar Council, opposite-party No. 1, has filed a written statement opposing the application. He maintained that the notice demanding Rs. 10/- from the applicant is correct and that the applicant is bound to pay the amount if he wants his name to be entered in the new roll. He added, however, that his duty was simply to accept the money that was paid to him and inform the Registrar of the fact of the payment and that the roll is to be prepared by the Registrar and not by himself.

(4) The Indian Bar Councils Act, 1926, was enacted by the Indian Legislature to provide for the constitution and incorporation of Bar Councils for certain courts. The Act extends to all the provinces of India. Under section 1(2), it was made applicable to certain High Courts of Judicature including that at Allahabad and to such other High Courts within the meaning of cl. (24) of section 3 of the General Clauses Act, 1897, as the Provincial Government by notification in the official gazette, declare to be High Courts to which this Act applies. Sections 1, 2, 17, 18 and 19 of the Act came into force at once and by S. 1(3) the Provincial Government was empowered by notification to direct that the other provisions of the Act would come into force in respect of any High Court to which the Act applies on such date as it may by the notification appoint.

The main provisions of the Act are as follows: Under S. 3 for every High Court a Bar Council would be constituted which was to be a body corporate, having perpetual succession. Section 8 lays down that

> "no person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the Advocates of the High Court maintained under this Act,"

and requires the High Court to prepare and maintain a roll of Advocates of the High Court. In the roll are to be entered the names of all persons who were, as Advocates etc., entitled as of right to practise in the High Court immediately before the date on which S. 8 comes into force, provided that they paid a fee, payable to the Bar Council, of Rs. 10/-. Also the names of all other persons who have been admitted to be Advocates of the High Court are to be entered in the roll on payment of such fee as may be prescribed. The High Court is required to send to the Bar Council a copy of the roll. This is also provided in S. 8.

The Bar Council is authorised to make rules to regulate the admission of persons to be Advocates of the High Court, vide S. 9. The High Court is given the power by section 10 to punish an Advocate for misconduct; the enquiry into the allegation of misconduct is to be made by a committee of the Bar Council. Every person whose name is entered in the roll of Advocates is entitled as of right to practise in the High Court of which he is an Advocate, vide S. 14. Power is given by S. 15 to a Bar Council to make rules in respect of the rights and duties of the Advocates of the High Court and their discipline and professional misconduct. When Ss. 8 to 16 are applied to any High Court, the Legal Practitioners Act of 1879 stands amended to the extent and in the manner specified in the schedule of the Act and if there is anything inconsistent with their provisions in the Letters Patent, they are deemed to have been repealed to that extent.

(5) On the passing of the above Act, the Provincial Government issued a notification under S. 1(3)

applying the rest of the sections of the Act to the High Courts then existing, the High Court of Judicature at Allahabad (which will be referred to as the old High Court) and the Chief Court of Avadh and Bar Councils were established for them. The applicant got himself admitted as an Advocate on payment of the fee & his name was entered on the roll prepared by the old High Court of Allahabad. Under S. 14 he acquired the right to practise in the old High Court.

(6) By the Amalgamation Order of 1948 the old High Court and the Chief Court of Avadh were amalgamated and the two constituted one High Court (which will be known as the new High Court), bearing the same name as the old High Court. Clause 8 of the Order provided that any person who was an Advocate entitled to practise in either of the High Courts would be recognised as an Advocate entitled to practise in the new High Court. Clause 17 of the Order repealed the Letters Patent of the old High Court. The last clause 18 is to the effect that the Order will have effect subject to any provisions that may be made with respect to the new High Court by any Legislature or authority having power to make such provision.

(7) The effect of the Amalgamation Order was to create a new High Court as a substitute for the old High Court and the Avadh Chief Court. The Order did not merely extend the territorial jurisdiction of the old High Court by adding to it the territory that was within the jurisdiction of the Avadh Chief Court. Though it did not expressly abolish the two courts, that was the effect of the provision of clause 3. When the two High Courts were amalgamated to constitute a new High Court, it meant that the two High Courts were abolished and in their place a new High Court was created. By chance the new High Court was given the same name that was borne by the old High Court. It could very well have been given a different name and then there could have been no doubt about the fact that a new High Court was created.

The Order disposed of both the Courts in the same manner; if the Chief Court of Avadh was abolished or gone, the old High Court also was abolished or gone. There was nothing in its provisions to suggest that only the Chief Court of Avadh was abolished and that the old High Court continued though with extended territorial jurisdiction. The new High Court is to sit at Allahabad or at such other places in the Uttar Pradesh as the Chief Justice may appoint. The fact that it is to sit at Allahabad does not mean that it is a continuation of the old High Court.

(8) When the new High Court was created, the Bar Councils Act had to be amended and at least a provision for the dissolution of the Bar Councils of the old High Court and the Chief Court of Avadh had to be made. It is mentioned in the statements of Objects and Reasons published in the U. P. Gazette Extraordinary dated 25-3-1950 that it was necessary to amend the Bar Councils Act, partly for the purpose of providing for the dissolution of the old Allahabad and Avadh Bar Councils and patrly to provide for the establishment of a Bar Council for the new High Court, that the Indian Bar Councils (U. P. Amendment and Validation of Proceedings) Ordinance, 1949, had expired and it was necessary to retain permanently on the statute book some of its provisions that opportunity was taken to make some additional provisions in the Act to provide for a more representative and expanded Bar Council and to make it a permanent body and that since the establishment of a new Bar Council might take some time, provision was made for an 'ad hoc' Bar Council.

The important provisions of the Amendment Act are the following:— Section 3 dissolves the old Allahabad and Avadh Councils with effect from 19-10-1949 and provides for the establishment of a Bar Council for the new High Court. Until a Bar Council has been established for the new High Court, the Chief Justice has been given power by section 5 to establish an 'ad hoc' Bar Council. Section 6 deletes the word "Allahabad" from section 1 (2) of the principal Act and adds the words "and the High Court of Judicature at Allahabad constituted by the U. P. High Court (Amalgamation) Order 1948" after the word "Patna". The effect of this Amendment is to make the principal Act applicable to the new High Court. Of Course it was open to the Provincial Government to achieve that object by simply issuing a notification in the Gazette, in exercise of the power conferred by that very provision, declaring the new High Court to be a High Court to which the Act applies. That act of the Provincial Government could not have been questioned on the ground of jurisdiction at all. But presumably because the Provincial Government wanted to make amendments in the principal Act by providing for the matters enumerated above it decided to pass an Act instead of issuing a notification making it applicable to the new High Court.

Under S. 1(2) of the principal Act, it had no power to make any modifications in the Act; the Act had to be applied to the new High Court as it stood or not at all. Section 4 of the principal Act dealing with the composition of Bar Councils was amended as also section 5 dealing with election of members. By S. 9 a new provision was made for the compulsory retirement of a certain percentage of members every third year. Section 10 makes amendments in section 6 dealing with the rule-making power of the High Court. Section 11 validates all proceedings taken, orders made and jurisdictions exercised by the Allahabad Bar Council between 26-7-48 and 26-3-50. Section 12 permits the continuation of all actions or proceedings commenced by or against the Allahabad and Avadh Bar Councils before 19-10-1949 and pending on that date. All property, funds and assets belonging to the two dissolved Councils are transferred by S. 13 to the Bar Council of the new High Court.

(9) The Amendment Act having been passed after the commencement of the Constitution, its validity is to be tested by Article 246. Under that Article Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule and Parliament and the Legislature of any State have power to make laws with respect to any of the matters enumerated in List III. List I is known as the Union List and List III, as the Concurrent List. The entry to be considered in List I is No. 78 "constitution and organisation of the High Courts.....; persons entitled to practise before the High Courts". The Amendment Act is not said to be with respect to any of the matters mentioned in List II, ("State list") and therefore it is left out of consideration. In List III, there is entry No. 26 "legal, medical and other professions".

The matters dealt with in the principal and the Amendment Acts undoubtedly come within entry No. 26 of List III, but it was contended on behalf of the applicant and denied on behalf of the opposite parties, that the matters dealt with in the

Amendment Act are included in entry No. 78 of List I. It was not disputed that according to the provisions of Article 246, if the matters are included in entry No. 78 of List I, Parliament has the exclusive power to make laws with respect to them and the Amendment Act passed by the Provincial or State Legislature would be invalid. The power of a State to make laws with respect to any of the matters enumerated in List III is subject to the exclusive power of Parliament, if it has any, to make laws with respect to the same matters. If Parliament has the exclusive power, a State cannot make laws even if the matters are enumerated in List III.

(10) The principles that a Court has to bear in mind when deciding whether a legislation comes within an entry of one list or an entry of another list are well settled. The problem always involves two questions, one of the interpretation of the entries of the two lists and the other of what the legislation purports to do. As regards the construction to be placed upon the entries in the rival lists it is to be assumed that the Union and the State Lists do not conflict and every attempt should be made to avoid a conflict. If necessary, the meaning given to one entry should be restricted in order to avoid overlapping. The meaning given to a general power in one entry may be restricted to give sense and efficacy to a power given by way of exception under an entry of another list. At the same time general language ought not to be cut down by far-fetched and impertinent limitations. The words "with respect to" mean the whole field of legislation.

In 'In the matter of C. P. & Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938', AIR 1939 FC 1 (A) the Federal Court held that the Act was intra vires the Provincial Legislature because it was with respect to "taxes on the sale of goods", entry No. 48 of the Provincial List and not to "duties of excise on tobacco and other goods manufactured or produced in India", entry No. 45 of List I of the Government of India Act. Gwyer, C. J. on page 5 quoted the following from — 'Citizens Insurance Co. of Canada v. Parsons', (1881) 7 AC 96 (B):

> "It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together and the language of one interpreted, and, where necessary, modified by that of the other. In this way, it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain, and to give effect to all of them".

On page 8 he observed that a reconciliation should be attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting and, where necessary, modifying the language of one by that of the other. He proceeded:

> "If indeed such a reconciliation should prove impossible, then and only then will the non-obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.
>
> It has been shown that if each legislative power is given its widest meaning, there is a common territory shared between them and an overlapping of jurisdictions is the inevitable result; and this can only be avoided if it is reasonably possible to adopt such an interpretation as would assign what would otherwise be common territory to one or the other. To do this it is necessary to construe this legislative power defined or described by one entry or the other in a more restricted sense than, as already pointed out, it can theoretically possess".

On page 10, the learned Chief Justice proceeded:

> "It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another..... A general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense, effect can be given to the latter in its ordinary and natural meaning."

Sulaiman, J. stated on page 21:

> "A difficulty may arise from the fact that some heads overlap as the groupings cannot be absolutely perfect. When overlapping is unavoidable, the provisions of section 100 operate" (referring to section 100 of Government of India Act corresponding to Article 246 of the Constitution)."

(11) In — 'Bhola Prasad v. Emperor', AIR 1942 FC 17 (C) the Federal Court upheld the validity of the Bihar Excise (Amendment) Act of 1940 passed by a Provincial Legislature. By that Act, possession of intoxicating liquor by any person, subject to certain exceptions, was prohibited. It was held that a power to legislate with respect to

> "intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs",

entry No. 31 of the Provincial List, included the power to prohibit intoxicating liquors throughout the province. Gwyer, C. J. remarked on page 19 that:

> "A power to legislate with respect to intoxicating liquors could not well be expressed in wider terms".

(12) The words "that is to say, the production ....other narcotic drugs" were held to be explanatory illustrative words and not words either of amplification or of limitation. It was said to be difficult to conceive a legislation with respect to intoxicating liquors and narcotic drugs which did not deal in some way or other with their production, manufacture etc., and those words were said to be apt to cover the whole field of possible legislation on the subject. Nicholes writes in his Australian Constitution, p. 241 that the words "with respect to" indicate the complete nature of a legislative power".

(13) The Madras General Sales Tax Act of 1939 passed by Provincial Legislature was held to be valid in — 'Governor General in Council v. Province of Madras', AIR 1945 PC 98 (D). The Act purported to levy a tax on first sales in Madras of goods manufactured or produced in India. It was held to come within entry No. 48 of the Provincial List "taxes on the sale of goods" and not within entry No. 45 of the Federal List "duties of excise on tobacco and other goods manufactured or produced in India". Lord Simonds observed on p. 100:

> "It is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it, and equally giving to the language

of the Provincial Legislative List a meaning which it can properly bear."

(14) The Act that was considered in — 'Kishori Shetty v. King', AIR 1950 FC 69 (E) was the Bombay Abkari Act, which prohibited, without permit or licence, possession of any intoxicant or hemp in excess of a certain quantity. The Federal Court held that the Act was validly passed by the State Legislature because it was with respect to "intoxicating liquor and narcotic drugs" entry No. 31 of the Provincial List. It was stated by Patanjali Sastri J. (as he then was) that the power given under entry No. 31 was expressed in wide and unqualified terms and it was far-fetched to suggest that so far as the provision in the Bombay Abkari Act covered foreign liquors it was legislation with respect to import and export across customs frontiers mentioned in entry No. 19 of the Federal List. In — 'State of Bombay v. F. N. Balsara', AIR 1951 SC 318 (F) Fazl Ali, J. laid down on page 322 that:

> "Where there is a seeming conflict between an entry in List II & an entry in List I, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction",

and relied upon the cases of the C. P. & Berar Sales of Motor Spirit & Lubricants Taxation Act (A) and — 'Governor General in Council v. Province of Madras (D)'.

(15) The "pith and substance" doctrine has been laid down in a number of decisions. In — 'Governor-General in Council v. Province of Madras (D)', Lord Simonds held on p. 99 that when a conflict arises between two lists,

> "it is not the name of the tax but its real nature, its 'pith and substance' as it has sometimes been said, which must determine into what category it falls."

In 'Kishori Shetty's case (E)', Patanjali Sastri, J. said on page 75:

> "If an enactment according to its true nature, its pith and substance, clearly falls within one of the matters assigned to the Provincial Legislature, it is valid, notwithstanding its incidental encroachment on a Federal subject".

Fazl Ali, J. observed in the case of 'F. N. Balsara (F)', at p. 322 that:

> "It is well established that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field; and therefore it is necessary to inquire in each case what is the pith and substance of the Act".

The pith and substance or the true nature and character of an Act is ascertained for the purpose of determining whether it is with respect to matters in this list or that list (ibid p. 322). In — Attorney-General for Ontario v. Attorney-General for Canada', 1912 AC 571 (G) the Judicial Committee laid down that:

> "When the text is ambiguous, as for example when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act".

This observation was relied upon by Gwyer, C. J. in the case of the 'C. P. & Berar Sales of Motor Spirit and Lubricants Taxation Act (A)'.

(16) Judging the matter in the light of the principles laid down above, I have no doubt that the Amendment Act is a legislation with respect to "persons entitled to practise before the High Courts" entry No. 78 of List I. The principal Act and the Amendment Act both are legislations with respect to Advocates who are persons entitled to practise before High Courts. The Amendment Act comes within entry 26 of List III, but the real question, when there is said to be a conflict between List I and List III, is whether the legislation comes within List I or not. If it comes within List I, Parliament has the exclusive power even though it may come within List III as well. The provision in entry No. 78 of List I is by way of an exception to entry No. 26 of List III. The power conferred by entry No. 26 of List III is general but since there is a power conferred by entry No. 78 of List I with respect to persons entitled to practise before the Hign Courts, the general power must be read subject to that power and a legislation with respect to Advocates must be held to come within entry No. 78 of List I regardless of whether it comes within entry No. 26 of List III or not.

The Bar Councils Act dealt only with Advocates who are the persons entitled to practise before the High Courts. The Amendment Act applied the whole Act with some modifications to the new High Court. All persons claiming a right to practise before tne new High Court are governed by the Amendment Act. But for the Amendment Act they would not have been governed by the principal Act because it applied to the old High Court which was in existence when it came into force and could not apply to the new High Court established subsequently (unless the State Government issued a notification under section 1(2)). Had the Amendment Act not been passed the persons claiming a right to practise before the new High Court would not have been governed by the principal Act.

It does not matter how the Amendment Act has made the principal Act applicable to them. It does not matter if all the provisions of the principal Act, which are made applicable to them, have not been reproduced word by word in the Amendment Act. It does not matter if it has achieved its object simply by substituting the words "High Court of Judicature at Allahabad constituted by the U. P. High Court Amalgamation Order" in place of the word "Allahabad" in section 1 (2) of the principal Act. The object of the Amendment Act was to apply the principal Act with some modifications to the persons claiming a right to practise before the Court. Thus the pith and substance or the true nature and character of the Amendment Act is making a law regarding the rights and liabilities of persons entitled to practise before High Courts. The words "with respect to persons entitled etc." are wide enough to cover all legislation with respect to such persons. Legislation which applies to all persons including persons entitled to practise before High Courts may not be said to be legislation with respect to persons entitled to practise before High Courts, but legislation which is exclusively applicable to such persons as regards their rights and liabilities is undoubtedly with respect to them.

The Arms Act or the Motor Vehicles Act applies to all persons including such persons and therefore may not be said to be laws with respect to such persons. If such persons are also governed by their provisions it is the incidental effect of them. The laws were not enacted to deal with them. They were enacted to deal with all persons and incidentally they became applicable to such persons also. But the Bar Councils Act and the Amendment Act dealt exclusively with persons entitled to practise before High Courts. The effect of the legislation felt by them was not an incidental effect. They were primarily intended to be affected by the Acts. I see no force in the con-

tention of the learned Advocate General that the entry No. 78 only refers to qualifications required for practising before High Courts. The words "with respect to" are wide enough to cover the whole field of legislation which primarily affects in any manner persons entitled to practise before High Courts.

(17) The learned Advocate General referred to Article 19(1)(g) and (6). All citizens have the right to practise any profession or to carry on any occupation. But this does not mean that the State cannot make any law relating to the professional qualifications necessary for practising any profession or carrying on any occupation. In List I there is entry No. 65; "Union agencies and institutions for, (a) professional, vocational or technical training". The learned Advocate-General contended on the basis of this provision that laws regarding qualifications only were comtemplated to be on an all-India basis and nothing else. The words used in entry No. 78 are not "qualifications of persons entitled to practise before High Courts". Merely because Parliament has the right to make laws with respect to Union agencies and institutions for professional, vocational or technical training, it cannot be said that Parliament has the right to make laws under entry No. 78, only regarding qualifications of persons entitled to practise before the High Courts.

I see no connection between the entires Nos. 65 and 78 and do not think that any light on the interpretation of entry No. 78 is shed by entry No. 65 or Article 19 (6). Article 19 (6) deals only with the question whether a certain law can be made or not and not with the question by whom it can be made.

(18) The words "with respect to persons entitled to practise before the High Courts" do not mean merely the question who shall be entitled to practise before the High Courts. They must not be mistaken for the words "right to practise before the High Courts". The Amendment Act, as a matter of fact, deals with the right of practice before the High Court and also the qualifications required by a person claiming the right. Under section 8 of the principal Act made applicable to the new High Court under the Amendment Act no person is entitled as of right to practise in the High Court unless his name is entered in the roll of the Advocates maintained under the Act. Section 9 of the principal Act empowers Bar Councils to make rules to regulate the admission of persons to be Advocates of the High Court by prescribing qualifications to be possessed by them and in other ways. Section 10 deals with the loss of the right to practise before the High Courts.

(19) It was conceded by the learned Advocate General that the whole of the principal Act could not be enacted by the State Legislature. He said that some provisions of it could be enacted by it, not others including S. 8. But he contended that the State Legislature has merely applied the provisions of the principal Act to the new High Court and has not enacted those provisions. On the analogy of executive authorities extending the applicability of Acts made by Legislatures beyond the areas or the tenures fixed by the Legislatures, he argued that the State Legislature has not made a law with respect to persons entitled to practise before the High Courts even though the effect of it is to make them governed by the principal Act with modifications. The contention is unsound.

There is absolutely no analogy between what has been done in the present instance by the State Legislature and what is done by executive authorities in exercise of powers specifically conferred upon them by enactments. If a Legislature passes an enactment making it initially applicable in a particular area or for a particular period and empowering executive authorities to extend it to other areas or beyond the period initially fixed and the executive authorities issue an order extending its applicability to other areas or beyond the period originally fixed, it may not be said that the Legislature has not made a law with respect to the other areas or for the extended period and it may not be said that it is the executive authorities who have made a law with respect to the other areas or for the extended period. But when a Legislature itself, expressly and after going through all the legislative formalities, enacts law, even though it may be in the form of adopting some law passed by some other Legislature for some other area, it is impossible to say that it has not made a law.

In the former case the appropriate Legislature has made a law which may be applied to other areas or beyond the period originally fixed by it and has left it to the executive authorities to determine those areas or the duration of the extended period; in the other case no such law has been made by the Legislature enacting the adopted law. No authority was shown to us in which it might have been held that even when an enactment is made with due legislative formalities by a Legislature, it has not made a law. In the present instance the principal Act did not empower the State Legislature to apply its provisions to other High Courts by simply passing a resolution. The State Legislature did not pass the Amendment Act in exercise of any power conferred upon it under the principal Act. Therefore neither can it be urged that the Legislature enacting the principal Act has conferred any power upon the State Legislatures, nor can it be urged that the State Legislature by passing the Amendment Act has not made a law but simply exercised a power conferred upon it.

When executive authorities extend the applicability of an Act in pursuance of a power conferred by the Act, the whole law is deemed to have been laid down by the Legislature passing the Act and the executive authorities are simply deemed to have exercised the power and not made a law. But when a State Legislature makes an enactment, not purporting to do so in exercise of any power conferred upon it by another enactment and expressly in exercise of its law-making power, it cannot be said with any show of reason that it has done an executive act and not a legislative act. Merely because the doing of an act by the executive authorities is held in certain circumstances to be an executive and not a legislative act, it cannot be said that whenever that act is done by a Legislature, it is not a legislative act.

(20) The next contention of the learned Advocate-General was, if I have understood him correctly, that making a law adopting some law previously made by another Legislature, even with modifications, is not making a law with respect to the matters dealt with in the previous law. Every law that is made by a Legislature in order to be effective must be within its powers. What laws are within the powers of which Legislatures is laid down in Article 246 of the Constitution. A State Legislature has power to make laws with respect to only those matters that are exhaustively enumerated in Lists II and III and has no power whatsoever to make laws with respect to any matter that cannot be found in them. A State Legislature has no residuary powers at all. Adopting a law made by another Legislature is

not a matter to be found in Lists II and III. Therefore no law made by a State Legislature can be justified on the ground that though it is not with respect to any of the matters dealt with in Lists II and III, it is simply adopting a law validly made by another Legislature.

As has been laid down one must have regard to the substance and not to the form of the enactment. Even though the form may be that of adopting a law made by another Legislature, in substance it is a law with respect to the matters dealt with in the adopted law. If a State Legislature has no power to make a law with respect to those matters, it has no power to adopt that law. If a Legislature cannot do anything directly, it cannot do it indirectly; if a State Legislature cannot directly enact a law with respect to a certain matter, it cannot do so indirectly by simply adopting a law made with respect to it by another Legislature.

(21) In the present case the State Legislature has not merely adopted a law made by another Legislature, it has made substantial modifications in it. Thus the case is worse than that of adopting a law made by another Legislature. When executive authorities are empowered to extend an Act beyond a certain area or a certain period with such modifications as they may think fit and they extend it with modifications, even then the Act is held to be an executive act and not a legislative act. But that is because the modifications are presumed to have been within the framework of the Act. — 'In re Delhi Laws Act, 1912, AIR 1951 SC 332 (H), Fazl Ali, J. said on pp. 359, 360:

> "The modifications are to be made within the framework of the Act and they cannot be such as to affect its identity or structure or the essential purpose to be served by it."

In his view "the power of introducing necessary restrictions and modifications is incidental to the power to apply or adapt the law". The modifications effected by the State Legislature in the Amendment Act, however, stand on a different footing. The State Legislature was bound by no rule to make only such modifications as were within the framework of the principal Act. Besides the discretion given to modify an Act is said to be by no means absolute or irrevocable in the strict legal sense.

The Legislature is always in a position to see how the powers, which it has conferred, are being exercised, and if they are exercised injudiciously or otherwise than in conformity with its intention or they result in any inconvenience, it can always by another Act recall its powers. See — 'Empress v. Burah, 3 Cal 63 at p. 140 (FB) (I)', and — 'In re Delhi Laws Act, (H) supra, at p. 360. The State Legislature when it enacted the Amendment Act was under no such check by the Union Legislature that had passed the principal Act. Therefore it is not possible to apply the doctrine of such decisions as — 'In re Delhi Laws Act (H)', in the present case and hold that the State Legislature has not made a law by passing the Amendment Act. When it was not empowered by any other Legislature to pass it, it could not possibly have passed it but in exercise of the legislative powers conferred by Article 246 it could not claim to have passed it in exercise of powers conferred by any enactment.

(22) I hold the Amendment Act to be 'ultra vires' the U. P. State Legislature.

(23) The Amalgamation Order, Cl. 17 (c) lays down that "references in any Indian Law to either of the existing High Courts by whatever name shall, unless the context otherwise requires, be construed as reference to the new High Court". So it was contended on behalf of the opposite-parties that the reference to the High Court of Judicature at Allahabad in Section 1 (2) of the principal Act would be construed as reference to the new High Court, that consequently the principal Act would apply to the new High Court and that even if the Amendment Act were declared to be 'ultra vires' the State Legislature, it would make no difference and the applicant would be bound to pay the fee if he wanted himself to be enrolled as an Advocate. The Amalgamation Order is to have effect "subject to any provision that may be made on or after the appointed day with respect to the new High Court by any Legislature or authority having power to make such provision" (see clause 18).

As the Amendment Act has been held to be 'ultra vires' and as no other provision has been made by any Legislature or authority having power to make such provision, the Amalgamation Order remains in force. It follows that section 1 (2) of the principal Act refers to the new High Court. But that seems to me to be the only effect; it has not the effect of conferring a power upon the new High Court to do afresh everything that the old High Court was empowered to do. Whenever the words, "The High Court of Judicature at Allahabad" are used in the Act they may be interpreted to refer to the new High Court but it is quite a different thing to say that whatever the old High Court was required to do has to be done over again by the new High Court as the result of this interpretation and clause 17 (c).

The provisions of the Act which require the High Courts to which it applies, to do certain acts use the words "High Court" and not "The High Court of Judicature at Allahabad." Therefore those provisions are not affected at all by Cl. 17 (c) and there arises no question of the new High Court's doing again or afresh what the old High Court was required to do. The clause simply interprets the words "the High Court of Judicature at Allahabad", and does not confer any powers upon the new High Court. There existed the Bar Councils at Allahabad and at Lucknow and so long as they were not dissolved, another Bar Council could not be created. The principal Act did not contain any provision for dissolution of a Bar Council. There cannot possibly be two Bar Councils for the same High Court under the Act. Therefore even if it could be said that the clause empowered the new High Court to do over again all the acts that were to be done by the old High Court, the context requires that a new Bar Council cannot be created so long as the old Bar Councils exist.

The proviso to clause 8 (2) of the Amalgamation Order lays down that—

> "any person who, immediately before the appointed day, is an Advocate entitled to practise ..... in either of the existing High Courts, shall be recognized as an Advocate ..... entitled to practise ..... in the new High Court".

Thus the Amalgamation order itself preserved to all the Advocates the right to practise in the new High Court. Consistently with that provision it cannot be said that the right to practise in the new High Court depends upon fresh enrolment by a new Bar Council. The applicant had the right to practise in the old High Court on the appointed day and the proviso to Cl. 8 (2) continued that right. Clause 17 (c) must be read in such a manner as to continue that right. In other words, it does not contemplate the creation of a new Bar

Council and preparation of a new roll of Advocates of the new High Court. If a new roll is not to be prepared, there arises no question of payment of any fee. If the applicant's right to practise in the new High Court continued by the proviso to Cl. 8 (2), it cannot be made dependant upon his paying any fee. In the result I find that the Amalgamation Order does not authorise the preparation of a new roll of Advocates and the demand of a fee from those wishing to practise in the new High Court.

(24) The applications must be granted and a writ of 'mandamus' should be issued to the opposite-parties 1 and 2 directing them to include or retain the name of the applicant in the roll of Advocates without his having to pay any sum of money. As the main dispute in the case was about the constitutionality of the U. P. Amendment Act and as it has been decided against opposite-party No. 3, I think the applicant should get his costs of these proceedings from it.

(25) B. MUKERJI J.: I agree.

V.S.B. Writ issued.

A.I.R. 1954 ALLAHABAD 735 (Vol. 41, C.N. 290)

DESAI AND B. MUKERJI JJ. (30-4-1954)

Kumari Saroj Rawat, Applicant v. Secretary, Bar Council High Court, Allahabad and others, Opposite Parties.

Civil Misc. Writ No. 320 of 1954.

(a) Bar Councils Act (1926), S. 1 — Amalgamated High Court of Allahabad and Oudh is new High Court — Applicability of Act to new High Court — Necessity of issue of Notification.

As the amalgamated High Court is a new High Court, then it is not one of the High Courts which had been specifically named in S.1 (2) of the Bar Councils Act &, therefore, if the Bar Councils Act is to be made applicable to this new High Court then a notification in respect thereof has to be issued by the State Government extending the provisions of the Bar Councils Act to it. Further, if the provisions of the Bar Councils Act mentioned in sub-section (3) of S. 1 were to apply to this new High Court then the requisite notification has to be issued by the State Government and so long as these notifications are not issued, the provisions of the Bar Councils Act of 1926 cannot apply to the new High Court. (Para 4)

(b) Constitution of India, Art. 226 — Mandamus in discretionary matters.

In a petition to the High Court to issue a writ of mandamus to the State Government directing it to issue a notification under section 1(3) of the Bar Councils Act, 1926, applying the provisions of that Act to the High Court, it was held that the High Court cannot do so as the State Government has a discretion in the matter and that it is not obligatory on the State Government to make the requisite notifications. (Paras 1, 5)

Anno: Const. Ind., Art. 226 N. 114.

CASE REFERRED: Para

(A) (V41) AIR 1954 All 728: Writ Appln. No. 53 of 1953, D/- 22-10-1953 (All) 4

Govind Das, for Applicant; Advocate-General, U. P., Kanhaiya Lal Misra, for Opposite Party; Gopal Behari, Amicus Curiae.

MUKERJI J.:

This is a petition by Kumari Saroj Rawat under Article 226 of the Constitution of India praying that a writ of mandamus be issued to opposite parties 1 and 2 "to act according to law and place the application of the applicant before the Court for appropriate orders" or in the alternative "to issue a writ of mandamus to opposite party No. 3 directing it to issue a notification under S. 1 (3) of the Indian Bar Councils Act 1926 applying the provisions of the Act of 1926 to this Court." So far as the first prayer is concerned we need say nothing since the petition has been placed before us and we are going to make appropriate orders on that petition. In order to see whether or not we would issue a writ of mandamus to opposite-party No. 3, namely, the Government of Uttar Pradesh, it is necessary to state a few facts.

(2) The petitioner alleges that she passed the LL. B. Examination from the University of Lucknow in the year 1952 and that thereafter she completed one year's training "in chambers" in accordance with Rule 1 of the rules framed under S. 9 of the Indian Bar Councils Act of 1926. She further states that she applied to this Court for enrolment as an advocate on 18-9-1953, and paid the requisite stamp duty of Rs. 750/- along with her application. She further alleges that on 18-9-1953, she sent a money order for a sum of Rs. 100/ to the Bar Council at Allahabad and that the said sum was received by the Secretary of the Bar Council on 21-9-1953 — this sum she sent in accordance with the rules which had been framed under the Bar Councils Act. The applicant has contended that she was unable to secure enrolment as an advocate because by our judgment dated October 22,1953, we had held the Bar Councils (U. P. Amendment) Act of 1950 ultra vires the State Legislature. It was contended on her behalf that because of this decision the Bar Councils constituted under the U. P. Amendment Act could not function and could not exercise any of the powers which were conferred on them and, therefore, they could not bring her name on to the rolls of advocates entitled to practise within the jurisdiction of this Court.

(3) On behalf of the State Government it was stated by the learned Advocate-General that the State Government was unable to issue the notifications contemplated under S. 1 (2) and Section 1 (3) of the Bar Councils Act (Act 38 of 1926) because according to the reading by the State Government of our judgment we had held that the old Bar Councils at Allahabad and Lucknow existed and that no more Bar Councils could come into existence in those areas.

(4) In the case of — 'D. D. Seth v. Secretary Bar Council, Allahabad', AIR 1954 All 728 (A) we had held that the Uttar Pradesh amendment of the Indian Bar Councils Act of 1926 by the State Act of 1950 was ultra vires the State Legislature. In that judgment we had given our reasons for coming to that conclusion and we do not consider it necessary to reiterate those reasons over again. Counsel for the petitioner has really not argued before us the question of the vires of the State Amendment Act of 1950; the position which the petitioner's counsel took was one in which he accepted that the State Amendment Act of 1950 was ultra vires the State Legislature. What he really contended was that there was nothing in our decision in the 'case of D. D. Seth (A)' which precluded the State Government from making the notifications contemplated under section 1 of the Bar Councils Act of 1926.

This submission by learned counsel for the petitioner appears to us to be right. What we said in

our earlier judgment on this question was that it was not possible to have two Bar Councils for the same High Court. We further expressed the opinion that there was no provision, as indeed there was none, by which a Bar Council could be dissolved. We did not say that it was not competent therefore, for the State Government to make a notification, if it so desired, under the provisions of either section 1 (2) or S. 1 (3) of the Bar Councils Act.

We had held that the amalgamated Court of Allahabad and Oudh was a new High Court and was not covered by the High Court to which reference has been made in S. 1 (2) of the Bar Councils Act, 1926. If the amalgamated High Court was a new High Court, as indeed it was under the Amalgamation Order of 1948, then it was not one of the High Courts which had been specifically named in S. 1 (2) of the Bar Councils Act and, therefore, if the Bar Councils Act was to be made applicable to this new High Court then a notification in respect thereof had to be issued by the State Government extending the provisions of the Bar Councils Act to it. Further, if the provisions of the Bar Councils Act mentioned in sub-section (3) of S. 1 were to apply to this new High Court then the requisite notification had to be issued by the State Government and so long as these notifications did not issue, the provisions of the Bar Councils Act of 1926 could not apply to the new High Court because the attempt of the State Government to make the provisions applicable in an amended form to the new High Court was found by us to be an attempt which was beyond the legislative competence of the State Government.

(5) In regard to our issuing a writ of mandamus to the State Government directing it to make the requisite notifications we are of the opinion that we cannot do so for the obvious reason that the State Government has a discretion in the matter and that it is not obligatory on the State Government to make the requisite notifications. We have already pointed out earlier that the learned Advocate-General stated before us that the State Government was willing to make the notifications, but it refrained from doing so because it was of the view that on account of our decision referred to earlier these notifications could not any further be made by it in relation to this Court. We have already stated that there is, in our judgment, no such disability in the way of the State Government.

(6) In the result this application must fail and is hereby dismissed. We make no orders as to the costs of this application for in our opinion the costs of the petition must be borne by the parties. We further note that Mr. Gopal Behari argued this matter amicus curiae supporting the view which we had expressed in the case of Sri D. D. Seth and others.

V.S.B. Application dismissed.

A.I.R. 1954 ALLAHABAD 736 (Vol. 41, C.N. 291)

BRIJ MOHAN LALL J. (29-4-1954)

L. Ram Sarup, Appellant v. Gindoo, Respondent.

Second Appeal No. 427 of 1949, against decree of Civil Judge, Bareilly, D/- 27-10-1948.

(a) Court-fees Act (1870), Sch. II, Art. 1(e) (iii) (U. P.) — One application containing prayer for more than one relief — Separate court-fee cannot be demanded — Court when can refuse some of prayers — S. A. No. 671 of 1935, D/- 16-10-1935 (All) and S. A. No. 1434 of 1933, D/- 17-3-1936 (All), Dissented from.

It is the application or petition (presented to the High Court) which is to be taxed with court-fee. The number of prayers contained in the petition has not been made the criterion for determining the amount of court-fee. If there is one petition one court-fee of Rs. 3/12/- is payable. If there are two separate documents they have to bear two separate court-fees. The number of reliefs is not the test for determining the court-fee on each application. If a petition to the High Court contains more than one prayer the Court cannot demand more than one court-fee. If the prayers are totally distinct and different from each other it is open to the Court to refuse some or all prayers unless they are embodied in separate documents. But while the Court may refuse some of the prayers on this ground it cannot demand payment of more than Rs. 3/12/- as court-fee in respect of one application on the ground that it contains more than one prayer. S. A. No. 671 of 1935, D/- 16-10-1935 (All) and S. A. No. 1434 of 1933, D/- 17-3-1936 (All), Dissented from. Cri Misc. No. 905 of 1946, D/- 7-11-1946 (All), Relied on. (Paras 5, 6, 8)

No hard and fast rules can be laid down as to which of the two prayers can legitimately be joined and which cannot. It will depend upon the circumstances of each case as to whether one or more prayers can legitimately be joined together and embodied in one petition. Where the petition consists of two prayers—one for bringing the legal representative of the deceased respondent on the record and the other to appoint the guardians-ad litem for two of them who happen to be minors, the two prayers are closely connected with each other. As a matter of fact that first prayer cannot be granted unless the second is granted. These two prayers can legitimately be grouped together in one application and the Court will not be justified in refusing any one of them because they are both contained in one document. (Paras 9, 10)

Thus considered from the point of view of court-fee there is no bar to a prayer for substitution of names and another for appointment of guardians being grouped together in one petition. (Para 12)

Anno: Court-fees Act, Sch. II, Art. 1 N. 2.

(b) High Court Rules and Orders — Allahabad High Court Rules—Chap. IX, Rule 2(i)—Composite application for substitution and appointment of guardian-ad-litem — Separate registration and numbering.

While Rule 2(i) of Chap. IX says that all applications "shall be separately registered and numbered" the intention is to give them a number separate and distinct from the number of the parent record. If, therefore, a composite petition like the one for bringing legal representatives of deceased respondent on record and for appointment of guardians-ad-litem for some of them who happen to be minors, is given a number separate from the parent record and is registered as a miscellaneous case the requirements of the rules will be complied with. It was not the intention of the rules that if a petition contained two prayers two separate numbers should be given and it should be registered as two separate cases. The office will be complying with the

requirements of R. 2 (1) by numbering and registering such a composite application as one miscellaneous case. (Para 13)

Under Chapter VI, R. 1 of the Rules of Court a separate order-sheet is to be attached to such a petition so that the history of that petition may appear at the very first glance by having a look at that order-sheet. The object is not to mix up the orders passed on miscellaneous applications with those passed in the appeal or revision itself. (Para 14)

CASES REFERRED: Paras

(A) ('35) Second Appeal No. 671 of 1935, D/- 16-10-1935 (All) 7

(B) ('36) Second Appeal No. 1434 of 1933, D/- 17-3-1936 (All) 7

(C) ('46) Criminal Misc. No. 905 of 1946, D/- 7-11-1946 (All) 7

Maharaja Bahadur Lal, for Appellant; S. P. Kumar, for Respondent.

JUDGMENT: Under rule 1(xiv) of Chapter II of the Rules of Court, 1952, the Joint Registrar has placed this matter before me so that I may issue directions for his future guidance. The question involved, as rightly pointed out by him, is one of importance and of frequent occurrence.

(2) It appears that Gindoo, the sole respondent in this second appeal, has died. The appellant has made an application to bring five persons on the record as the deceased's legal representatives. Two of the persons sought to be brought on the record are minors. Therefore the petition contains a further prayer, viz. that guardians 'ad litem' be appointed for the said two minors.

(3) The question which the Joint Registrar has referred for decision is whether these two prayers could be combined in one petition or whether two separate petitions should have been presented. He has pointed out that prior to the coming into force of the present rules in 1952 such a composite application could be made. He, however, doubts whether in view of rule 2(1) of Chapter IX of the Rules of Court such a composite application is now entertainable.

The reason which has created a doubt in his mind is that under the aforesaid rule every application for substitution of names and every application for appointment of a guardian or next friend is to be "separately registered and numbered". He feels that possibly an application like the present containing these two prayers is to be given two numbers — one as an application for substitution of names and the other as an application for appointment of a guardian — and numbering one application twice may be impracticable.

(4) Another aspect of the case, though not stressed by the Joint Registrar, but pointed out by the learned Standing Counsel is whether the provisions of Court Fees Act are defeated by reason of two prayers being embodied in one petition. It is desirable to deal with both these aspects of the case in order to finally decide this point.

(5) The question of court fee may be taken up first. Under Schedule II, article 1, of the Court Fees Act (VII of 1870) as amended in the State of Uttar Pradesh the entry is as follows:

Application or petition	(e) When presented to a High Court.	Three rupees twelve annas.

It is to be noticed that it is the application or petition which is to be taxed with court fee. The number of prayers contained in the petition has not been made the criterion for determining the amount of court fee. If there is one petition one court fee of Rs. 3/12/- is payable. If there are two separate documents they have to bear two separate court fees.

It is possible to conceive of cases where it may not be possible for a petitioner to ask for a definite relief. It may be that on account of circumstances (all of which may not be within his knowledge) he may be entitled to one relief or another. In such circumstances he may ask for an alternative relief. He is not to pay more than one court fee if he asks for an alternative relief. I will go further and hold that he is not to pay more than one court fee even if he asks for more than one relief primarily and not alternatively. The reason for this conclusion is that, as already stated, the number of reliefs is not the test for determining the court fee on each application.

(6) It will, therefore, follow that if a petition contains more than one prayer the Court cannot demand more than one court-fee. If the prayers are totally distinct and different from each other it is open to Court to refuse some or all prayers unless they are embodied in separate documents. But while the Court may refuse some of the prayers on this ground it cannot demand payment of more than Rs. 3/12/- as court-fee in respect of one application on the ground that it contains more than one prayer.

(7) No reported case has been cited before me on this point. But my attention has been drawn to some unreported decisions. On 16-10-1935 Iqbal Ahmad J. (as he then was) held in Second Appeal No. 671 of 1935 (All) (A) that if a petition contained more than one prayer it should be treated as more than one application and a court-fee should be paid in respect of each prayer. In other words, it was held that if the petition contained two prayers two court-fees were to be paid.

On 17-3-36 the same learned Judge re-affirmed his previous view in 'Second Appeal No. 1434 of 1933 (All) (B)'.

The matter came up again for decision before Sulaiman C. J. on 5-3-37 and he was of the opinion that only one court-fee was payable irrespective of the number of prayers contained in a petition. He, however, went on to hold that although the Court could not demand more than one court-fee it was open to the Court to refuse to grant more than one prayer. The matter was considered on 7-11-46 by Malik J. (now C. J.) in 'Criminal Misc. No. 905 of 1946 (All) (C)' and he agreed with the view taken by Sulaiman C. J.

(8) The position, therefore, is that if a petition contains more than one relief the Court is not entitled to demand more than one court-fee but it is open to the Court to reject some of the prayers on the ground that they are disconnected with main petition.

(9) No hard and fast rule can be laid down as to which of the two prayers can legitimately be joined and which cannot. It will depend upon the circumstances of each case as to whether one or more prayers can legitimately be joined together and embodied in one petition.

(10) In the present petition there are two prayers— one for bringing the legal representative of the deceased respondent on the record and the other to appoint the guardians 'ad litem' of two of them who happen to be minors. The two prayers are closely connected with each other. As a matter of fact the first prayer cannot be granted unless the second is granted.

The Court cannot bring a person on the record without hearing his objections, if any, and if he happens to be minor the objections cannot be put

forward by him unless a guardian 'ad litem' is appointed. The appointment of a guardian is, therefore, a condition precedent to the bringing on the record the deceased's minor legal representatives. In the circumstances I am of opinion that these two prayers can legitimately be grouped together in one application and that the Court will not be justified in refusing any one of them because they are both contained in one document.

Similarly, if a petition contains a prayer for bringing the deceased's legal representatives on the record and also a prayer for setting aside the abatement the two prayers will be interconnected that it will not be proper to reject them on the ground that they are contained in the same petition.

(11) A substitution application may, however, be made in certain cases more than 150 days after the death. In that case a prayer for granting a relief under S. 5 of the Limitation Act will also have to be made. Article 176 prescribed a period of 90 days for making an application for bringing the deceased's legal representatives on the record. After the expiry of this period of 90 days an automatic abatement takes place and Art. 171 prescribes a period of 60 days for setting aside the abatement. But if the petitioner has allowed the period of 150 (90 plus 60) days to expire and has made an application under S. 5 of the Limitation Act his prayer for condoning the delay is a separate and independent prayer. Such a prayer can, in my opinion, be rejected on the ground that it should not have been embodied in the substitution application.

(12) I am, therefore, of the opinion that considered from the point of view of court-fee there is no bar to prayer for substitution of names and another for appointment of guardians being grouped together in one petition.

(13) Now I come to the second question, viz., whether in view of the provisions of rule 2(1) of Chapter IX the two prayers can be embodied in one application.

In deciding this question it is necessary to take note of the historical back-ground. Before the coming into force of these Rules the practice in Allahabad High Court was that the appeals, revisions and reference were numbered, but no application presented during the pendency of the litigation was ever separately numbered or registered. All applications whether for stay of execution, for substitution of names, appointment of guardians or receivers, for injunction, or for any other interlocutory matter, were described as applications in appeals or revisions. No separate order-sheets were maintained in respect of such petitions.

On the other hand, the practice in the erstwhile Chief Court at Lucknow, which was followed at Lucknow even after the amalgamation, was that every application was separately entered in the Miscellaneous Register and was given a separate number which was distinct from the number of the parent record. While the new rules were being framed it was considered desirable to establish a uniform practice and the choice had to be made out of the aforesaid two practices. The Lucknow practice was preferred and adopted. Therefore while the rule says that all such applications "shall be separately registered and numbered" the intention is to give them a number separate and distinct from the number of the parent record. If, therefore, a composite petition like the present one is given a number separate from the parent record and is registered as a miscellaneous case the requirements of the rules will be complied with. It was not the intention of the rules that if a petition contained two prayers two separate numbers should be given and it should be registered as two separate cases. In my opinion the office will be complying with the requirements of rule 2(1) by numbering and registering such a composite application as one miscellaneous case.

(14) Under chapter VI, rule 1, of the Rules of Court a separate order-sheet is to be attached to such a petition so that the history of that petition may appear at the very first glance by having a look at that order-sheet. The object is not to mix up the orders passed on miscellaneous applications with those passed in the appeal or revision itself.

(15) In the circumstances my reply to the query made by the Joint Registrar is that a petition containing two prayers, viz., one for substitution of names as legal representatives and the other for appointment of guardians 'ad litem' of the minors, is legally entertainable.

R.G.D. Answer accordingly.

A.I.R. 1954 ALLAHABAD 738 (Vol. 41, C.N. 292)

ROY J. (9-6-1954)

State v. Deadley Misra, Opposite Party.

Criminal Reference No. 371 of 1951, made by Judicial Officer, Jaunpur.

Criminal P. C. (1898), S. 144 — Validity — (Constitution of India, Art. 19(1)(a), (2) (as amended in 1951)).

Having regard to the Constitution (First Amendment) Act (1951) there can be no two opinions that S. 144 of the Code of Criminal Procedure was never in conflict with Art. 19(1)(a) of the Constitution of India. The phrase 'reasonable restriction' in Art. 19 connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. An order promulgated under S. 144 of the Code of Criminal Procedure by a District Magistrate for the maintenance of public peace and tranquillity, one of the clauses of which is that no one shall arrange, organise or take part in any demonstration whatsover, from the 15th September 1950, to the 31st October 1950, must be taken as a reasonable order and not of an excessive nature beyond what was required in the interest of the public. The provisions of S. 144 are valid. (Paras 2, 3)

Anno: Cr. P. C., S. 144 N. 1.

A. G. A., for the State; S. C. Khare, for Opposite Party.

ORDER: This is a reference under S. 432, Criminal P. C., by the learned Judicial Officer of Jaunpur for a decision as to whether or not S. 144, Criminal P. C., is ultra vires as it offends against Art. 19(1)(a) of the Constitution of India.

(2) On 9-9-1950, an order under S. 144, Criminal P. C., was promulgated by the District Magistrate of Jaunpur with a view to prevent breach of peace and to maintain public tranquillity. One of the clauses contained in that order was that no one shall arrange, organise or take part in any demonstration whatsoever. The order was to remain in force from 15-9-1950 to 31-10-1950, both days inclusive. It was alleged on behalf of the prosecution that on 27-9-1950, Deadley Misra in contravention of that order organised a public meeting at the crossing in Mohalla Tikli Tola and took part in a demonstration and raised slogans like

"Inqilab Jindabad, Socialist Party Zindabad", etc. The learned Magistrate held the accused guilty of breach of the order under S. 144, Criminal P. C., punishable under S. 188, I. P. C.

The learned Magistrate, however, observed that since Art. 19(1)(a) of the Constitution of India gave unfettered right of freedom of speech and expression to every citizen of India except for restrictions imposed under Art. 19(2) of the Constitution which did not cover a contigency of the present nature, S. 144, Criminal P. C., must be held to be ultra vires. It appears that the learned Magistrate did not take into consideration the Constitution (First Amendment) Act, 1951, which came into force on 18-6-1951, by which Art. 19, as it originally stood, had been amended.

By the amendment the following clause was substituted for clause (2) of Art. 19:

"(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency, morality, or in relation to contempt of Court, defamation or incitement to an offence."

(3) The amendment further provided that no law in force in the territory of India immediately before the commencement of the Constitution which is consistent with the provisions of Art. 19 of the Constitution as amended by sub-s. (1) of S. 3 of the Amending Act shall be deemed to be void or ever to have become void on the ground only that, being the law which takes away or abridges a right conferred by sub-cl. (a) of cl. (1) of Art. 19, its operation was not saved by cl. (2) of that article as originally enacted. Having regard to the Amending Act, there can be no two opinions that S. 144, Criminal P. C., was never in conflict with Art. 19(1)(a) of the Constitution of India. The phrase 'reasonable restriction' in Art. 19 connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. An order promulgated under S. 144, Criminal P. C., by a District Magistrate for the maintenance of public peace and tranquillity of the nature promulgated in the present case must be taken as a reasonable order and not of an excessive nature beyond what was required in the interest of the public.

My answer to the reference therefore is that S. 144, Criminal P. C., is not in conflict with Art. 19(1)(a) of the Constitution of India and that the provisions of that section are valid. A copy of this order shall be sent to the Magistrate by whom the reference was made who shall dispose of the case in terms of this order. In the circumstances of the case I make no order as to the costs of this reference.

D.H.Z. Answer accordingly.

A.I.R. 1954 ALLAHABAD 739 (Vol. 41, C. N. 293)

(LUCKNOW BENCH): BEG J. (12-1-1954)

Dhondhey Prasad, Appellant v. Sewak and others, Respondents.

Second Ex. Decree Appeal No. 13 of 1951, against decree of Civil J., Gonda, D/- 29-5-1951.

(a) Civil P. C. (1908), O. 21, Rr. 1 (b), 15 — "To the decree-holder" — (Civil P. C. (1908), Pre.) — (Interpretation of Statutes — Addition of words).

An interpretation of statute that cannot be supported except by addition of words not found in the body of the statute itself is a strained one and must be rejected as unwarranted. Order 21, R. 1 itself neither contains the word 'all' nor the words "jointly at one time." All that it connotes is that payment must be made to the decree-holder or decree-holders, and if they are shown or proved to have separate interests, separate payment to each of the decree-holders of their respective shares in the decretal amount is not barred nor prohibited. The statute, as it stands, does not postulate the joint concurrence of all the decree-holders as a condition precedent of satisfaction of the decree. It cannot be held that the word 'decree-holder' must include the plural, 'decree-holders', and that hence payment must be made to all the decree-holders jointly at one time. (Para 4)

Anno: Civil P. C., O. 21, R. 1 N. 8.

1953 Mulla: O. 21, R. 1 (Topic discussed in N. 8 to O. 21, R. 1 in AIR Com., extra).

Civil P. C., O. 21, R. 15, N. 4.

1953 Mulla: O. 21, R. 15, P. 770 N. "Application .....decree' (12 Pts. extra in N. 4 to O. 21, R. 15 in AIR Com.—Conflict between Lahore, Sind and Oudh on the one hand and Patna on the other, noticed in Pts. 9, 10 and 11 in N. 4 to O. 21, R. 15 in AIR Com., not noticed in Mulla).

Civil P. C., O. 21, R. 15 N. 8.

1953 Mulla: O. 21, R. 15 P. 772 N. "Payment .....decree" (Views of other Courts on Pt. (n) not noticed in Mulla — Question as to what will happen when payment is made to one of decree-holders when they are members of Hindu coparcenary, not discussed in Mulla).

Civil P. C., Preamble N. 7.

(b) Civil P. C. (1908), O. 21, Rr. 1, 15 — Partial execution.

Order 21, R. 15 does not deprive a judgment-debtor from paying off the share of one of the decree-holders. All that it says is that one of the joint decree-holders can take out execution of the whole decree for the benefit of the entire body of decree-holders. Where the other two decree-holders have been paid off, and yet the remaining decree-holder is seeking execution of the whole decree he is seeking execution of the whole decree not for the benefit of the entire body of the decree-holders but obviously for his own benefit.

Further under O. 21, R. 15 (1) the Court in according its permission cannot shut its eyes to the equities of the case. Thus, by adopting the procedure prescribed by O. 21, R. 15 (1) the decree-holder places himself at the mercy of the Court, who can refuse to allow him to proceed.

Further, in such a case, under sub-cl. (2) of O. 21, R. 15 it would be open to the Court to impose a condition that the entire money be deposited in Court and that out of it the applicant decree-holder should be allowed to be paid only one-third of the amount of the decree and not the remaining two-third which has already been paid off. If the Court could impose a condition like that and stop in the end the eventual payment of two-third of money realized as a result of execution there seems to be no reason why the Court should not allow the satisfaction of two-third of the decree to be recorded in Court and allow the execution proceedings to go on only with respect to the remaining one-third from the

very beginning. This is certainly a more convenient and expeditious mode of achieving the same purpose which is both just and equitable. (Paras 6, 7)

Anno: Civil P. C., O. 21, R. 1 N. 8.

1953 Mulla: O. 21, R. 1 (Topic discussed in N. 8 to O. 21, R. 1 in AIR Com. extra).

Civil P. C., O. 21, R. 15 N. 4.

1953 Mulla: O. 21, R. 15 P. 770 N "Application .....decree" (12 Pts. extra in N. 4 to O. 21, R. 15 in AIR Com.—Conflict between Lahore, Sind and Oudh on the one hand and Patna on the other, noticed in Pts. 9, 10 and 11 in N. 4 to O. 21, R. 15 in AIR Com., not noticed in Mulla).

Civil P. C., O. 21, R. 15, N. 5.

1953 Mulla: O. 21, R. 15, P. 771 N. "Application .....decree" (1 Pt. extra in N. 5 to O. 21, R. 15 in AIR Com.—1 Pt. extra in Mulla—Compare Pt. 3 in N. 5 to O. 21, R. 15 in AIR Com., Pt. (j) in Mulla and 9 Cal 482 (494) (PC) — Proposition (j) in Mulla seems to be inadequate.

Civil P. C., O. 21, R. 15 N. 8.

1953 Mulla: O. 21, R. 15, P. 772 N. "Payment .....decree" (Views of other Courts on Pt. (n) not noticed in Mulla—Question as to what will happen when payment is made to one of decree-holders when they are members of Hindu coparcenary not indicated in Mulla).

(c) Civil P. C. (1908), S. 38, O. 21, Rr. 1, 2, 15 — Partial satisfaction.

Where the decree does not specify the separate shares of various decree-holders but on the other hand does not also state that the payment of the decree has to be made in one instalment and not separately, by allowing payments of the respective shares of each of the decree-holder separately the provisions of the decree are not in any way contravened. If the rights of the several decree-holders were actually separate prior to the decree, the interposition of a decree cannot vary them for the purposes of its satisfaction. (Para 8)

Anno: Civil P. C., S. 38 N. 8.

1953 Mulla: S. 38, P. 166 N. "Powers..... decree" and S. 47, P. 184 N. "(1) Questions..... decree".

Civil P. C., O. 21, R. 1 N. 8.

1953 Mulla: O. 21, R. 1 (Topic discussed in N. 8 to O. 21, R. 1 in AIR Com., extra).

Civil P. C., O. 21, R. 2 N. 9.

1953 Mulla: O. 21, R. 2 (Topic discussed in N. 9 to O. 21, R. 2 in AIR Com. extra — See however, N. "Agent" on P. 759 in Mulla).

Civil P. C., O. 21, R. 15 N. 4.

1953 Mulla: O. 21, R. 15, P. 770 N. "Application.....decree" (12 Pts. extra in N. 4 to O. 21, R. 15 in AIR Com.—Conflict between Lahore, Sind and Oudh on the one hand and Patna on the other, noticed in Pts. 9, 10 and 11 in N. 4 to O. 21, R. 15 in AIR Com. not noticed in Mulla).

Civil P. C., O. 21, R. 15 N. 5.

1953 Mulla: O. 21, R. 15, P. 771 N. "Application .....decree" (1 Pt. extra in N. 5 to O. 21, R. 15 in AIR Com.—1 Pt. extra in Mulla — Compare Pt. 3 in N. 5 to O, 21, R. 15 in AIR Com., Pt. (j) in Mulla and 9 Cal 482 (494) (PC) —Proposition (j) in Mulla seems to be inadequate).

Civil P. C., O. 21, R. 15 N. 8.

1953 Mulla: O. 21, R. 15, P. 772 N. "Payment .....decree" (Views of other Courts on Pt. (n) not noticed in Mulla—Question as to what will happen when payment is made to one of decree-holders when they are members of Hindu coparcenary, not indicated in Mulla).

(d) Civil P. C. (1908), O. 21, Rr. 1, 2, 15 — Payment to one decree-holder.

It is not open to one of the two joint decree-holders of a decree to certify satisfaction of the whole decree so as to bind the other decree-holder although he can certify satisfaction in respect of his own interest in the decree. Case law discussed. (Para 11)

Anno: Civil P. C., O. 21, R. 1 N. 8.

1953 Mulla: O. 21, R. 1 (Topic discussed in N. 8 to O. 21, R. 1 in AIR Com. extra).

Civil P. C., O. 21, R. 15 N. 8.

1953 Mulla: O. 21, R. 15 P. 772 N. "Payment .....decree" (Views of other Courts on Pt. (n) not noticed in Mulla — Question as to what will happen when payment is made to one of decree-holders when they are members of Hindu coparcenary not discussed in Mulla).

CASES REFERRED: Paras

(A) (V4) AIR 1917 Mad 988: 35 Ind Cas 157 9
(B) (V21) AIR 1934 Mad 330: 57 Mad 696 10
(C) (V36) AIR 1949 Mad 790: ILR (1950) Mad 285 (FB) 10
(D) ('04) 26 All 334: 1 All LJ 40 10
(E) ('06) 28 All 252: 3 All LJ 49 10
(F) (V30) AIR 1943 Pat 188: 207 Ind Cas 250 11
(G) (V5) AIR 1918 Oudh 91: 4 Oudh LJ 735 11

H. D. Srivastava, for Appellant; Bhawani Shankar, for Respondent No. 1.

JUDGMENT: This appeal arises out of execution proceedings.

(2) It would appear that a mortgage decree was passed in favour of three brothers, namely, Ram Sewak, Ram Sudhist and Ram Naresh against one Sewak, minor, who is respondent No. 1 in this appeal. After the said decree was passed, a two-third share belonging to two of the brothers, namely, Ram Sewak and Ram Naresh was paid off and only the remaining one-third share belonging to Ram Sudhist remained unsatisfied. Dhondhey Prasad son of Ram Sudhist put in an application for execution in respect of the entire amount of the decree. An objection was made on behalf of the judgment-debtor that the two-third share belonging to the two other decree-holders having been paid off and satisfaction in respect of the said payment having been recorded by the Court, execution should be allowed to proceed only in respect of the remaining one-third share belonging to the applicant decree-holder.

On behalf of the decree-holder, it was argued that payment should have been made to all the decree-holders and any partial payment of the decree in respect of the shares of the other decree-holders cannot be recorded or recognized by the Court and should therefore be ignored altogether. The execution Court gave effect to the objection of the judgment-debtor and held that execution could be allowed to proceed only in respect of the remaining one-third share belonging to the appellant decree-holder. The decree-holder took the matter up in appeal. His appeal having been dismissed, he has filed this second appeal in the High Court.

(3) Having heard learned Counsel for the appellant, I am of opinion that this appeal must be dismissed. It may be noted at the very outset that it is not claimed on behalf of the appellant decree-holder that he is entitled to the entire

amount of the decree nor is it stated on his behalf that the two other decree-holders were not entitled to two-third share which has been paid off to them or to their heirs. On behalf of the decree-holder reliance has been placed on the provisions of O. 21, R. 1, Civil P. C. which provides as follows:

"All money payable under a decree shall be paid as follows, namely—

(a) .....

(b) out of Court to the decree-holder; or

(c) ....."

(4) It is argued by the learned Counsel that the word 'decree-holder' must include the plural, 'decree-holders', hence payment must be made to all the decree-holders jointly at one time. The statute itself neither contains the word 'all' nor the words "jointly at one time". All that it connotes is that payment must be made to the decree-holder or decree-holders, and if they are shown or proved to have separate interests, in my opinion, separate payment to each of the decree-holders of their respective shares in the decretal amount is not barred nor prohibited. The statute, as it stands, does not postulate the joint concurrence of all the decree-holders as a condition precedent of satisfaction of the decree. An interpretation of statute that cannot be supported except by the addition of words not found in the body of the statute itself is a strained one and must be rejected as unwarranted. The interpretation sought to be given to this provision of law by the learned Counsel for the appellant if accepted might result in hardship in certain cases where a joint decree is passed in favour of a number of decree-holders having separate and divisible shares in the decretal amount.

If, for example, one of the decree-holders has gone abroad or is untraceable for the time being, then according to the interpretation placed by the learned Counsel for the appellant, it would not be possible for the judgment-debtor to pay off the share or shares of the remaining decree-holders out of Court. Nor would it be possible for the remaining decree-holders to accept out of court payment of their shares in the decretal amount in partial satisfaction of the decree. It would also not be possible for the Court to record satisfaction of such payment in Court. Further where partial payment of the respective shares of other decree-holders has been made by the judgment-debtor, it would enable the remaining decree-holders to still insist on the payment of the entire amount and to ask the Court to disregard such payment in execution proceedings. This is exactly what has happened in this case. The situation created would certainly be inequitable.

On behalf of the minor respondent a serious grievance has also been made that in spite of the fact that the mortgage-decree is a long standing one, its redemption by the minor is being protracted by the decree-holders by the adoption of such delaying tactics. I would be loath to place an interpretation that might lead to consequences so unfair, unless the words of the statute clearly warrant it.

(5) The learned counsel also placed reliance on the provisions of O. 21, R. 15, Civil P. C. Order 21, R. 15 provides as follows:

"(1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application."

(6) I do not see how the above provision of law deprives a judgment-debtor from paying off the share of one of the decree-holders. All that it says is that one of the joint decree-holders can take out execution of the whole decree for the benefit of the entire body of decree-holders. In the present case the other decree-holders have been paid off, and yet the remaining decree-holder is seeking execution of the whole decree. He is, therefore, seeking execution of the whole decree not for the benefit of the entire body of the decree-holders but obviously for his own benefit. This interpretation is, therefore, contrary to the spirit of O. 21, R. 15(1).

(7) This matter can be put in another form. Under the provisions of O. 21, R. 15(1) where one of the decree-holders proceeds to execute a decree on behalf of all the decree-holders, he can do it only for the benefit of all of them. This, however, is not an unconditional or inherent right of the decree-holder. It is within the discretion of the Court to allow it. The Court in according its permission cannot shut its eyes to the equities of the case. Thus by adopting the procedure prescribed by O. 21, R. 15(1) the decree-holder places himself at the mercy of the Court, who can refuse to allow him to proceed. Further in such a case, under sub-clause (2) of O. 21, R. 15 it is open to the Court to allow such an application on such conditions as it seems necessary to impose for protecting the interests of the other persons who have not joined in the application.

It would, therefore, be open to the Court in such a case to impose a condition that the entire money be deposited in Court and that out of it the applicant decree-holder should be allowed to be paid only one-third of the amount of the decree and not the remaining two-thirds which has already been paid off. In this particular case there seems to be a conflict between the three decree-holders and a direction like that would be justifiable under the provisions of O. 21, R. 15(2), Civil P. C. If the Court could impose a condition like that and stop in the end the eventual payment of two thirds of money realized as a result of execution there seems to be no reason why the Court should not allow the satisfaction of two-thirds of the decree to be recorded in Court and allow the execution proceedings to go on only with respect to the remaining one-third from the very beginning. This is certainly a more convenient and expeditious mode of achieving the same purpose which is both just and equitable.

(8) The learned counsel for the appellant also argued that it is not open to the execution Court to go behind the decree in view of the fact that the shares of the various decree-holders have not been specified in the decree itself. I am unable to see how by allowing payments of the respective shares of each of the decree-holders separately, the provisions of the decree are in any way contravened. The decree no doubt does not specify the separate shares of the various decree-holders. On the other hand, it does not also state that the payment of the decree has to be made in one instalment and not separately. There is nothing in the decree itself expressly stating or indicating that integrity of the decretal amount

cannot be broken in execution proceedings. The decree itself is quite silent on the point and does not say anything one way or the other as to the manner or mode in which the decree is to be satisfied.

It may be mentioned in this connection that the learned counsel has not stated that the other two decree-holders did not have separate shares in the amount of the decree. On the other hand, the grounds of appeal filed by him indicate that this is not a case of a joint Hindu family in which case the interests of the various decree-holders could not be considered to be separate or divisible. Reference in this connection may also be made to O. 21, R. 2 which does contemplate partial satisfaction of the decree. If the rights of the several decree-holders were actually separate prior to the decree, I do not see how the interposition of a decree can vary them for the purposes of its satisfaction.

(9) Learned counsel for the appellant has relied on — 'Mohomed Silar Sahib & Co. v. Nabi Khan Sahib', AIR 1917 Mad 988 (A), in which it was held that payment of the amount of a decree to two out of three joint decree-holders cannot be treated as satisfaction of the decree even in part unless it is admitted by the third decree-holder or unless it is proved that he and the other two decree-holders to whom the money was paid owned separate and definite shares in the joint decree debt. In this particular case, it has been established that the two other decree-holders owned separate and distinct shares in the decree. This ruling, therefore, is of no avail to the learned counsel.

(10) The learned counsel for the appellant also relied on a Bench decision of the same High Court reported in — 'V. N. Muthuswamy Iyer v. V. S. Narasimha Ayyar', AIR 1934 Mad 330 (B). In this case it was held that satisfaction of the whole decree entered upon the report of one of the joint decree-holders alone would amount to a violation of the provisions of O. 21, R. 15, Civil P. C. It may be mentioned that this was the case of a firm consisting of the brothers of a joint Hindu family. The facts of the present case, therefore, are distinguishable from this case. Moreover, in the present case, satisfaction has not been recorded of the whole decree but only of a part of the decree, i.e., in respect of the share of the two of the decree-holders. The satisfaction recorded is not in excess of their share.

Further, it may be noted that the view of law taken in the above two cases cited on behalf of the appellants by their learned counsel was not approved of by a Full Bench of the Madras High Court itself. This case is reported in — 'Hanumanthappa v. Seethayya & Co.', AIR 1949 Mad 790 (FB) (C). The learned counsel also relied on two cases of the Allahabad High Court reported in — 'Moti Ram v. Hannu Prasad', 26 All 334 (D) and — 'Lachman Das v. Chaturbhuj Das', 28 All 252 (E) in which it was held that it was not open to one of two or more joint decree-holders to certify payment of the entire decree without being authorized by the other or others to do so. As already mentioned, in the present case the other decree-holders have not certified the payment of the entire decree. They have only certified payment of their own share of the decree. Thus, neither of the two Allahabad cases cited by the learned counsel for the appellant have any application to the present case.

(11) In my opinion, the correct law on the point has been laid down by Fazl Ali J. (later on a Judge of the Supreme Court of India) in the case reported in — 'Adikando Panigrahi v. Yetiraju Narayanaswami', AIR 1943 Pat 188 (F). In this case, it was held that it is not open to one of the two joint decree-holders of a decree to certify satisfaction of the whole decree so as to bind the other decree-holder although he can certify satisfaction in respect of his own interest in the decree. The learned counsel for the respondents has invited my attention to a case reported in — 'Ram Dutt v. Deota Din', AIR 1918 Oudh 91 (G) in which it was held that where money is advanced by two co-mortgagors without any specification of shares, the presumption is that each of them advanced half the money; and if one of them accepts satisfaction of his interest as mortgagee from the mortgagor the result is that the only mortgagee interest outstanding is the interest of the other co-mortgagee which extends to half of the mortgage money. This case supports the contention advanced on behalf of the respondents.

(12) Having given my serious consideration to this case, I have come to the conclusion that this appeal has no substance. It is accordingly dismissed with costs. Leave to appeal to a Bench is asked for and is allowed.

D.H.Z. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 742 (Vol. 41, C.N. 294)

MALIK C. J. AND SAPRU J. (13-1-1954)

Baseshwar Dayal and another, Applicants v. Mst. Bhagwati Devi and others, Opposite Party.

Civil Revn. No. 189 of 1949 connected with Civil Revn. Nos. 190, 191 and 192 of 1949, against Order of Addl. Dist. Judge, Meerut, D/- 25-1-1947.

(a) Civil P. C. (1908), Pre — Marginal notes and heading — (Interpretation of statute).

The interpretation of the clear language of the section cannot be controlled either by the marginal notes or by the heading. (Para 10)

Anno: Civil P. C., Pre, N. 10, 11.

(b) Provincial Insolvency Act (1920), S. 61(6) — Debts entered into schedule — Distinction as regards interest.

Section 61(6) is intended to provide that if there is a surplus after payment of all the debts entered in the schedule then all the creditors are to be treated equally and for the deprivation during the pendency of the Court proceedings they are to be compensated at a fixed rate. The section, therefore, applies to all debts entered in the schedule whether there was or was no stipulation between the creditors and the debtors as regards some of the debts about payment of interest. (Paras 10 and 16)

The word "all debts entered in the schedule" can be interpreted only to mean that the Legislature had intended that all debts so entered must carry interest at 6 per centum per annum and as the proceedings after the date of adjudication affect all the creditors in the same way there is no reason why a difference should be made between one set of creditors and another set of creditors. (1891) 2 QB 574, Rel. on. Case law referred. (Para 9)

Anno: Pro. Insol. Act, S. 61 N. 6.

(c) Provincial Insolvency Act (1920), S. 61(6) — Rate of interest is excessive.

Interest at 6 per cent. provided in S. 61(6), according to the rates now prevailing, is excessive. The Civil Courts do not now award interest at a rate higher than 3 to 3½ per cent.

per annum as pendente lite and future interest.
(Para 18)

Anno: Pro. Ins. Act, S. 61 N. 6.

CASES REFERRED: Paras

(A) (V13) AIR 1926 All 289: 24 All LJ 244 11
(B) (V13) AIR 1926 All 361: 24 All LJ 441 11
(C) (1905) 1905-2 KB 666: 74 LJKB 694 11
(D) ('86) 13 Cal 66 12
(E) (1863) 1 Mad HCR 217 12
(F) (V35) AIR 1948 Mad 64: 1947-1 Mad LJ 242 12
(G) (V8) AIR 1921 Lah 346: 1 Lah 368 12
(H) (1891) 1891-2 QB 574: 61 LJQB 15 16

K. C. Mittal, for Applicant; B. L. Gupta, for Opposite Party.

MALIK C. J.:

These four Civil Revisions under S. 75 of the Provincial Insolvency Act, 1920 (Act 5 of 1920) can be disposed of by one judgment.

(2) L. Bisheshwar Dayal and Dhanushdhari Kirpal were adjudicated insolvents in the year 1928. The Official Receiver in possession of the estate of the insolvents paid by instalments a sum of Rs. 28,678/- odd to the creditors of the insolvents. The total debts entered in the schedule amounted to Rs. 1,49,190/- odd. The insolvency proceedings had been pending till 1945 and the insolvents, it is said, approached a relation or friend of theirs who advanced them a substantial sum of money and from that amount the insolvents paid a total sum of Rs. 69,928/- odd to some of the creditors in full satisfaction of their debts. Debts to the extent of Rs. 47,611/- odd entered in the schedule remained unpaid and as the creditors refused to accept the amount out of Court that amount was deposited in Court and in November, 1945 an application for annulment of the adjudication was made on behalf of the insolvents on the ground that all the debts by reason of the deposit of Rs. 47,611/- odd must be deemed to have been paid up in full.

(3) This application was opposed by certain creditors and on 29-3-1946 the learned Civil Judge exercising insolvency powers came to the conclusion that the adjudication could not be annulled unless the insolvents paid a certain further amount so that interest payable to all the creditors during the period of adjudication could also be paid up. On 26-4-1946 the insolvents filed an application for review which was granted by the learned Judge on 8-5-1946. Against the order granting the review application, four appeals by four sets of creditors were filed in the Court of the learned District Judge who allowed these appeals on 25-1-1947. The learned Judge held that grounds of granting review had not been made out and the learned Civil Judge exercising insolvency powers should not have therefore granted the application of 26-4-1946. Even on the merits the learned District Judge was not satisfied that all the creditors had been paid in full.

(4) It has been conceded by Mr. Pathak that if we are not satisfied that all the debts were paid in full the application for annulment must fail on that ground and it would therefore be not necessary to go into the question whether review was properly granted. The learned Judge pointed out that apart from other defects notice of the review application was not served on four of the creditors Anand Prakash, Kasturi Devi, Shiam Sunder and Kamala. Notices were not issued to them and information of the review application was not given even to their counsel. Mr. Pathak has however urged that that might be a ground for sending the case back to the learned Civil Judge but the lower appellate Court was not justified in allowing the appeals and dismissing the application for annulment of the adjudication.

(5) Coming to the merits of the application, S. 35 of the Provincial Insolvency Act provides that where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court, that the debts of the insolvent have been paid in full, the Court may annul the adjudication. It is not the applicants' case that the applicants should never have been adjudged insolvents. They based their case on the second part of the section that the debts of the insolvents had been paid in full. In that connection reference has been made to S. 33 which provides preparation of the schedule of debts and S. 48 which provides for interest prior to the date of adjudication and before the date of payment.

(6) The amount deposited by the applicants was sufficient to pay off the amount mentioned in the schedule. If the applicants are liable to pay up the interest after the date of adjudication then it is admitted that it cannot be said that the amount deposited is sufficient to pay off all the debts in full. The argument of Mr. Pathak, learned counsel for the applicants, however, is that under S. 61(6) of the Provincial Insolvency Act interest after the the date of adjudication is payable only on debts which carried interest, and he has submitted that as the bulk of the liability consisted of bahi khata debts for which there was no stipulation as regards payment of interest S. 61(6) of the Provincial Insolvency Act did not entitle the Court to allow interest after the date of adjudication.

(7) The point, therefore, for consideration is the interpretation of S. 61(6). It being admitted that if S. 61(6) provides that interest has to be paid on all debts irrespective of the fact whether there was stipulation or not about payment of interest then it cannot be said that the amount deposited was sufficient to pay off all the debts including interest payable thereon.

(8) Section 48 of the Provincial Insolvency Act deals with the question as to payment of interest up to the date of adjudication (which under S. 28 (7) dates back to the date of application) both on debts which carried interest as well as debts regarding which there is no stipulation as regards payment of interest. Under S. 48(1) on any debt whereon interest is not reserved or agreed for, interest is payable at the rate not exceeding 6 per centum per annum if there is a written instrument under which the debt is payable at a certain time and the time has already expired before the date of adjudication or when a demand in writing has been made for payment of the amount and the debtor has been notified that interest will be claimed from the date of demand until the time of payment.

As regards the debts which carried interest, S. 48 (2) provides a maximum limit of 6 per centum per annum in the rate of interest, but preserves the right of a creditor to receive out of the debtor's estate any higher rate of interest, to which he may be entitled after all the debts proved have been paid in full. Section 48 has nothing to do with interest after the date of adjudication and the only section dealing with this matter is S. 61(6) which is as follows:

"61(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of

six per centum per annum on all debts entered in the schedule."

(9) On the clear language of the sub-section it cannot be denied that if there is a surplus after payment of the debts entered in the schedule then all debts so entered are to carry interest at a fixed rate of six per centum per annum. This appears to us to be also just and equitable as this interest has accrued during the pendency of the insolvency proceedings. The delay in the payment after the adjudication of the insolvent works exactly in a similar manner on all creditors and they are all equally prevented from claiming their dues by reason of the pendency of the insolvency proceedings.

The proceedings after the date of adjudication, it appears to us, therefore, should be deemed to have affected all the creditors in the same way and there is no reason why a difference should be made between one set of creditors and another set of creditors. The words "all debts entered in the schedule" can be interpreted only to mean that the legislature had intended that all debts so entered must carry interest at 6 per centum per annum. In all ordinary civil cases S. 34, Civil P. C. gives the civil Courts a right to direct payment of interest though the interest is payable at the discretion of the Court. Only in suits based on mortgages the contractual rate of interest has to be paid up to the date fixed for payment.

(10) Mr. Pathak's argument however is based on the marginal notes and the heading. The marginal note to S. 61 is 'Priority of debts' and the heading is 'Distribution of Property'. Mr. Pathak has urged that S. 61(6) was not intended to give to the creditors a right which they did not possess and the section merely sets out how the property has to be divided and in what order the debts are to be paid. The interpretation of the clear language of the section however cannot be controlled either by the marginal notes or by the heading. And, as we read the section, we have no doubt that the section was intended to provide that if there is a surplus after payment of all the debts entered in the schedule then all the creditors are to be treated equally and for the deprivation during the pendency of the Court proceedings they are to be compensated at a fixed rate.

(11) Only two cases of this Court that have been cited and which, it is said have some bearing are the decision of Sulaiman and Mukerji JJ. in — 'Muhammad Ibrahim v. Ram Chandra', AIR 1926 All 289 (A) and Sulaiman and Boys JJ. in — 'Ganga Sahai v. Mukarram Ali Khan', AIR 1926 All 361 (B). 'Muhammad Ibrahim's case (A)' is not a direct authority on the point. The question for consideration before the Bench was whether it could be said that all the debts had been paid in full when the debts had been paid in part and the creditor had foregone his claim to the rest and the learned Judge relying on a decision in 'In re: Keet' (1905) 2 KB 666 (C) and certain decisions of Indian Courts came to the conclusion that in such circumstances it could not be said that the debts had been paid in full. It was pointed out in that case that the annulment of adjudication really meant that the insolvent should not have been adjudged insolvent at all or even though there might have been some justification for adjudging him an insolvent at a particular date the circumstances had so changed that he was no longer an insolvent at all. The learned Judge pointed out the difference between annulment of adjudication and discharge of the insolvent.

In the other case of 'Ganga Sahai v. Mukarram Ali Khan (B)' from the judgment it does not appear that the point was clearly considered though the observation in the body of the judgment of Sulaiman J. is in favour of the view that we are inclined to take as he has in more places than one in the judgment laid stress on the words "all debts entered in the schedule".

(12) In support of learned counsel's contentions decisions of Norris J. in 'In re Mahomed Mahmud Shah' 13 Cal 66 (D) and in 'In re Thomas Pereira', 1 Mad H C R 217 (E) have been cited. Learned counsel has however admitted that these cases are no authority on the interpretation of S. 61(6) and are based on the view taken in England. Reference has also been made to the case of — 'Official Receiver v. Rao & Co.', AIR 1948 Mad 64 (F), a case under the Indian Companies Act, where the learned Judge, Mr. Justice Clark, referred to certain English cases and held that during the pendency of the liquidation proceedings only those creditors whose debts carried interest were entitled to interest on the debts. The learned Judge differed from a decision of Young J. and pointed out that Young J. had not given any reason of his own for coming to a contrary conclusion but had relied on a decision of the Lahore High Court in — 'Devi Ditta v. Official Liquidator, Amritsar Bank Ltd.', AIR 1921 Lah 346 (G); but that the Lahore case was no authority for the proposition as in that case there was stipulation as regards payment of interest. In the judgment of Clark J. also no reference was made to the provisions of the Provincial Insolvency Act.

No other case either of Indian Courts or Courts in England has been cited at the Bar. We have, however, looked into the Presidency Towns Insolvency Act, 1909 (Act 3 of 1909) S. 49(6) of which is exactly similar and its provisions are as follows:

"49(6) Where there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of six per centum per annum on all debts proved in the insolvency."

(13) The words "proved in the insolvency" or the words "entered in the schedule" do not seem to make any difference as all debts proved in the insolvency have to be entered in the schedule. We have also looked up the English Bankruptcy Act, 1914, 4 and 5 George V, Chapter 59, S. 33(8) of which is as follows:

"33(8). If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy."

(14) In Williams on Bankruptcy, sixteenth edition, no case relevant on the point has been cited. The only note on this sub-section at page 234 is as follows:

"Sub-section (8) does not apply to a deed of arrangement unless there is some provision, express or implied, in the deed for payment of interest."

We have examined the case to which reference has been given for the said proposition and find that it is not relevant for the decision of the point raised before us.

(15) The result, therefore, is that though the language of the Bankruptcy Act in England as also the Presidency Towns Insolvency Act, 1909, are similar to the language of S. 61(6) of the Provincial Insolvency Act, no authority directly

on the point and helpful to the interpretation of the section has been cited or is available.

(16) Mr. Pathak after we had delivered the judgment so far referred us to certain remarks made by Lord Justice Lindley in 'In re Browne, Ex parte Ador.', (1891) 2 QB 574 at p. 580 (H). The learned Lord Justice says:

"The only express provisions relating to interest in the Bankruptcy Act, 1883, and the Rules of 1886 are section 40, sub-s. 5, and rule 20 in the Second Schedule to the Act. Section 40, sub-s. 5, applies to interest after the date of the receiving order; it applies to all debts proved, whether they bear interest or not (thus extending the old law, Cooke's Bankruptcy Law, 8th Ed., Vol. 1, p. 207); it gives interest on all debts proved at 4 per cent. from the above date; but it only comes into operation where there is a surplus after payment in full of all the debts proved."

This is a very high authority and is in complete support of the view that we have taken. We have, therefore, no hesitation in holding that S. 61(6) of the Provincial Insolvency Act applies to all debts entered in the schedule whether there was or was not a stipulation between the creditors and the debtors as regards some of the debts about payment of interest.

(17) The question then arises whether there was a surplus. It is not denied that there is house property and zamindari property (and now after abolition of the zamindari the compensation payable for it) in the hands of the Official Receiver at the time when the order of annulment was made. The fact that the insolvents had provided funds from some private source which they claimed was a loan made to them by some kind friend or relation would make no difference. Therefore, the position is that the insolvents have paid out of Court Rs. 69,928- odd to creditors and have paid into Court Rs. 47,611/- odd. The Official Receiver has paid to the creditors Rs. 28,678/-. The debts entered in the schedule can therefore, be said to have been paid up. The house property and the zamindari property in the hands of the Official Receiver must now be deemed to be surplus in his hands and the creditors were entitled to claim interest under S. 61(6) of the Act. So long as that interest is not paid, it cannot be held that the debts have been paid up in full. In this view, it is not necessary to go into the question whether the learned Civil Judge exercising insolvency powers could entertain the application for review and grant it.

(18) The result, therefore, is that these revisions fail and are dismissed. These are, however, cases where in our view the insolvents have behaved in a very decent manner in securing funds exceeding Rs. 1,16,000/- for payment to their creditors. As we have already remarked in another case, interest at 6 per cent. provided in S. 61(6), according to the rates now prevailing, is excessive. Civil Courts do not now award interest at a rate higher than 3 to 3½ per cent. per annum as pendente lite and future interest. In the circumstances, in our view, these are fit cases where the parties should be directed to bear their own costs in all the Courts.

D.R.R. Applications dismissed.

A.I.R. 1954 ALLAHABAD 745 (Vol. 41, C.N. 295)

V. BHARGAVA J. (4-1-1954)

Jang Bahadur, Applicant, v. Dist. Magistrate Banaras and others, Opposite Party.

Civil Misc Writ No. 117 of 1952.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 17 — Rules under — R. 4 — Allotment should be made within one month of intimation of vacancy.

A landlord gave the notice of vacancy to the Assistant Rent Control and Eviction Officer on 1-6-1950. Then on 11-7-1950 he sent an application nominating F as his tenant under R. 4 and requesting the Assistant Rent Control and Eviction Officer to pass an order of allotment in favour of F. On the same day, one J also had applied for the allotment in his favour. The Assistant Rent Control and Eviction Officer passed the order directing the landlord not to let out the shop to any one without his order and then on 3-8-1950 held that F who had occupied the shop in the meantime was an unauthorised occupier and was liable to be ejected. On 12-8-1950 he further passed an order of allotment in favour of J.

Held that no allotment was made by the Assistant Rent Control and Eviction Officer within one month of the receipt of the notice of vacancy. The landlord had a right to nominate his own tenant and to send the nomination to the Assistant Rent Control and Eviction Officer. This the landlord did. Thereupon it was incumbent on the Assistant Rent Control and Eviction Officer either to make an allotment in favour of some other person forthwith for reasons to be recorded in writing or to make allotment in accordance with the wishes of the landlord. The Assistant Rent Control and Eviction Officer did not forthwith make allotment in favour of any person. In fact he passed no order of allotment until the 12th August 1950, though on the 3rd August 1950 he held that the occupation by F was unauthorised. The order of allotment passed on the 12th August 1950 was, therefore, not in accordance with law. (Para 3)

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 2 (d), 17 — Review by Court having concurrent jurisdiction — (Civil P. C. (1908), O. 47, R. 1).

It is true that the District Magistrate or the Additional District Magistrate cannot appropriate to himself the powers of appellate or revisional authority in respect of the orders passed by the Assistant Rent Control and Eviction Officer, for, if two officers exercise the same power one cannot revise the order of another. But if the jurisdiction is concurrent, it may be possible for one to revise the order of another.

Where the Additional District Magistrate as well as the Assistant Rent Control and Eviction Officer were both persons to whom the District Magistrate had delegated his authority under the U. P. Act of 1947 and they exercised concurrent powers, and Additional District Magistrate reviewed the order of the Assistant Rent Control and Eviction Officer:

Held, that it was within his jurisdiction. AIR 1952 All 819, Dist. (Para 5)

Anno: Civil P. C., O. 47, R. 1 N. 2.

1953 Mulla: O. 47, R. 1 (Topic discussed in N. 2 to O. 47, R. 1 in AIR Com. extra).

CASES REFERRED: Paras

(A) (V39) AIR 1952 All 819: 1952 RD (HC) 79 5
(B) (V41) AIR 1954 All 6: 1953 All LJ 440 5

S. N. Kacker, for Applicant; Rajeshwari Pd., and S. C., for Opposite Party.

ORDER: On 18-5-1950 a decree for ejectment of one Nand Lal tenant from shop No. CK25/8 mohalla Kaghzi Tola, Banaras was obtained by the landlord Krishna Chaitanya Goswami from the court of the II Additional Civil Judge, Banaras. On that very day the petitioner Jang Bahadur presented an application to the Assistant Rent Control and Eviction Officer for allotment of that shop in his favour. No order of allotment was passed on that application and on the 11th July 1950 the landlord sent an application dated 3rd July 1950 to the Assistant Rent Control and Eviction Officer, Banaras nominating opposite party No. 4 Faujdar Rai, as tenant of the shop under Rule 4 of the Rules framed under S. 17 of the United Provinces (Temporary) Control of Rent and Eviction Act, 1947 and requesting the Assistant Rent Control and Eviction Officer to pass an order of allotment in favour of Faujdar Rai.

On the 11th July 1950 the petitioner Jang Bahadur also made another application in the prescribed form requesting that the shop be allotted to him as it had actually fallen vacant. There were various other persons also who wanted allotment of that shop in their favour. The Assistant Rent Control and Eviction Officer first passed an order directing the landlord not to let out the shop to any one without his order and then on the 3rd August 1950 held that Faujdar Rai, who had occupied the shop in the meantime, was an unauthorised occupier and was liable to be ejected from the shop. The Assistant Rent Control and Eviction Officer came to this view after holding that the vacancy had not been intimated to him by a letter alleged to have been sent by the landlord on 5-7-1950 and consequently no right had accrued to the landlord to nominate a tenant of his own choice under the rules.

On 12-8-1950 the Assistant Rent Control and Eviction Officer passed an order of allotment in favour of Jang Bahadur. On the same day Faujdar Rai moved the Additional District Magistrate seeking reversal of the order of the Assistant Rent Control and Eviction Officer making the allotment in favour of Jang Bahadur. The Additional District Magistrate stayed operation of the order of the Assistant Rent Control and Eviction Officer. On 1-9-1950 the landlord applied to the Additional District Magistrate asking for the stay of the order passed by the Rent Control and Eviction Officer directing possession to be given to Jang Bahadur.

On 25-10-1950 the Additional District Magistrate dismissed the application of Faujdar Rai for reversing the order of the Assistant Rent Control and Eviction Officer on the ground that that application had been presented directly to him and had not been received by him on transfer from the District Magistrate. Thereupon on 26-10-1950 Faujdar moved an application before the District Magistrate. This application was entertained by the District Magistrate who delegated his authority to the Additional District Magistrate and sent the application to him for disposal. The Additional District Magistrate after hearing parties passed an order on the 6th December 1950 setting aside the order of allotment passed in favour of Jang Bahadur and directed that the shop in question be allotted to Faujdar Rai.

On 8-12-1950 the petitioner moved the District Magistrate to vacate the order of the Additional District Magistrate dated 6-12-1950. This application was rejected by the District Magistrate on 25-4-1951 with an order that he could not entertain an appeal or revision and if a review of the order of the Additional Magistrate was sought the application should be presented direct before the Additional District Magistrate.

While these proceedings were going on before the Additional District Magistrate and the District Magistrate the Assist. Rent Control and Eviction Officer had also started proceedings under S. 7A of the United Provinces (Temporary) Control of Rent and Eviction Act, 1947 for ejectment of Faujdar Rai from the shop in question. These proceedings also terminated after the order of the Additional District Magistrate dated 6-12-1950. This writ petition has been presented by Jang Bahadur challenging the competence of the District Magistrate and the Additional District Magistrate to pass the orders dated 25-4-1951 and 6-12-1950 and the validity of those orders with a request that these orders be quashed by issue of a writ of certiorari and the enforcement of those order be stopped.

(2) I consider that in this case the claim of the petitioner may first be properly examined on merits. The petitioner first applied on 18-5-1950 for allotment of the shop in his favour. On that date admittedly the shop was not vacant and the application for allotment was, therefore, premature. His next application was presented on 11-7-1950 and it appears that even on that date the shop was no longer vacant as it had been occupied by Faujdar Rai.

The landlord contended that the shop had actually fallen vacant on 29-5-1950 and he gave notice of the vacancy to the Assistant Rent Control and Eviction Officer on the 1st June. He sent the letter under a certificate of posting. During the proceedings before the Assistant Rent Control and Eviction Officer, the landlord produced that certificate of posting which mentioned that the certificate related to a letter sent by the landlord to the Assistant Rent Control and Eviction Officer and related to shop No. CK25/8. The Assistant Rent Control and Eviction Officer held that letter intimating vacancy had not been received by him.

(3) But the learned Additional District Magistrate in reviewing the order of the Assistant Rent Control and Eviction Officer came to the view that the letter had really been sent and must have been received by the Assistant Rent Control and Eviction Officer on 2 or 3-6-1950. It also appears that on merits the view taken by the learned Additional District Magistrate is more sound. The likelihood is that the letter was received in the office of the Assistant Rent Control and Eviction Officer and was probably misplaced there.

The suggestion that the certificate of posting related to some other matter seems to have no force as the Assistant Rent Control and Eviction Officer was not able to produce any other letter from the landlord which might have been sent under that certificate and which may have related to some other matter. In these circumstances no allotment was made by the Assistant Rent Control and Eviction Officer within one month of the receipt of the notice of vacancy. The landlord had a right to nominate his own tenant and to send that nomination to the Assistant Rent Control and Eviction Officer. This the landlord did. Thereupon it was incumbent on the Assistant Rent Control and Eviction Officer either to make an allotment in favour of some other person forthwith for reasons to be recorded in writing or to make allotment in accordance with the wishes of the landlord.

The Assistant Rent Control and Eviction Officer did not forthwith make allotment in favour of any person. In fact he passed no order of allotment until 12-8-1950, though on 3-8-1950 he held that the occupation by Faujdar Rai was unauthorised. Clearly the order of allotment passed on 12-8-1950 was not in accordance with law.

(4) When on receipt of the nomination of the landlord on 11-7-1950, the Assistant Rent Control and Eviction Officer did not forthwith make an order in favour of any other person he was bound under law to pass an order of allotment in favour of the landlord's nominee Fauzdar Rai, and in not making such an order he neglected to carry out his duties enjoined by the statute. The order of the Additional District Magistrate dated the 6th December 1950 was therefore merely a correction of the error which had been committed by Assistant Rent Control and Eviction Officer inasmuch as he passed an order that should have been passed under the law by the Assistant Rent Control and Eviction Officer. On merits, therefore it is clear that the order of the Additional District Magistrate which is being challenged by this writ application is really a correct and valid order under the law and is eminently just and proper.

(5) The contention of learned counsel for the petitioner is that the Additional District Magistrate had no jurisdiction to pass the order of 6-12-1950 as the matter was being dealt with by the Assistant Rent Control and Eviction Officer acting as District Magistrate under the United Provinces (Temporary) Control of Rent and Eviction Act, 1947 and the Additional District Magistrate could not exercise any powers of appeal or revision against the orders passed by the Assistant Rent Control and Eviction Officer in his capacity as District Magistrate under that Act.

The proposition that the District Magistrate or the Additional District Magistrate could not appropriate to himself the powers of appellate or revisional authority in respect of the orders passed by the Assistant Rent Control and Eviction Officer must be accepted. But it appears that in this case what the Additional District Magistrate did was not to exercise any powers of appeal or revision. The Additional District Magistrate as well as the Assistant Rent Control and Eviction Officer were both persons to whom the District Magistrate had delegated his authority under the United Provinces (Temporary) Control of Rent and Eviction Act and they exercised concurrent powers. It was in these circumstances that the Additional District Magistrate reviewed the order of the Assistant Rent Control and Eviction Officer. Learned counsel urged the Additional District Magistrate had no such powers of review and for this proposition relied on a decision of a division Bench of this Court in — 'R. N. Seth v. Girja Shankar Srivastava', AIR 1952 All 819 (A).

It, however, appears that that case related to an order which was passed by the District Magistrate purporting to revise the order of an officer to whom he had delegated his authority under the United Provinces (Temporary) Control of Rent and Eviction Act. The District Magistrate did not purport to review the order. It is obivious that if two officers exercise the same power one cannot revise the order of another. But if the jurisdiction is concurrent, it may be possible for one to review the order of another. The question whether the District Magistrate could review an order passed by the Rent Control and Eviction Officer who exercised powers under delegation from him came up before another Bench in —'Shri Chandra Bhan v. Rent Control Eviction Officer, Agra', AIR 1954 All 6 (B), but the learned Judges left this question open and said that it was unnecessary for them to express an opinion on the question whether a valid allotment order can be reviewed either by the officer who makes it or by a higher executive authority.

In this case before me also, it appears to be unnecessary to decide this question for the purposes of this writ application. I have already expressed my opinion above that the orders which were passed by the Assistant Rent Control and Eviction Officer on the 3rd August and 12th August 1950 were against law and incorrect orders and they were corrected by the Additional District Magistrate by this order dated the 6th December 1950. Further, the order of the 6th December 1950 was the just and proper order which should have been passed in the circumstances of this case.

In these circumstances it does not appear to be necessary to exercise the discretionary powers under Art. 226 of the Constitution in this case to interfere with that order even if technical grounds may exist indicating that the Additional District Magistrate could not have passed that order. Faujdar Rai is already in possession of the shop and the orders passed in favour of the petitioner dated 3 & 12-8-1950 were never given effect to. Faujdar Rai has thus been in possession of this shop for about three and a half years already and according to law he was the person who should have been in possession. The Assistant Rent Control and Eviction Officer was not entitled to make an order of allotment in favour of Jang Bahadur. Consequently I do not think that this is a proper case where I should go into the validity of the order of 6-12-1950 and set it aside on some technical or legal ground.

The writ petition must, therefore, fail and is dismissed with costs. The costs of the first three opposite parties who were represented by the learned Standing Counsel are fixed at Rs. 80/- and of opposite party No. 4 at Rs. 51.

H.G.P. Petition dismissed.

A.I.R. 1954 ALLAHABAD 747 (Vol. 41, C.N. 296)

MALIK C. J. AND SAPRU J. (11-1-1954)

Sheo Prasad, Appellant v. Dominion of India, Respondent.

Civil Revn. No. 178 of 1949, against order of J., Small Cause Court, Allahabad, D/- 19-10-1948.

Contract Act (1872), S. 161 — Sale of Goods Act (1930), S. 2 (4) — T. P. Act (1882), S. 137 — Shortage in delivery of goods sent by railway — Suit for value by endorsee of railway receipt — (Railways Act (1890), S. 72).

A railway receipt being a mercantile document of title to goods, it is possible to transfer the title in the goods, to the endorsee by mere endorsement. It is, therefore, not possible to accept the contention that a mere endorsement of a railway receipt is not by itself enough to transfer the property in the goods represented by the receipt and the endorsee has to prove aliunde that he is the owner of the goods covered by the railway receipt endorsed in his favour. (Para 10)

Thus, the presumption is in favour of the endorsee though from other facts and circumstances it may be possible to hold that the goods have not been transferred to the endorsee and he is merely deputed to act as agent. AIR

1914 Bom 178; AIR 1916 PC 7, Rel. on; AIR 1947 Bom 169, Expl. (Para 11)

In a suit by the plaintiff to recover value for shortage of goods delivered to him by the railway, it was admitted that the goods belonged to the consignor, that the consignor had merely authorised the plaintiff by endorsement to him of the railway receipt to take delivery of the goods and that the goods were kept at the shop of the plaintiff for the purpose of sale as an agent of the consignor:

Held that the plaintiff's right being only to get a share in the sale proceeds by way of commission, he was not entitled to bring the suit. AIR 1949 EP 190, Expl. (Para 13)

Anno: Cont. Act, S. 161 N. 1; S. G. Act, S. 2 N. 2; T. P. Act, S. 137 N. 5.

1949 Mulla: S. 137, P. 738 N. "Negotiable..... Merchant" (5 Pts. extra in N. 5 to S. 137 in AIR Com.).

Rail Act, S. 72 N. 33.

CASES REFERRED: Paras

(A) (V1) AIR 1914 Bom 178: 38 Bom 659 8
(B) (V34) AIR 1947 Bom 169: 231 Ind Cas 367 10
(C) (V3) AIR 1916 PC 7: 40 Bom 630 (PC) 10
(D) (V36) AIR 1949 EP 190: 50 Pun LR 290 12

G. P. Bhargava, for Appellant; J. Swarup, for Respondent.

MALIK C. J.:

This case has been argued at great length but the point involved in the Civil Revision is a very short one: Certain goods were consigned from Chandpur Ghat to Allahabad. The consignment was deliverable to self. The railway receipt was, however, endorsed in favour of the plaintiff who took delivery of the goods and found that there was a shortage of 2 maunds and 7 seers. The value of the shortage was Rs. 174/-. The plaintiff filed a suit for recovery of the amount.

(2) On behalf of the defendant it was denied that the plaintiff was entitled to maintain the suit.

(3) The plaintiff, in the witness-box, stated that the consignor had sent the goods to him for sale. The exact words were as follows:

"He (the consignor) kept the goods into my 'arhat' to sell it and pay its price to him after deducting my commission."

After the plaintiff examined himself no other evidence was given and the lower Court dismissed the suit on the ground that the plaintiff was not the owner of the goods and he had, therefore, no right to file the suit.

(4) Against the decision of the lower Court a civil revision under S. 25 of the Court of Small Causes has been filed in this Court.

(5) It is urged by learned counsel for the applicant that the railway receipt having been endorsed in favour of the plaintiff, the plaintiff had sufficient interest to maintain the suit. It has also been urged that, as the plaintiff would have earned a commission by the sale of the goods at a certain percentage of the sale price, his interest had suffered by reason of the short delivery and he had a right to bring an action.

(6) The second point is not worthy of very serious consideration as the claim based on the basis of the loss of commission must be deemed to be remote and the plaintiff has not claimed the loss of commission that he might have suffered but has claimed the price of the goods lost in transit.

(7) The first question, however, is of some importance, whether a transferee simpliciter of a railway receipt can maintain a suit for price of goods lost in transit. It can no longer be seriously contested that a railway receipt is a document of title and by endorsement of the railway receipt the title in the goods can be transferred to the endorsee. If the case stood merely at that there would be no difficulty in holding that the plaintiff was entitled to bring a suit, being the endorsee of the railway receipt and 'prima facie' the owner of the goods. The difficulty, however, has arisen by reason of the plaintiff's own statement that the goods were merely kept in his arhat for sale and after the sale the price less commission was to be paid to the person to whom the goods belonged.

(8) In — 'Dolatram Dwarkadas v. B. B. & C. I. Rly. Co.', AIR 1914 Bom 178 (A) it was held that a railway receipt was a mercantile document of title and the endorsee of the receipt had sufficient interest in the goods covered by it to maintain an action against the railway company for damages in respect of the goods covered by the receipt. The nature of the action, however, in that case was a little different from the one with which we are concerned. In that case, the endorsee of the railway receipt had gone to take delivery, the railway had accepted that he had the right to take delivery, he had signed the receipt book and paid freight and demurrage, he took delivery of 96 bags and claimed open delivery of 19 bags, the railway refused to give him open delivery and it was urged on behalf of the endorsee before the High Court of Bombay that the railway having chosen to accept the freight and demurrage from the plaintiff and having taken his signature in anticipation of the delivery to him, was not entitled to refuse delivery and that the defendant having by its acts recognised the plaintiff as the person entitled to take delivery was estopped from contending that it was not liable for failure to give delivery.

The learned Judges allowed the revision holding that a railway receipt was a mercantile document of title and proceeded to say:

"That being so, we think, it necessarily follows that the endorsee of such a railway receipt has sufficient interest in the goods covered by it to maintain an action of this kind."

It may, therefore, be accepted that it was decided in that case that if a railway receipt has been duly endorsed, the endorsee has a right to take delivery and that the wrongful refusal of the railway to give delivery entitles him to bring a suit.

(9) From the facts quoted in the report it does not appear that it was a case where a part of the consignment had been lost and the suit was filed for price of the goods lost. 'Prima facie' such a suit for loss of goods can be filed by the person to whom the goods belonged or who had a substantial interest in the same.

(10) In — 'Shamji Bhanji & Co. v. North Western Rly. Co.', AIR 1947 Bom 169 (B) the point came up for decision before a learned single Judge, Bhagwati, J., who held that even though a railway receipt was a document of title to goods a mere endorsement of a railway receipt was not by itself enough to transfer the property in the goods represented by the receipt to the endorsee thereof; that without anything more, the endorsement of the railway receipt only constituted the endorsee the agent of the consignee for the purpose of taking delivery of the goods, represented by the receipt, from the railway company. The facts of that case were peculiar and these observations must not, to our

minds, be understood to mean that an endorsee of a railway receipt must always be deemed to be a mere agent who has no interest in the goods.

The Privy Council in — 'Ramdas Vithaldas v. Amerchand & Co.', AIR 1916 PC 7 at p. 8 (C) has held as follows:

"In their Lordships' opinion the only possible conclusion is that whenever any doubt arises as to whether a particular document is a "document showing title" or a "document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. In the present case, it has been found as a fact by both the Courts below, and is not and indeed cannot be disputed before this Board, that the railway receipts in question satisfy the test. It is, therefore, unnecessary to consider whether, apart from the evidence as to the ordinary course of business, the effect of Ss. 4 and 137 of the Transfer of Property Act would be conclusive on the point."

Chapter VIII of the Transfer of Property Act deals with transfers of actionable claims and how they are to be made. Section 137 of the Act, however, provides that

"Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being by law or custom, negotiable, or to any mercantile document of title to goods:"

and in the Explanation appended to the section the expression "mercantile document of title to goods" includes a railway receipt.

A railway receipt, therefore, being a mercantile document of title to goods, it is possible to transfer the title in the goods, to the endorsee by mere endorsement. It is, therefore, not possible to accept the contention that a mere endorsement of a railway receipt was not by itself enough to transfer the property in the goods represented by the receipt and the endorsee has to prove 'aliunde' that he is the owner of the goods covered by the railway receipt endorsed in his favour.

(11) The presumption must be in favour of the endorsee though from other facts and circumstances it may be possible to hold that the goods had not been transferred to the endorsee and he was merely deputed to act as agent.

(12) Great reliance has been placed by learned counsel for the applicant on a judgment of the East Punjab High Court in — 'Jalan and Sons, Ltd. v. Governor General in Council', AIR 1949 EP 190 (D). The sixth and seventh paragraphs of the judgment no doubt lay down that the case of an endorsee of a railway receipt is altogether different from the case of an ordinary agent and that such an endorsee being in a position to take delivery of the goods covered by the railway receipt and give a complete discharge to the railway he is competent to bring a suit in respect of the goods, but in paragraph 8 of the judgment the learned Judges went on to hold that in the case before them the endorsee had become the owner of the goods and had beneficial interest in the same as he was entitled to earn a commission on the proceeds of the sale of the goods.

If he had become the owner of the goods and the evidence on the point was accepted by the learned Judges, the fact whether he was entitled to a share in the sale proceeds may not have been of much importance for the purpose of the decision of the case. A trustee who has no beneficial interest in the goods but is the owner of the goods can always maintain a suit if the goods are lost or damaged.

Learned counsel for the applicant has admitted that on the statement made by his client he cannot claim that the applicant became the owner of the goods but he has urged that he had a beneficial interest in the same as he was entitled to commission on the sale proceeds as 'in the case of Jalan & Sons Ltd (D)'. The learned Judges, however, did not hold that the mere fact that the plaintiff was entitled to get a commission was enough to entitle him to maintain the suit. They have laid stress on both the points that he was the owner of the goods and had considerable interest in the sale proceeds of the same. The learned Judges accepted the contention that a mere agent for taking delivery had no right to file a suit for damages for loss of goods and pointed out that in the case before them the plaintiff was not constituted a mere agent for the purpose of taking delivery but he was entitled to take delivery in his own right as owner to get possession of the goods and then to sell them as owner. It cannot, therefore, be said that the decision relied upon helps the applicant. The observations in the judgment must be read in connection with the facts of the particular case.

(13) In the case before us, it being admitted that the goods belonged to the consignor, that the consignor had merely authorised the plaintiff to take delivery of the goods and that the goods were kept at the shop of the plaintiff for the purpose of sale as an agent of the consignor, the plaintiff's right being only to get a share in the sale proceeds by way of commission, we do not think that the case is covered by the decision quoted.

(14) The judgment of the lower Court appears to be right. The revision must, therefore, fail and is dismissed with costs.

V.S.B.

Revision dismissed.

A.I.R. 1954 ALLAHABAD 749 (Vol. 41, C.N. 297)

AGARWALA J. (15-3-1954)

Debi Sahai, Defendant-Appellant v. Ganga Sahai and another, Plaintiffs-Respondents.

Second Appeal No. 2139 of 1953, against decree of Civil J., Bulandshahr, D/- 31-7-1953.

(a) Civil P. C. (1908), O. 6, R. 17; O. 7, R. 10 — Amendment of returned plaint and representation to same Court — Legality.

Under the law a plaintiff is not prevented from amending the plaint which had been returned to him and to represent it to the Court which would have jurisdiction to entertain the amended plaint. No question of an abuse of the process of Court is involved in the case. AIR 1938 All 17, Rel. on. (Para 8)

Anno: C. P. C., O. 6, R. 17 N. 16a Pt. 2; O. 7, R. 10, N. 1.

(b) Civil P. C. (1908), Ss. 6, 9, 15 — Jurisdiction how determined — (U. P. Panchayat Raj Act (26 of 1947), S. 64).

The jurisdiction of a Court to entertain a suit is to be determined by the allegations made in the plaint and not by the result of the suit. Thus, where the valuation fixed in a plaint, as amended, was Rs. 110/- and the suit was cognizable by the Munsiff, it is wholly immaterial that when the suit was tried the value of the claim was found to be Rs. 80/- and

that such a claim was cognizable only by a Panchayati Adalat and not by the Munsiff. (Para 9)

Anno: C. P. C.:, S. 6 N. 4; S. 9 N. 3, 53; S. 15 N. 6.

CASE REFERRED: Para

(A) (V25) AIR 1938 All 17: ILR (1938) All 40 6

Bhagwan Das Gupta, for Appellant.

AGARWALA J.:

This is a defendant's appeal arising out of a suit for recovery of a sum of money as the price of a tree which was alleged to have belonged to the plaintiffs and which had been taken away by the defendant-appellant with the intention of committing theft. The suit was filed in the Court of the Munsif. The price of the tree as fixed by the plaintiffs was Rs. 100/- only. The defendant objected that the suit was cognizable by the Panchayati Adalat under the U. P. Panchayat Raj Act. Thereupon the plaintiffs-respondents made an application for amendment of the plaint saying that the valuation of the tree was Rs. 110/- and an amendment may be made accordingly in the plaint. This application was contested by the defendant-appellant, and it was rejected by the Munsif. After the rejection of the application, the plaint was bound to be returned to the plaintiffs for presentation to the proper Court, and it was so returned.

(2) After the plaint was returned to the plaintiffs-respondents, they themselves amended the valuation of the suit in the original plaint by altering the figure of Rs. 100/- into Rs. 110/- and represented it to the Munsif. The plaint was registered as a suit. It is not clear whether the defendant raised the plea that the suit was not triable by the Munsif because it was triable by the Panchayati Adalat. There was an issue, however, whether the suit was triable by the Munsif; and the judgment merely says that the issue had been decided in the affirmative on a previous date. We will, however, assume that the issue was raised as to whether that suit was not cognizable by the trial Court because it was triable by the Panchayati Adalat.

(3) The suit was decreed by the Munsif, and the plaintiffs were held entitled to Rs. 80/- from the defendant. The defendant appealed to the lower appellate court and raised two points before that Court. First, whether after the abolition of the zamindari the plaintiffs had any interest left in the tree, and second, whether the trial Court had any jurisdiction to try the suit. The Court below decided both the points against the defendant, and dismissed the appeal. Against this decree the defendant has come up in appeal to this Court, and the only point raised before me is whether the Munsif had jurisdiction to entertain the suit.

(4) It is urged that once the plaint was returned for presentation to the proper Court, it was not open to the plaintiffs to represent the plaint after correcting the valuation themselves outside the Court. It is argued that if this were allowed to be done, it would be an abuse of the process of the Court. It has been suggested that the proper remedy for the plaintiffs was to appeal against the order directing the return of the plaint.

(5) In my opinion the contention has no force. The Court's previous order that the plaint be returned for presentation to the proper Court was on the basis of the plaint as it stood before the Court. The suit was valued at Rs. 100/-. Under the U. P. Panchayat Raj Act the suit was cognizable by the Panchayati Adalat. The Munsif had, therefore, no jurisdiction to entertain the plaint as it was at that time. No appeal lay against the order on the application for amendment of the plaint. An appeal could only lie against the order directing that the plaint be returned for presentation to the proper Court.

This appeal would have failed because admittedly the plaint, as it stood at that time, was not cognizable by the Munsif. It may be open to question whether the Munsif had jurisdiction, on the plaint as it stood, to amend it. However that may be, assuming that the Munsif had jurisdiction to amend it, the fact remains that he dismissed the application for amendment. This was entirely a matter for his discretion, and in the appeal that might have been presented against the order directing the return of the plaint to the proper Court, the appellate Court was not bound to interfere with the order rejecting the application for amendment.

(6) After the plaint had been returned to the plaintiffs there is no rule of law preventing them from altering the valuation mentioned in the plaint so as to bring it within the jurisdiction of the Munsif. In — 'Deoki Nandan v. Ram Chandra', AIR 1938 All 17 (A)—it was observed:

> "Assuming that the plaint, as originally filed, disclosed a suit not cognizable by the civil Court, and assuming also that the amendment would have made it cognizable by such a Court, it was open to the plaintiff to amend it as soon as it was returned to him for presentation to the proper Court and to represent it in the same Court which was bound to entertain it, as ex hypothesi the suit would have become one which the civil Court was competent to decide."

(7) The plaint, as amended by them outside the Court, could be presented to the Court which would have taken cognizance of the plaint as so amended. As amended, the valuation was Rs. 110/-, and the plaint was not cognizable by the Panchayati Adalat. It was cognizable by the Munsif. The Munsif alone had jurisdiction to entertain it and he entertained it correctly.

(8) There is no question of an abuse of the process of Court involved in the case, seeing that under the law the plaintiffs are not prevented from amending the plaint which had been returned to them and to represent it to the Court which would have jurisdiction to entertain the amended plaint.

(9) It was urged that the Courts below found that the value of the trees was only Rs. 80/-, and that on this finding the suit was not cognizable by the Munsif but was cognizable by the Panchayati Adalat. This contention also has no force. The jurisdiction of a Court to entertain a suit is to be determined by the allegations made in the plaint and not by the result of the suit. The valuation fixed in the plaint, as amended, was Rs. 110/-. The suit was cognizable by the Munsif upon the plaint as it was presented. It was wholly immaterial that when the suit was tried the value of the tree was found to be Rs. 80/- and the suit was decreed for Rs. 80/- only.

(10) There is no force in this appeal. It is dismissed under O. 41, R. 11, Civil P. C.

D.R.R. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 750 (Vol. 41, C.N. 298)

MALIK C. J. AND SAPRU J. (29-1-1954)

A. H. Bhiwindiwala and Co., Plaintiff-Appellant v. R. B. Lakshman Dass Mohan Lal and Sons Ltd. and another, Opposite Party.

F. A. F. O. No. 149 of 1950, against decree of Addl. Civil J., Kanpur, D/- 27-2-1950.

Arbitration Act (1940), S. 2 (a) — Suit contract mentioning another contract containing arbitration clause.

By a contract relating to purchase of sugar the parties agreed to be governed by the terms and conditions of the Indian Sugar Syndicate Contract Form which was filed by the parties. The Form contained an arbitration clause which provided that in the case of a dispute between parties the matter shall be referred to arbitration, that if the parties agreed there will be a sole arbitrator and that if they did not agree each would nominate his own arbitrator and the arbitrators would appoint an umpire. In case, however, the arbitrators did not agree to the appointment of an umpire or the umpire or the arbitrators did not give their award within thirty days the dispute shall be referred to arbitration, "under the Rules of the Tribunal of Arbitration of..... Chamber of Commerce applicable for the time being for decision and such decision shall be accepted as final and binding on both parties to this contract. The Buyer and Seller agree that all such disputes are to be settled at...." The blanks within the inverted commas were not filled in by the parties:

Held that by reason of those blanks not having been filled in it could not be said that the parties had not agreed to the arbitration clause. It was not necessary to fill in the blanks inasmuch as the Arbitration Act contains provisions about the appointment of an umpire if the arbitrators do not appoint an umpire or if the umpire or the arbitrators do not give their award within time. (Para 4)

Anno: Arbitration Act, S. 2 N. 1, 4.

CASES REFERRED: Paras

(A) (V8) AIR 1921 Cal 767: 47 Cal 799 5
(B) (1889) 5 TLR 677 5

D. Sanyal, for Appellant; S. N. Verma, for Opposite Party.

MALIK C. J.:

This is an appeal against an order passed by the lower Court under S. 34 of the Arbitration Act.

(2) The plaintiff and the defendants entered into a contract on 18-2-1949, the relevant portion of which is as follows:

> "We confirm having bought from you through your sole selling agents M/s Charan Company of Kanpur on the terms and conditions of the Indian Sugar Syndicate Contract Form, the following sugar."

A copy of the printed form of contract issued by the Indian Sugar Syndicate Ltd. was filed on behalf of the defendants and it was urged that the parties had agreed to the matter being referred to arbitration and the suit should, therefore, be stayed in accordance with the provisions of S. 34 of the Arbitration Act. The question, therefore, arose what the parties meant by the words "on the terms and conditions of the Indian Sugar Syndicate Contract Form." In that printed form the relevant words are:

> "AN AGREEMENT made this.....day of.... 19.. between..... (Seller) and..... (Buyer) for the sale of the following goods by the Seller to the Buyer upon the following terms and conditions"

Then the terms and conditions are set out in a number of paragraphs.

(3) In paragraph 17 of the agreement it is set out that in the case of a dispute the matter shall be referred to arbitration, that if the parties agreed there will be a sole arbitrator and that if they did not agree each would nominate his own arbitrator and the arbitrators would appoint an umpire. In case, however, the arbitrators did not agree to the appointment of an umpire or the umpire or the arbitrators did not give their award within thirty days the dispute shall be referred to arbitration

> "under the Rules of the Tribunal of Arbitration of.....Chamber of Commerce applicable for the time being for decision and such decision shall be accepted as final and binding on both parties to this Contract. The Buyer and Seller agree that all such disputes are to be settled at....."

(4) The blanks within the inverted commas were not filled in and the question is whether by reason of those blanks not having been filled in it could be said that the parties had not agreed to the arbitration clause. A reference, however, to this part of the agreement would show that it was not necessary to fill in the blanks inasmuch as the Arbitration Act contains provisions about the appointment of an umpire if the arbitrators do not appoint an umpire or if the umpire or the arbitrators do not give their award within time. In the circumstances the lower Court came to the conclusion that the parties must be deemed to have agreed to the arbitration clause excluding the portion where the blanks were not filled in as that portion was really unnecessary in view of the provisions of the Arbitration Act. In our view the decision of the lower Court is correct.

(5) Learned counsel has referred us to certain cases that relate to charter-parties and bills of lading and to the special rules regarding interpretation of such documents. Even these cases are not really helpful to the appellant. In — 'Chatturbhuj v. Basdeo', AIR 1921 Cal 767 (A), Mookerjee, J. in the body of the judgment quoted with approval the decision of Lord Esher, Master of the Rolls, in — 'Hamilton & Co. v. Mackie and Sons', (1889) 5 TLR 677 (B). That was also a case relating to charter-party and a bill of lading and Lord Esher, Master of the Rolls, says that

> "Where in a bill of lading there was such a condition as all other conditions as per charter-party, the conditions of the charter-party must be read verbatim into the bill of lading as though they were there 'in extenso'. Then if it was that any one of the conditions of the charter-party on being so read, was inconsistent with the bill of lading, they were insensible and must be disregarded."

We respectfully agree with this general proposition.

(5) There has nothing been shown to us to indicate that the contract entered into on 18-2-1949 (on the terms and conditions of the Indian Sugar Syndicate Contract Form) contained anything which can be said to go contrary to the provisions of Cl. 17 of the Form of Agreement relating to arbitration.

(6) The appeal has, therefore, no force and is dismissed with costs.

G.M.J. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 751 (Vol. 41, C.N. 299)

(LUCKNOW BENCH): SAPRU J. (5-2-1954)

Ram Udit and another, Appellants v. Smt. Shyam Kali, Respondent.

F. A. F. O. No. 45 of 1952, against decree of Civil J., Gonda, D/- 27-8-1952.

(a) Tenancy Laws — U. P. Zemindary Abolition and Land Reforms Act (1 of 1951), Ss. 34, 48 and 49 —Scope.

Section 34 preserves the right of any person to establish his claim in respect of any estate or part thereof in the ordinary municipal Courts having jurisdiction and this notwithstanding anything that may be found in Ss. 32, 33 and 49 which makes the order of the compensation officer deciding an objection under S. 48 to be a decree of a civil Court. While Ss. 48 and 49 of the Act enable the Court to determine the extent of the compensation they are not intended to cover cases where the question of title to compensation is itself involved. These are cases which are covered by S. 34. (Paras 3, 4)

(b) Civil P. C. (1908), S. 100 and O. 41, Rr. 27 and 33 — New point — Power of appellate Court to take notice of subsequent events.

Suit by members of joint Hindu family for possession of their share in certain Zemindari property — Suit decreed — Pending appeal by the defendant all Zamindaris in the State vesting in Government as a result of notification under the U. P. Zamindari Abolition and Land Reforms Act thereby disentitling plaintiff to claim possession of the Zamindari property — Appellate Court dismissing plaintiffs suit on this ground — Second appeal by plaintiff:

Held that while taking note of the changes effected by the Zemindari Abolition and Land Reforms Act and refusing a possessory decree, the proper course for the appellate Court was to determine the question of the title to compensation in respect of the Zemindari property claimed by the plaintiffs: (Para 4)

Held further that the failure of the plaintiffs appellants to raise the question as to their right to the compensation in the lower appellate Court, though a good ground for depriving them of the costs in the case, was not sufficient to disallow the point to be raised for the first time in second appeal especially when it would avoid multiplicity of proceedings. (Para 4)

Anno: Civil P. C., S. 100 N. 55; O. 41, R. 27 N. 16; O. 41, R. 33 N. 4.

CASES REFERRED: Paras

(A) (V28) AIR 1941 FC 5: 1941 Oudh WN 372 (FC) 4

(B) (1934) 234 US 600: 79 Law Ed 1082 4

Sarvsri Hyder Husain and H. N. Misra, for Appellants; P. N. Bhat holding brief of J. D. Pradhan, for Respondent.

JUDGMENT: This second appeal raised an interesting question of law. In order that that question may be properly understood, it is necessary to set out the facts which have given rise to the appeal.

(2) The plaintiffs instituted the suit as members of a joint Hindu family for possession of certain zemindari and house property. Their case was that they were entitled to a two-thirds share of the property. The suit was resisted by the defendant who is the widow of the plaintiff's brother. Her case was that her husband was separate from the plaintiffs and that on his death, she became entitled to the property.

(3) The trial Court decreed the suit holding that the family was joint and not separate. The defendant went in appeal to the lower appellate Court. The learned Civil Judge allowed the appeal, dismissed the suit so far as the zemindari property is concerned and remanded the case for a fresh trial about property No. 6 mentioned in the list attached to the plaint. The plaintiffs have now come up in appeal to this Court against this order. The view taken by the learned Civil Judge was that having regard to Ss. 4 and 6 of the U. P. Zemindari Abolition and Land Reforms Act (hereinafter called the Act), the plaintiffs could not claim possession of the zemindari property in suit. That property vested under S. 4 of the Act in the State of Uttar Pradesh; and consequently the plaintiffs had no subsisting right or title in respect of it.

The learned Judge was undoubtedly right in holding that under S. 4 of the Act after the notification all estates situate in Uttar Pradesh vested in the State. Further there is no doubt that as a consequence of that vesting, all rights, title and interest of all intermediaries ceased and vested in the State of Uttar Pradesh free from all encumbrances on and from the date of the notification of vesting. The question, however, to which the learned Judge did not address his attention at all was whether the fact that the plaintiffs could not claim a possessory title to the property and the relief of possession could not be given to them, had at all affected their right to establish their claim in respect of any estate or part thereof by due process of law in a Court having jurisdiction. That they had this right assured to them is, in my opinion, clear from Section 34 of the Act. Section 34 is in the following terms:

> "Nothing in Ss. 32, 33 and 49 shall affect the right of any person to establish his claim in respect of any estate or part thereof by due process of law in the Court having jurisdiction."

The plain meaning of S. 34, as I understand it is that it preserves the right of any person to establish his claim in respect of any estate or part thereof in the ordinary municipal Courts having jurisdiction and this notwithstanding anything that may be found in Ss. 32, 33 and 49 which, it may be remarked, makes the order of the compensation officer deciding an objection under S. 48 to be a decree of a civil Court.

(4) While it may be that no decree for possessory relief could be given by the learned Judge, it was open to him to determine and declare the extent of the plaintiffs' title to property over which they were claiming possession. The relief thus granted would have been different from that of possession. I think it right to add that in taking into account the change in the state of affairs after the coming into force of the Act, the learned Civil Judge acted in accordance with the rule laid down by the Federal Court in — 'Lachmeshwar Prasad Shukul v. Keshwar Lal', AIR 1941 FC 5 (A), in which Gwyer C. J. approved the observation of Hughes C. J. in — 'Patterson v. State of Albama', (1934) 294 US 600 (B) to the following effect:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

While taking note of the changes effected by the Zemindari Abolition and Land Reforms Act and refusing a possessory decree I think the

proper course for the learned Judge was to determine in this case the question of the title to compensation in respect of the zemindari property claimed by the plaintiffs. In fairness, however to the learned Judge I must point out that the plaintiffs are themselves to blame for his failure to do so. They never seem to have invited him to determine the question of their right to compensation at all and it was only in this Court that this point was raised by learned counsel for the appellants. While this may be a good ground for depriving the successful appellants of their costs in the case, I do not think I would be justified in refusing this point to be entertained at all for multiplicity of proceedings which will probably result from my doing so is to be deprecated. While sections 48 and 49 of the Act enable the Court to determine the extent of the compensation they are not intended in my opinion, to cover cases where the question of title to compensation is itself involved. These are cases which are covered by S. 34. That section, I think, makes it clear that the right of any person to establish his claim in respect of any estate or part thereof in any ordinary court of law is not affected by anything which has been said in Ss. 32, 33 and 49.

(5) The result is that I have come to the conclusion that the learned Judge should not have only determined the point raised by item No. 6 relating to house property but also the point about the right of the plaintiffs to compensation in respect of the share in the property to which before the Act came into force they would have been entitled had the fact of jointness been established.

(6) I may say that I am not impressed with the argument that in order to give adequate relief it would have been essential for the Court to require the pleadings to be amended. I have read the plaint and I am satisfied that the alternative remedy of determining the right to compensation is covered by the prayer embodied in it.

(7) For the reasons given above, I allow this appeal, set aside the order of remand and direct the learned Judge of the Lower Appellate Court to decide both the questions raised in the appeal according to the observations contained in this judgment. The plaintiffs appellants shall not get their costs in this Court and the lower appellate Court.

K.S.B. Appeal allowed.

A.I.R. 1954 ALLAHABAD 753 (Vol. 41, C.N. 300)

(LUCKNOW BENCH) MALIK C. J. AND HARI SHANKAR J. (22-7-1954)

Mohd. Karrar Ali and others, Petitioners v. The State of U. P.

Civil Misc. Appln. (O. J.) No. 11 of 1953.

(a) Constitution of India, Art. 226 — Petition under — Disputed question of fact involved — Other appropriate remedy open — Maintainability.

Where the petitioners for writ, who are tenants of certain land, claim a right to cultivate that land they would have a right under the general law to go to the appropriate Court for relief which would be in a better position to decide the question of fact in dispute as to whether the land was brought under cultivation before a particular date or afterwards. As the applicants have another suitable and effective remedy, it is not necessary for the High Court in the writ petition to decide whether they have the right to cultivate the portion of the land which had already been under their cultivation. (Para 4)

†(b) U. P. Private Forests Protection Act (6 of 1949) — Act does not offend Art. 31(2) of the Constitution — (Constitution of India, Art. 31(2)).

The U. P. Private Forests Act does not offend Art. 31(2) of the Constitution and as such is not unconstitutional. The Act was passed, as it preamble shows, for the conservation of forests and groves and for afforestation of waste lands which were not vested in the Government. Private owners have not been divested of any of their rights in forests, groves or trees. All that the Act provides is that they cannot cut, collect or remove timber without the permission of the Forest Officer. The restrictions imposed are all subject to permits being given by the Forest Officer. The property remains the property of the owner. His right to transfer the same is left intact. Certain restrictions have, however, been imposed on the exercise of ownership in the larger public interest. It cannot be said that the provisions of the Act amount either to a dispossession of the owners or to the acquisition of property of private owners by the State. Article 31(2), therefore, has no application at all. AIR 1951 SC 41; 68 CLR 261, Distinguished. (Para 6)

†(c) U. P. Private Forests Protection Act (6 of 1949), Ss. 12 and 13 — Art. 19(1)(f) of the Constitution is not infringed — (Constitution of India, Art. 19(1)(f) and (5)).

The U. P. Private Forests Act is not unconstitutional on ground of infringement of Art. 19(1)(f) of the Constitution. (Para 7)

It is not possible to hold that the State was not entitled to impose restrictions against the indiscriminate felling of trees in forests and groves when it is now well known that such forests are a national asset of great value. The State was entitled to see that there is no indiscriminate cutting down of trees in order to sell the wood and get money before the landlords lost their zemindari rights and the trees or the forests vested in the State. (Para 7)

Sections 12 and 13 make it clear that the only object behind the restriction was to see that the forest wealth of the country is not denuded by the short-sighted policy of some of the owners. (Para 7)

The provision of the Act restricting the right of an owner, or a transferee from him, to fell a tree is not unreasonable especially as there is no absolute restriction and he has been given a right to obtain a permit from the Forest Officer. (Para 8)

(d) U. P. Private Forests Protection Act (6 of 1949), S. 3(3) — Scope.

Unless the notification makes it out that the land is declared to be a forest for the purposes of the U. P. Private Forests Act, 1948,

the land cannot be treated as 'forest' and the provisions of the Act cannot be made applicable to it. (Para 11)

CASES REFERRED: Paras

(A) (V38) AIR 1951 SC 41: 1950 SCR 869 (SC) 5
(B) 68 CLR 261 5
(C) (V38) AIR 1951 SC 118: 1950 SCR 759 (SC) 7

S. D. Misra, for Petitioners; B. K. Dhaon and B. N. Roy, for the State.

MALIK C. J.:

This is an application on behalf of three minors that they have been cultivating portions of two plots Nos. 4458 and 4471 in village Ailra, tahsil Utraula, district Gonda, since 1948, and a patta was executed in their favour in August 1951, that in March, 1952, when certain labourers and servants of the applicants were felling certain mahua trees, the District Forest Officer took exception under the provisions of the U. P. Private Forests Protection Act, 1948 (6 of 1949) and prevented them from cutting down trees or from cultivating the portion of the land which had been under cultivation since 1948.

(2) It is urged that the Act is ultra vires as it offends against the provisions of Art. 31, cl. (2) and Art. 19, cl. (1)(f) of the Constitution. In the affidavit it was said that this land was banjar land and the notification No. 1927/XIV-134-47 dated 3-1-1949, by which the U. P. Government declared all forest lands in Uttar Pradesh to be forest for the purposes of the said Act, was an invalid notification inasmuch as it did not specify the area which was to be treated as forest land. A counter-affidavit was filed in which it was denied that this was banjar land and it was said that these two plots along with several other plots were situated in a forest area to which the U. P. Private Forests Act applied. It was also urged that these plots had a large number of trees on them and they were forest land and were not brought under cultivation in 1948 as was stated in the affidavit in support of the application.

In paragraph 5 of the counter-affidavit it was mentioned that 7.07 acres of land was brought under cultivation by the aforesaid minors in 1359F., that is, after 3-6-1949, when the U. P. Private Forests Act, 1948, had come into force and this was done without obtaining the previous permission of the Forest Officer as required by S. 7 of the Act. That the applicants, therefore, had no right to cultivate the said plots.

In the rejoinder affidavit, it was mentioned that the applicants had been paying rent for the portions brought under cultivation and had paid rent as late as 20-6-1953. It was again asserted that they had been in cultivation since 1948 and that Tribeni Prasad qanungo, who had inspected the plots and had made his report on 26-2-1952, had found on the spot that 5 acres of rabi crops were standing, that the rest of the land had been ploughed and that he had been informed by some villagers that the land was under cultivation for about four years. An additional counter-affidavit has also been filed on behalf of the opposite party in which it is said that the trees standing on the two plots in dispute are about 33.000 in number.

(3) The two points urged before us were that the applicants were entitled to cut the trees and the Forest Officer had no right to prevent them from cutting the same. This argument was advanced on two grounds, firstly, that the whole Act was bad under Art. 31(2) of the Constitution and secondly that even if there was no question of appropriation of the rights of the applicants or of taking possession of the property and the Act merely imposed restrictions then the restrictions were unreasonable and under Art. 19(1)(f) of the Constitution the restrictions must be deemed to be bad. The second point raised was that the applicants were entitled to cultivate the land already under cultivation and the Forest Officer had no right to prevent their doing so. Both these points can be easily disposed of.

(4) As regards the second point, the real dispute relates to a question of fact, the applicants' contention being that the land was under cultivation since 1948, that is, before the notification, to which S. 7 of the Act did not apply while the contention of the opposite party is that the land was brought under cultivation after 3-6-1949, and the action, therefore, was illegal in view of S. 7 of the Act. The applicants claim that they were tenants of the two plots and their tenancy rights have been recognized by Government and the Government have been realizing rent from them.

Learned counsel for the applicants does not deny that if his clients are tenants of these plots they have a right under the general law to go to the appropriate Court for relief. That Court would be in a better position to decide the question of fact in dispute as to whether the land was brought under cultivation before 3-6-1949 or afterwards. As the applicants have another suitable and effective remedy, it is not necessary for us in this writ petition to decide whether they have the right to cultivate the portion of the land which had already been under their cultivation.

(5) The other point raised by learned counsel was that the Act is in contravention of the provisions of Art. 31(2) and is, therefore, invalid. Reliance is placed on a decision of the Supreme Court in — 'Charanjit Lal Chowdhury v. Union of India', AIR 1951 SC 41 (A), wherein Mr. Justice Mukherjea discussing the meaning of the word 'property' as used in Art. 31 of the Constitution expressed the opinion that it does not necessarily mean a totality of the rights which the ownership of the object connotes and the question whether a person has been dispossessed from the property depends upon the answer to the question whether he has been dispossessed substantially from the rights held by him or the loss is only in regard to some minor ingredient of the proprietary right.

Reliance was placed on a decision of the High Court of Australia in — 'Minister of State for the Army v. Dalziel', 68 CLR 261 (B). The case before the Australian High Court was entirely distinguishable. There the exclusive possession of property for an indefinite period had been taken by the Commonwealth of Australia under regulation 54 of the National Security Regulations and the question was whether this amounted to acquisition of property. The case before the Supreme Court is also distinguishable from the case before us. In that case by an Ordinance the Central Government had notified that they could appoint as many persons as they thought fit as directors of a company and in case they appointed certain directors, the powers of the directors elected by the share-holders, the functions of the managing agents and the rights of the share-holders mentioned in detail in para 36 would cease. It was pointed out by the learned Judge that the share-holders still had the right to transfer their rights and to get the dividends on their shares. It was, therefore, held that the Ordinance did not amount to dispossession of the share-holders of their rights in the company.

We have looked into the provisions of the U. P. Private Forests Act and we cannot say that the provisions of this Act can be said to be bad because of Art. 31(2) of the Constitution. Article 31(2) of the Constitution provides that

"No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

(6) There is no question in this case of either possession or acquisition of the rights of the applicants. The U. P. Private Forests Act was passed, as its preamble shows, for the conservation of forests and groves and for afforestation of waste lands which were not vested in the Government. It cannot be denied that the denuding of the country-side of trees and extensive overfelling causes great national loss as forests are not only a national asset but they prevent erosion of soil and also help in the increase of rainfall. With that object in view, the State Legislature passed an Act which is in line to some extent with the Central Act, the Indian Forests Act (16 of 1927). Private owners have not been divested of any of their rights in forests, groves or trees. All that the Act provides is that they cannot cut, collect or remove timber without the permission of the Forest Officer. The restrictions imposed are all subject to permits being given by the Forest Officer. The property remains the property of the owner. His right to transfer the same is left intact. Certain restrictions have, however, been imposed on the exercise of ownership in the larger public interest. It cannot be said that the provisions of the Act amount either to a dispossession of the owners or to the acquisition of property of private owners by the State. Article 31 (2), therefore, has no application at all.

(7) Learned counsel has urged in the alternative that the provisions of the Act are bad being in contravention of the provisions of Art. 19(1)(f) of the Constitution. Article 19(1)(f) provides that all citizens shall have the right to acquire, hold and dispose of property. It is subject, however, to cl. (5) that the State can impose reasonable restrictions on the exercise of any of the rights conferred by the sub-clause in the interest of the general public. It is urged by learned counsel that some of the restrictions imposed by the section cannot be said to be reasonable restrictions. He has relied on the case of — 'Chintamanrao v. State of Madhva Pradesh', AIR 1951 SC 118 (C), for the definition of the words 'reasonable restrictions'. The only restriction with which we are concerned in this case is the restriction against the felling of trees. It is not possible to hold that the State was not entitled to impose restrictions against the indiscriminate felling of trees in forests and groves when it is now well-known that such forests are a national asset of great value. In our view the State was entitled to see that there is no indiscriminate cutting down of trees in order to sell the wood and get money before the landlords lost their zemindari rights and the trees or the forests vested in the State. Section 12 of the Private Forests Act lays down that:

"A Forest Officer may on the application of the landlord grant a felling licence for the felling of trees for such purpose and with such conditions as he may deem proper and thereupon it shall be lawful for the landlord to carry out felling in accordance with the terms of the felling licence."

Section 13 of the Act provides that

"The Forest Officer may direct any owner of a notified forest to prepare within a specified period a working plan in the prescribed manner for the management of the forest."

A study of these provisions makes it clear that the only object behind the restriction was to see that the forest wealth of the country is not denuded by the shortsighted policy of some of the owners. We are not called upon in this case to express any opinion whether any harm would be done to the national wealth if restrictions are not imposed on the gathering of forest produce. That question has not been raised.

(8) We are, therefore, of opinion that the provision of the Act restricting the right of an owner, or a transferee from him, to fell a tree is not unreasonable especially as there is no absolute restriction and he has been given a right to obtain a permit from the Forest Officer.

(9) After we had heard learned counsel on the first two points, a point was raised on which it may be necessary to have a little more information. In para 9 of the affidavit, it is mentioned that notification No. 1927/XIV-134-47 dated 3-1-1949 is invalid and ineffective as no forests have been specified therein. This paragraph has not been specifically answered in the counter-affidavit. In the counter-affidavit the paragraphs of the affidavit have not been answered paragraph by paragraph. It is, however, said in the counter-affidavit that these two plots including a number of other plots are a forest area. A 'forest' has been defined in the U. P. Private Forests Act as meaning any land which the State Government by notification declares to be a forest for the purposes of this Act. The notification issued by the State Government to which our attention has been drawn is in these terms:

"The Governor is pleased to declare all forest lands in Uttar Pradesh other than those mentioned in S. 2 of the said Act to be forests for the purposes of the said Act."

This presupposes that there are certain forest lands in the U. P. which are well known as such so that anybody reading the notification would know that the notification refers to those forest lands. The definition of the word forest on the other hand is that 'forest' means any land which the State Government has declared to be a forest. From this general notification it is impossible to say what particular piece or pieces of land have been declared by the State Government to be forest for the purposes of the Act. We find in the Central Act that the form of the notification is given in S. 4 and it is as follows:

"Whenever it has been decided to constitute any land a reserved forest, the Provincial Government shall issue a notification in the official gazette

(a) declaring that it has been decided to constitute such land a reserved forest;

(b) specifying as nearly as possible the situation and limits of such land, and

(c) appointing an officer (hereinafter called 'the forest settlement officer') to enquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest produce, and to deal with the same as provided in this Chapter."

(10) It is not possible to say what is the land to which the notification No. 1927/XIV-134-47 dated 3-1-1949 referred to above applies. Learned counsel for the State has referred to certain directions contained in the Revenue Manual and to certain other orders passed by the Forest Department but we think it would be more satisfactory if he were asked to file a complete and full affidavit to indicate how the notification applies to these particular plots that are in question in this case. It may be shown whether this notification applies to this land and if there are other notifications, a reference to those notifications should also be given. We allow learned counsel three weeks' time to file an affidavit and to supply a copy of it to the learned counsel for the other side who may file an affidavit in reply within a week of the receipt of the affidavit.

SUBSEQUENT ORDER (D/- 22-7-1954)

MALIK C. J.:

(11) On 30-9-1953, we dictated a long order and dealt with the various points raised in this writ petition. Towards the end of the hearing, learned counsel had raised a new point that the plots in question were not 'forest' land as there was no notification issued by the Government declaring them to be 'forest' land. We then pointed out that in the U. P. Private Forests Act, 1948, 'forest' has been defined as meaning 'any land which the State Government may, by notification, declare to be a forest for the purposes of this Act'. We gave the counsel for the State time to file a further affidavit giving reference to the notification by which the land in question had been declared to be 'forest'. A counter-affidavit was filed on behalf of the State on 13-10-1953, and reference is made in paragraph 5 of this affidavit to a Government Notification No. 517/XIV, dated 11-10-1952, by which the area of 274.3 acres of land existing in Ailra has been notified as a private forest.

This notification which was published in the U. P. Gazette, Part I, page 1179, and is dated 11-10-1952, was in the exercise of the powers conferred by S. 117, U. P. Zemindari Abolition and Land Reforms Act, 1950 (U. P. Act I of 1951). Section 3, sub-s. (3) of the U. P. Private Forests Act, 1948, with which we are concerned defines 'forest' as meaning any land which the State Government may by notification declare to be a 'forest for purposes of this Act'. So unless the notification makes it out that the land is declared to be a forest for the purposes of the U. P. Private Forests Act, 1948, the land cannot be treated as 'forest' and the provisions of the Act cannot be made applicable to it. We are, therefore, of the opinion that the District Forest Officer, Gonda, had no jurisdiction to act under the U. P. Private Forests Act, 1948, and prevent either the cutting of the trees or taking forcible possession of the timber that had been cut.

(12) We, therefore, issue a direction under Art. 226 of the Constitution that the opposite party is not entitled to act under the U. P. Private Forests Act, 1948, as the provisions of that Act are not applicable to the two plots Nos. 4458 and 4471, with regard to which no notification has yet been issued by the State Government declaring them to be forest land for purposes of the U. P. Private Forests Act, 1948.

(13) We make no order as to costs.

K.S.B. Petition allowed.

A.I.R. 1954 ALLAHABAD 756 (Vol. 41, C.N. 301)

(LUCKNOW BENCH) MALIK C. J. AND RANDHIR SINGH J. (21-7-1954)

Mohammad Siddiqui, Applicant v. State of U. P. and another, Opposite Party.

Civil Misc. Appln. (O. J.) No. 3 of 1953, connected with Civil Misc. Writ Nos. 11, 12 and 13 of 1954.

Constitution of India, Art. 25 — Right to take out religious procession — Magistrate can prohibit it, if he apprehends breach of peace — (Religious procession — Right to take out).

Persons of whatever sect are entitled to conduct religious procession through public streets provided that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace. This right of a person of a particular religious sect to freely profess, practice and propagate his religion is now a part of the fundamental rights guaranteed by Art. 25 of the Constitution but it has been made subject to public order and there can be no doubt that in exercise of the police powers of the State it is open to a Magistrate, in a case where he apprehends breach of the peace, to pass such orders as he may consider necessary to prevent breach of the peace. (Para 5)

It is no part of the Magistrate's duty to fix the date, time and the route and if he thinks that he cannot fix a date, time and route which would not lead to a breach of the peace and rejects the application, the order cannot be read as meaning that he purported to hold that the parties have no right to take out a procession. It is not for the Court to consider whether the Magistrate was right in his apprehension that there was a likelihood of breach of peace, when his bona fides have not been questioned. It is a matter entirely for the District authorities to consider whether in the particular circumstances if a procession was taken out it would lead to public disturbance. Whether it would be more suitable on a particular occasion to bind down a particular party and to allow the procession to be taken out by the others is a matter in the discretion of the Magistrate. It is not open to Courts to take the administration in their own hands and to issue orders to the Magistrate in this respect. (Paras 6, 7)

CASES REFERRED: Paras

(A) (V12) AIR 1925 PC 36: 47 All 151 (PC) 5
(B) (V32) AIR 1945 All 54: ILR (1945) All 3 5
(C) (V22) AIR 1935 All 575: 36 Cri LJ 955 7
(D) ('83) 6 Mad 203: 2 Weir 77 (FB) 7

S. C. Das and Nazeer Ahmad, for Applicant; N. Banerji and Ashraf Husain, for Applicants in C. M. An. 317-54; Advocate-General, B. K. Dhaon and B. N. Roy, for the State.

MALIK C. J.:

Qazi Mohammad Siddiq has filed an application, Civil Misc. Writ No. 3 of 1953, against the State of Uttar Pradesh and the District Magistrate of

Lucknow, under Art. 226 of the Constitution, that the applicant applied for the taking out of a religious procession, Madhe Saheba, and this was unjustly refused by the Magistrate on 26-11-1952.

The prayer in the application is that a writ of mandamus or prohibition or directions or such other writ, directions or orders, be issued, as it may be expedient, to the U. P. Government and the District Magistrate of Lucknow prohibiting them from interfering in taking out of the Madhe Saheba procession and holding public Madhe Saheba meetings by the applicant in the city of Lucknow and directing them to allow the applicant to take out such processions and to hold such meetings under such reasonable conditions as may be necessary in this connection, for which the applicant shall ever remain grateful.

(2) There are three other applications. Civil Misc. Appln. No. 12 of 1954 is by Syed Ahmad Ali that he made an application on 25-7-1953, for taking out a Madhe Saheba procession but it was refused. We may mention here that while the previous application by Qazi Mohammad Siddiq was by a Sunni Mohammedan this application is by a Shia Muslim. This application was dismissed by the District Magistrate on 24-8-1953, and the prayer in the application is that a writ of mandamus or prohibition or directions or such other writ, directions or orders, as it may be expedient, be issued to the U. P. Govt. and the District authorities prohibiting them from interfering in their taking out Madhe Saheba procession and holding public meeting for the recitation of Madhe Saheba by the applicant and directing them to allow the applicant to take out such procession and hold such meetings under such reasonable condition as may be necessary in this connection.

(3) Civil Misc. Appln. No. 13 is by Syed Manzoor Husain Nasir, another Shia Muslim. He also made an application on 25-7-1953, to take out what he calls a 'counter procession and hold a public meeting to recite the narrative therewith'. This application was dismissed on 25-8-1953.

(4) The fourth and the last application No. 11 of 1954 is by Husain Ameer who is also a Shia Muslim.

He claims that Shias have an absolute right to recite Tabarra in public places as enjoined by their religion and when Madhe Saheba is recited at public places they are specially duty bound to recite Tabarra. He made an application to the District Magistrate on 25-7-1953, that he wanted to take out a Tabarra procession and hold a public meeting to recite Tabarra therein and this too was refused by the District Magistrate on 24-8-1953, on the ground that there was an apprehension of a breach of peace.

The prayer in this application is more or less to the same effect as in the other applications that the U. P. Government and the District authorities should be prohibited from interfering in taking out Tabarra procession and holding public meeting for the recitation of Tabarra by the applicant and directing them to allow the applicant to take out such procession as may be necessary in this connection.

(5) It is not necessary for us to go into any detail as regards the dispute between Shias and Sunnis. We are really not concerned with the nature of the dispute or with the rights of the parties to take out processions in praise of their Caliphs. The Shias consider that the first three Caliphs were not true to their prophet or to the true religious belief while the Sunnis consider it otherwise.

It appears from the affidavit filed on behalf of the State in Civil Misc. Writ No. 3 of 1953 that upto 1905 the two Muslim sects, Shias and Sunnis, observed Moharram together. Since then disputes have arisen and there were two committees known as the Piggott Committee and the Allsop Committee which reported about the matter. In — 'Manzur Hasan v. Muhammad Zaman', AIR 1925 PC 36 (A), their Lordships of the Judicial Committee have held that there is a right to conduct a religious procession with its appropriate observance along a highway, and persons of whatever sect are entitled to conduct religious procession through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace.

On behalf of the State the right to take out procession has not been denied. In Art. 25 of the Constitution it is provided that subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. The difficulty however arises at times when by reason of members of one particular sect or religion doing something in public the religious susceptibilities of others are hurt and there is a danger of the breach of peace.

In the case of — 'Manzur Hassan (A)', cited above, the Privy Council recognised that such rights were subject to the directions that a Magistrate may lawfully give to prevent obstructions of the thoroughfare or breaches of the public peace. The same view was taken in a Division Bench ruling of this Court in — 'Haidar Husain v. Ali Mohammad', AIR 1945 All 54 (B), which also related to the dispute between Shias and Sunnis about Madhe Saheba and Tabarra processions.

This right of a person of a particular religious sect to freely profess, practise and propagate his religion is now a part of the fundamental rights guaranteed by Art. 25 of the Constitution but it has been made subject to public order and there can be no doubt that in exercise of the police powers of the State it is open to a Magistrate, in a case where he apprehends breach of the peace, to pass such orders as he may consider necessary to prevent breach of the peace.

(6) Counsel in the various applications have tried to interpret that the orders of the Magistrate are most general and for all times. As we read these orders they do not seem to mean that the Magistrate intended to pass a general order for all times.

Applications were made for taking out processions and the applications were refused. In some of the applications the Magistrate was asked to fix a date, time and route that he considered most suitable. Firstly it was no part of the Magistrate's duty to fix the date, time and the route and in any case, if he thought that he could not fix a date, time and route which would not lead to a breach of the peace and rejected the application, the order cannot be read as meaning that he purported to hold that the parties have no right to take out a procession.

Learned Advocate General has stated in clear terms that these orders were not intended to take away for all times any rights that the parties may have and they merely related to the grant of the particular application for taking out a

procession at the time or near about the time when the application was made.

We found in the writ application of Qazi Mohammad Siddiq, No. 3 of 1953, that the District Magistrate called for a report from the City Magistrate and, on receipt of the report from the City Magistrate that there was a likelihood of a breach of peace if a procession was allowed, he rejected the application of the applicant. In the other applications he called for a report from the police and, again, on receipt of adverse reports from the police he rejected the applications for permission to take out a procession.

(7) It is not for us to consider whether the Magistrate was right in his apprehension that there was a likelihood of breach of peace. In none of the affidavits has his bona fides been questioned. It is a matter entirely for the District authorities to consider whether in the particular circumstances if a procession was taken out it would lead to public disturbance.

One party blames the other and each alleges that it was he who was exercising peacefully his public right and it is the other party against whom prohibition order should have been made and his procession should have been allowed. Again whether it would be more suitable on a particular occasion to bind down a particular party and to allow the procession to be taken out by the others is a matter in the discretion of the Magistrate. No doubt the Magistrates, as has been laid down in — 'Jafar Husain v. Pearey Lal', AIR 1935 All 575 (C) and — 'Sundram Chetti v. The Queen', 6 Mad 203 (D), would try to help a party who is in the right and not a party who is in the wrong, but this does not mean that it is open to Courts to take the administration in their own hands and to issue orders as to whether a Magistrate should or should not allow a procession to be taken out by a party when the Magistrate is satisfied that it is likely to end in a serious disturbance and to direct what restrictions he should impose on such an occasion.

(8) The orders in these cases were passed by the District authorities in the year 1952 or 1953. The circumstances in 1954 may have entirely changed. Even if the Magistrate had made an error of judgment in those years and had not allowed the processions to be taken out under a misapprehension that cannot be recitified today by any order that we might pass. In effect we are being asked to grant a declaration as regards the rights of the parties. We are not satisfied that the applicants are entitled to any relief under Art. 226 of the Constitution.

(9) These applications are, therefore, dismissed with costs.

(10) Learned counsel for the parties have asked for leave to appeal to the Supreme Court under Art. 132 of the Constitution. We do not think any question of importance as regards the interpretation of the Constitution arises in these writ petitions. The prayer is, therefore, refused.

R.G.D. Applications dismissed.

A.I.R. 1954 ALLAHABAD 758 (Vol. 41, C.N. 302)

DESAI AND MUKERJI JJ. (20-7-1954)

B. Ram Lal, Applicant v. State.

Criminal Revn. No. 124 of 1952, against decision of S. J., Mathura, D/- 21-12-1951.

(a) High Denomination Bank Notes (Demonetization) Ordinance (1946), Preamble—Ordinance, if subject to six months' duration — (Government of India Act (1935), Sch. IX, S. 72).

The Ordinance, having been promulgated between 27-6-1940 and 1-4-1946, was not subject to the limitation of six months' duration contained in S. 72 of Sch. IX of the Government of India Act, 1935. It was to remain in force so long as it was not repealed. (Para 1)

Anno: Govt. of India Act, Sch. IX, S. 72 N. 1.

(b) High Denomination Bank Notes (Demonetization) Ordinance (1946), S. 7(3) — Sanction if should show facts.

There is no law that a sanction should show the facts constituting the offence. The sanction is not required to be in any form. It need not be in writing even. (Para 4)

(c) High Denomination Bank Notes (Demonetization) Ordinance (1946), Sections 3 and 4 — Validity — (Constitution of India, Arts. 13 and 19 (1) (f)).

The provisions of Ss. 3 and 4 of the Ordinance were not in conflict with the guarantee given by the Constitution under Art. 19 (1) (f) and therefore did not become void under Art. 13. (Paras 5 and 36)

(d) High Denomination Bank Notes (Demonetization) Ordinance (1946), S. 7 (3) — Sanction — Consideration of allegations by Central Government.

Section 7 does not require that the Central Government must consider the allegations made against the accused; much less does it require that it should be proved to the satisfaction of the Court that the Central Government had considered the allegations and spent a certain minimum amount of time over the consideration. The requirement of S. 7 is fully met if there is on the record a sanction of the Central Government for prosecution of the accused. AIR 1948 PC 82, Explained. (Para 6)

(e) High Denomination Bank Notes (Demonetization) Ordinance (1946), S. 7 (3) — Sanction granted by Secretary — Legality — (Government of India Act (1935), S. 313 and Sch. IX, S. 40(2)).

Sanctioning prosecution for breach of an Ordinance dealing with currency matters is undoubtedly a currency matter. Therefore, a sanction granted by the Deputy Secretary in accordance with the rules made by the Governor-General under S. 40 (2) of the 9th Schedule must be treated as that of the Governor-General in Council, i.e., the Central Government and as such there is no illegality in the sanction. AIR 1952 Orissa 200, Distinguished. (Para 7)

(f) Government of India Act (1935), Sch. IX, S. 40 — Contention that Governor-General had not considered facts — Bar of.

Under S. 40 not only was the contention that the sanction was not given by the Governor-General in Council barred but also the contention that the Governor-General had not considered the facts of the case. AIR 1945 PC 156, Distinguished. (Para 10)

(g) Criminal P. C. (1898), S. 517 — Section does not contravene Art. 19 of Constitution — (Constitution of India, Art. 19).

Section 517 does not contravene Art. 19. A confiscation or forfeiture of property does not amount to any disturbance of the right to acquire, hold or dispose of the property. It certainly has nothing to do with the right to acquire or dispose of property. It removes the property from the possession of a person, but not on the ground that he has no right to hold it. Even if it does, the provisions of S. 517 are reasonable restriction on the right to hold property. (Para 11)

Anno: Cr. P. C., S. 517 N. 1.

(h) Criminal P. C. (1898), S. 439 — Finding of fact — Interference with.

The High Court sitting in revision is not concerned at all with the question whether the Courts below were justified or not in relying upon prosecution evidence. The Court does not ordinarily go into question of fact and would not interfere with a finding of fact unless there was no evidence to support it or the evidence was so bad that no reasonable person could act upon it. (Para 15)

Anno: Cr. P. C., S. 439 N. 15 Pts. 1 and 20.

(i) Criminal P. C. (1898), S. 517 — Disposal of property produced.

A Magistrate has the power to pass orders as he thinks fit for the disposal, by confiscation or otherwise, of any property that is produced before him. It does not matter if the property has not been used for the commission of any offence or is not one regarding which any offence has been committed. The bare fact that it is produced by the police before him invests him with the authority to pass an order for its disposal. (Para 16)

Anno: Cr. P. C., S. 517 N. 19 Pt. 4.

(j) Criminal P. C. (1898), S. 517 — Disposal by confiscation of property.

Accused not claiming property — Rightful owner not known — Property obtained through commission of offence — Property held could very reasonably be ordered to be confiscated. (Para 16)

Anno: Cr. P. C., S. 517 N. 9.

(k) Government of India Act (1935), S. 59 (2) and Sch. IX, S. 40 (1) — Distinction.

Section 59 (2) creates a bar to questioning the 'validity' of an order on the ground that such an order was not an order made by the Governor. Section 40(1), on the other hand, creates a bar in the way of the accused from raising the question that the order, which was duly authenticated, had not been 'duly made' by the Governor-General in Council. (Para 30)

Anno: Govt. of India Act, S. 59 N. 1.

(l) High Denomination Bank Notes (Demonetization) Ordinance (1946), S. 7 — Confiscation.

There is no provision in the Ordinance for confiscation either of the high denomination notes or the equivalent thereof. The Ordinance only prescribes punishment for any breach of any of the conditions provided for by the Ordinance. (Para 37)

CASES REFERRED: Paras

(A) (V35) AIR 1948 All 182: 49 Cri LJ 185 2

(B) (V35) AIR 1948 PC 82: 49 Cri LJ 261 (PC) 4, 6, 31

(C) (V39) AIR 1952 Bom 184: 1952 Cri LJ 627 8, 32

(D) (V39) AIR 1952 Orissa 200: 1952 Cri LJ 1051 8, 10, 32

(E) (V32) AIR 1945 PC 156: 1945 FCR 195 (PC) 9, 10, 30

Shri Narain Sahai, N. P. Asthana and K. B. Asthana, for Applicant; Advocate General and Sri Ram, Dy. Govt. Advocate, for the State.

DESAI J.:

I have seen the order proposed to be made by my learned brother.

(2) It was contended before us that the Ordinance lapsed before the prosecution. This contention was advanced on behalf of Sridhar Acharya before the withdrawal of the prosecution on 29-9-1948 and was overruled by the trial Court. He had brought up the matter to this Court and our brother Harish Chandra rejected the contention, see — 'Sridhar Achari v. Emperor', AIR 1948 All 182 (A). He held that the Ordinance was not of a limited validity and remained valid and in force after 1-4-1946 and that there was no legal bar to a prosecution started under S. 7 of the Ordinance in March 1947.

The present prosecution is a different prosecution and the decision of our brother Harish Chandra is not binding on the applicant. But we are in full agreement with the decision. The Ordinance, having been promulgated between 27-6-1940 and 1-4-1946, was not subject to the limitation of six months' duration contained in S. 72 of Sch. IX of the Government of India Act, 1935. It was to remain in force so long as it was not repealed.

(3) The second contention that the sanction was not proved no longer remains valid. We examined Sri O. P. Gupta, Assistant Secretary to Government of India, Finance Department. He proved that under a resolution dated 28-7-1939 of the Ministry of Home Department he was authorised to sign letters and orders issued on behalf of the Government of India, that the Government of India had received a precis of the case from the State Government and after considering the facts of the case had sanctioned prosecution of the applicant and others for the offence of S. 7 of the Ordinance and that the sanction sent to the State Government on 16-4-1947 was signed by him. He also stated that the Deputy Secretary of the Finance Department and an Officer of the Department of Law were consulted before the sanction was granted.

(4) Another contention was that the sanction does not show the facts constituting the offence. It certainly does not show the facts but there is no law that it should show the facts. The sanction is not required to be in any form. It need not be in writing even, see — 'Gokul Chand Dwarka Das v. The King', AIR 1948 PC 82 at p. 84 (B). It was pointed out in that case that if the facts were not stated in a sanction the prosecution would have to prove that the sanction related to those facts which formed the basis of the trial. Sri O. P. Gupta has proved that the

sanction was for those acts of the four men which were mentioned in the precis sent by the State Government to the Government of India.

(5) The next contention was that Ss. 3 and 4 of the Ordinance contravened Art. 19(1)(f) of the Constitution and, therefore, became void under Art. 13. Under Art. 19(1)(f) all citizens have the right "to acquire, hold and dispose of property." Section 3 of the Ordinance declared that after 12-1-1946 all high denomination bank notes ceased to be legal tender in payment or on account, while S. 4 prohibited every person after that date from transferring to the possession of another or receiving into his possession from another, any high denomination bank note.

As far as the declaration that the high denomination notes ceased to be legal tender is concerned, it did not interfere with anybody's right to acquire, hold or dispose of property; the high denomination notes ceased to be legal tender but anybody could hold them and nobody was prevented by S. 3 from acquiring or disposing of them. Section 4 certainly interfered with that right, but the right of citizens to acquire, hold and dispose of property is subject, under the Constitution itself, to any existing law in so far as it imposes reasonable restrictions on the exercise of it, in the interest of the general public.

The Ordinance was promulgated in the interest of the general public to meet a certain emergency that had arisen. The declaration that the high denomination bank notes ceased to be legal tender did not infringe any of the constitutional rights of a citizen. Once the high denomination bank notes ceased to be legal tender, any restriction on their transfer to another person cannot be said to be unreasonable. The Ordinance provided for exchange of the high denomination notes for notes of smaller denominations on certain conditions.

Therefore all that a person who held high denomination notes had to do was to have them exchanged for notes of smaller denominations after fulfilling the conditions prescribed therefor. He had nothing to gain by not having them exchanged for notes of smaller denominations and instead transferring them to another person.

A person also had nothing to gain by acquiring high denomination notes when they had ceased to be legal tender. Therefore, the restriction imposed by S. 4 of the Ordinance upon the power to transfer or to receive high denomination notes was not at all an unreasonable restriction; having regard to the emergency which justified the promulgation of the Ordinance, the restriction was undoubtedly reasonable.

But really we are not concerned even with the question whether Ss. 3 and 4 became void under Art. 13 or not. The applicant has been convicted not for infringing the provisions of Ss. 3 and 4 but for violating the provisions of S. 6(2) by making a false or only partially true declaration. If S. 6 were unconstitutional, the applicant could not be prosecuted for violating its provisions. The constitutionality of S. 6 was not impugned and did not depend upon the constitutionality of Ss. 3 and 4.

(6) The next contention, a contention which was argued very seriously, was that it has not been proved that the Central Government considered the facts of the case before sanctioning the prosecution of the four men. All that S. 7 of the Ordinance requires is that there must be a previous sanction of the Central Government. It does not require that the Central Government must consider the allegations made against the accused; much less does it require that it should be proved to the satisfaction of the Court that the Central Government had considered the allegations and spent a certain minimum amount of time over the consideration.

The requirement of S. 7 was fully met if there was on the record a sanction of the Central Government for prosecution of the four men for the acts which were the subject-matter of the trial. The leading case on the subject is — 'AIR 1948 PC 82 (B)', in which Sir John Beaumont observed at page 84 that:

> "In order to comply with the provisions of Cl. 23, it must be proved that the sanction was given in respect of the facts constituting the offence charged." ("Cl. 23" referred to Cl. 23 of the Cotton Cloth and Yarn (Control) Order, 1943, which provided that no prosecution for the contravention of any provision of it can be instituted without the previous sanction of the Provincial Government).

His Lordship said in continuation that it is desirable that the facts should be referred to on the face of the sanction and that if it is not done,

> "the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority."

His Lordship certainly did not intend to lay down that the prosecution must prove that the facts constituting the offence were considered by the authority. If the facts were mentioned in the sanction itself, nothing was required to be proved by the prosecution; the prosecution had not to prove either that the facts were placed before the authority or that they were considered by it. It is because the very mention of the facts in the sanction would have shown that the sanction was for prosecution in respect of those facts.

If the facts were not mentioned in the sanction itself, the fact that they were placed before the authority was required to be proved not because it was necessary to prove that the facts were considered by the authority, but because it had to be shown that the sanction was in respect of those facts and not some other facts. A general sanction would not do; the sanction had to be for the particular act alleged to have been done by the accused.

Unless the sanction for doing an act, for doing which the accused was placed on trial, was there, it could not be said that the prosecution was with previous sanction. Consequently — 'Gokulchand Dwarkadas v. The King (B)' is no authority for the proposition that even if it is shown that the sanction was for the act, for doing which he is tried, the prosecution must show that the allegations made against him were considered by the sanctioning authority.

In the present case it has been shown that the sanction and the trial were for the acts done by the applicant and the other men; in other words, the prosecution of the four men was with previous sanction. The preliminary condition for the taking of cognizance against the four men having been satisfied, all that the Court had to see was whether the offence was established against them or not.

(7) Since there is no law which expressly requires that the sanctioning authority must consider the allegations made against the accused, there should not arise any question of the identity of the person who actually considers the facts. Under the ordinance the sanction has to be of the Central Government. According to the Gene-

ral Clauses Act, S. 2(8), 'Central Government' means the Governor-General in Council. Under S. 313, Government of India Act, the executive authority was to be exercised by the Governor-General in Council either directly or through officers subordinate to them.

Sanctioning prosecution for an offence was an exercise of executive authority so the Governor-General could sanction prosecutions himself or could authorise officers subordinate to him to sanction them. It was provided in S. 40 of 9th Schedule of the Government of India Act, 1935, that the Governor-General could make rules and orders for the more convenient transaction of business in his Executive Council and that every order made or acted upon in accordance with them, was to be treated as being the order or act of the Governor-General in Council.

According to the Administrative Directory of the Government of India, page 125, currency matters were to be dealt with by the Deputy Secretary (F), through Assistant Secretary (F). Shri K. N. Kaul was the Deputy Secretary (F) and it was he who sanctioned the prosecution.

Sanctioning prosecution for breach of an Ordinance dealing with currency matters was undoubtedly a currency matter; therefore, the Deputy Secretary sanctioned the prosecution in accordance with the rules made by the Governor-General under S. 40(2) of the 9th Schedule, Government of India Act, and the sanction granted by him must be treated as that of the Governor-General in Council, i.e., of the Central Government. There was thus no illegality in the sanction.

(8) In — 'Harprasad Ghasiram Gupta v. State', AIR 1952 Bom 184 (C), a Bench of the High Court of Bombay dealt with a sanction given by the Deputy Secretary to the Government of India for prosecution under S. 7(3) of the High Denomination Bank Notes Ordinance and the sanction was held to be in order. With regard to — 'Shyamaghana Ray v. State', AIR 1952 Orissa 200 (D), which was cited on behalf of the applicant, I have to make two observations. One is that it related to interpretation of S. 3, Preventive Detention Act (1950), which requires not only that the Governor should pass an order of detention but also that he should be satisfied that such order is necessary.

The Ordinance requires only one act to be done by the Central Government, namely, that of sanctioning the prosecution. Since two acts are required to be done under the Preventive Detention Act, it may be argued that while one act may be done by an officer authorised by the Governor to do it, the other act, namely, that of being satisfied, must be done by the Governor himself; no such argument is possible in the present case where only one act is required to be done. The other is that the decision in that case depended upon the subsidiary rules of business made by the Orissa State Government, with which we have no concern in the present case.

(9) In — 'Emperor v. Sibnath Banerji', AIR 1945 PC 156 (E), the Privy Council held that R. 26, Defence of India Rules, which authorised the Central Government or the Provincial Government, "If it is satisfied with respect to any particular person.....", to pass an order of detention against him, did not require that the Governor must be personally satisfied.

(10) Section 40 of the 9th Schedule of the Government of India Act laid down that

> "all orders.....of the Governor-General in Council shall be expressed to be made by the Governor-General in Council, and shall be signed.....as the Governor-General in Council may direct, and, when so signed, shall not be called into question in any legal proceedings on the ground that they were not duly made by the Governor-General in Council."

The sanction was expressed to be made in the name of the Governor-General in Council (i.e. the Central Government); it uses the words "the Central Government is pleased to sanction....." There was no dispute on this point. It was signed by the Assistant Secretary of the Government of India, Defence Department, Shri O. P. Gupta, who deposed that he was authorised to sign it. Under Home Department Resolution No. 18/3/39-dated Public—28-7-1939, the Governor- General in Council had directed in pursuance of S. 40(1) of the 9th Schedule, that orders and other proceedings of the Governor-General in Council should be signed by a Secretary, a Deputy Secretary, or an Assistant Secretary of the Government of India.

Thus the provisions of S. 40, 9th Schedule, were fully complied with and the result was that the sanction could

> "not be called into question in any legal proceedings on the ground that it was not duly made by the Governor-General in Council."

The word 'duly' is of great importance. If it was a requirement of a due sanction of prosecution that the facts were placed before the sanctioning authority and were properly considered by it. S. 40 prohibited the questioning of the sanction in any legal proceedings (such as the trial of the accused for the offence) on the ground that it was not made by the Governor-General in Council after duly considering the facts.

There is no substance in the argument that all that was barred under S. 40 was the contention that the sanction was not given by the Governor-General in Council and not the contention that the Governor-General had not considered the facts of the case. 'AIR 1945 PC 156 (E)' does not support the argument advanced on behalf of the applicant. It interpreted the words used in S. 59, Government of India Act, which are materially different from those of S. 40(2) of 9th Schedule, inasmuch as it did not use the word 'duly'.

There is a difference between questioning an order on the ground that it was not made by the Governor-General in Council and questioning it on the ground that it was not duly made by him. Further in that case it was decided that the Court was not debarred from investigating the truth of a recital contained in the order.

The applicant before us does not question the truth of any recital contained in the sanction. From the fact that he is not debarred from questioning the truth of any recital contained in the sanction, it does not follow that he is not debarred from questioning that the sanction was duly given. Article 166(2) uses language similar to that of S. 59, Government of India Act; therefore, the interpretation placed upon it by the Orissa High Court in 'Shyama Ghana Ray's case (D)' is of no assistance. I agree with my brother Mukerji that S. 40(2) is a complete answer to this contention of the applicant.

(11) The next contention is that the confiscation of the notes recovered from the temple treasury contravenes Art. 19 of the Constitution. The order of confiscation was passed by the Courts below under S. 517, Cr. P. C. The Ordinance contains no provisions for confiscation or

forfeiture and S. 517, Cr. P. C., being the only provision dealing with these matters, must be deemed to be the authority for the order.

Section 517, Cr. P. C. certainly does not contravene Art. 19. A confiscation or forfeiture of property does not amount to any disturbance of the right to acquire, hold or dispose of the property. It certainly has nothing to do with the right to acquire, or dispose of property. It removes the property from the possession of a person, but not on the ground that he has no right to hold it. Even if it does, the provisions of S. 517, Cr. P. C., are reasonable restrictions on the right to hold property.

It is in the public interest that the property that the offender acquired through the commission of an offence should be taken away from him. It is a reasonable restriction that a person should not be allowed to retain in his possession the property acquired by him through commission of offence. Nobody can claim a right to hold a property, the possession over which has been acquired by him through the commission of an offence.

(12) Further I find that the applicant himself does not claim that the notes of smaller denominations belong to him. He has no right whatsoever over them, and no right of his is infringed by the order of forfeiture. The notes do not belong even to the temple. The real owner has remained behind the screen. He may be aggrieved by the order of confiscation but not the applicant or even the temple trust committee.

(13) The applicant did not rely upon Art. 31 of the Constitution.

(14) The last but one contention is that the applicant did not make any false or partially true declaration. (His Lordship referred to the evidence and proceeded:)

(15) The Courts below relied upon the prosecution evidence. This Court sitting in revision is not concerned at all with the question whether they were justified or not in relying upon it. This Court does not ordinarily go into questions of fact and would not interfere with a finding of fact unless there was no evidence to support it or the evidence was so bad that no reasonable person could act upon it. (His Lordship after discussing the evidence held that the accused was rightly convicted and sentenced and proceeded:)

(16) The order of forfeiture was challenged on the ground that it was not covered by the language of S. 517 of the Code inasmuch as the notes of smaller denomination seized by the police from the double lock were not property

> "regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

The offence committed by the applicant was that he signed the declaration without being the owner and that he stated in it particulars which were false or were not believed by him to be true. Even if it is correct to say that the smaller denomination notes were not the property regarding which the offence was committed or which had been used for the commission of the offence, there is another circumstance on account of which the courts below could pass the order of forfeiture. They had the power to pass orders as they thought fit for the disposal, by confiscation or otherwise, of any property that was produced before them.

It did not matter if the property had not been used for the commission of any offence or was not one regarding which any offence had been committed. The bare fact that it was produced by the police before them invested them with the authority to pass an order for its disposal. In what manner they should order it to be disposed of was within their discretion. They might abuse the discretion by ordering it to be disposed of in an improper manner but there can be no doubt that they had the exclusive jurisdiction to pass an order for its disposal. The property having come in their custody, they had to pass an order for its disposal.

Once the smaller denomination notes were seized by the police, rightly or wrongly, legally or illegally, and produced before them, they had to pass an order for their disposal. Therefore the order of confiscation was an order within their jurisdiction. As regards the propriety of it, I think it was the only correct order that could be passed in the circumstances. There was no claimant for the notes; the trustees of the temple did not claim them as temple property. The applicant did not claim them as his personal property and had no 'locus standi' to claim them as temple property in opposition to the trustees themselves.

As a matter of fact, it was not temple property at all. The rightful owner was not known, as I said earlier, he chose, and chose for very good reasons, to remain in the background. Therefore the notes could not be ordered to be handed over to any person. Since they had been obtained through the commission of an offence, they could very reasonably be ordered to be confiscated. The Courts below did not exercise their discretion at all arbitrarily or injudiciously and it would be illegal for me to interfere with their exercise of discretion.

(17) There is no force in the application which should be dismissed.

MUKERJI J.:

(18) The applicant Ram Lal has been convicted under S. 7, High Denomination Bank Notes (Demonetization) Ordinance, 1946 (3 of 1946), and sentenced to a fine of Rs. 800/-. In default of the payment of fine he was ordered to undergo rigorous imprisonment for six months. There is further an order forfeiting a sum of Rs. 50,000/- in currency notes.

(19) The applicant was the mukhtar-a-am and also performed the functions of an accountant of a trust which appertained to the temple of Sri Rangji at Brindaban in the district of Mathura. This trust was managed by a Board of Trustees in accordance with a scheme that had been drawn up by this Court some time back. The temple, or more appropriately the trust, possessed extensive properties which were in its hands as endowment and the trust also had in its treasury a large sum of money, almost, at all times.

(20) The exigencies of the War necessitated action in regard to certain monetary activities of the country and, therefore, an Ordinance called the High Denomination Bank Notes (Demonetisation) Ordinance was promulgated on 12-1-1946 by the Governor-General in exercise of the powers conferred upon him by S. 72, Government of India Act, as set forth in the 9th Schedule of that Act.

Section 6 of the Ordinance provided for the exchange of high denomination bank notes held by any one for notes of smaller denomination or for other valid legal tender. This section provided for the procedure that had to be undergone, if and when, a holder of a high denomination bank note wished to have it converted into equivalent monies.

Section 6 provided for a declaration that the owner of a high denomination bank note was enjoined to make before he was entitled to have that note converted by the Reserve Bank of India; for the Reserve Bank of India was authorised to convert the high denomination bank note which had been demonetised by the Ordinance. Section 7 of the Ordinance provided for penalties that would be imposed for breaches of any of the provisions of the Ordinance. The same section by its cl. (3) provided as follows:

"No prosecution for an offence punishable under this section shall be instituted except with the previous sanction of the Central Government."

Section 7(1) was to the following effect:

"Whoever knowingly makes in any declaration under S. 6 any statement which is false or only partially true or which he does not believe to be true, or contravenes any provision of this Ordinance or the rules made thereunder, shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

It is necessary to note the provision of sub-s. (5) of S. 6 also. That provision was in these words:

"The person who signs any declaration under this section shall be deemed for all purposes to be the owner of the high denomination bank notes to which it relates, and if it is proved that he is not in fact the owner of such bank notes, he and the owner thereof, unless in the case of the latter he can prove that the declaration was made without his knowledge, shall be deemed to have contravened the provisions of S. 4."

Section 4 reads thus:

"Save as provided by or under this Ordinance, no person shall after the 12th day of January 1946 transfer to the possession of another person or receive into his possession from another person any high denomination bank note."

(21) On 16-1-1946, Mahant Govind Das, the managing trustee, sent a letter to Sridhar Acharya, the manager, authorising him to exchange the high denomination bank notes belonging to and held by the trust in accordance with the provisions of the Ordinance. On 25-1-1946 Sridhar Acharya accompanied by the applicant went to the Civil and Sessions Judge of Mathura before whom the applicant made a declaration on an application which was signed by him in accordance with the requirements of S. 6 of the Ordinance. The application was in accordance with the requirements of the Ordinance.

In the column 'Name of declarant' the applicant put down this — "Sri Thakur Rangji Maharaj under the mahtamim Mahant Govind Das through Ram Lal mukhtar-e-am." In the column of 'Status of declarant' he put down—"Individual capacity of God". In the column of 'Particulars of high denomination notes tendered' he gives the particulars of the fifty notes of the value of Rs. 1,000/- each. The other particulars required to be filled in were also filled in by the applicant. The declaration which the applicant signed was in these words:

"I hereby declare that the particulars furnished above are full, true and correct to the best of my/our knowledge and belief. I further declare that the bank notes tendered herewith belong to me/us and are not benami holdings."

The applicant signed his name and described himself as mukhtar-e-am of Mahant Govind Das mahtamim Sri Rangji Temple, Brindaban.

(22) The Imperial Bank received the application but did not forthwith determine to exchange the high denomination notes but the Agent of the Bank referred the matter to the Finance Department of the Government of India for orders. The Agent also sent a copy of his letter, which he addressed to the Government of India, to Mahant Govind Das. On 13-3-1946 the Imperial Bank, however, exchanged the high denomination bank notes and delivered to the applicant five hundred notes of the value of Rs. 100/- each.

(23) It appears that on receipt of the letter of the Agent of the Imperial Bank, Drigpal Singh, one of the trustees, recorded the statements of the applicant and some others in respect of this transaction of exchanging the high denomination bank notes. The applicant in his statement said that Sridhar Acharya had given him the notes for having them exchanged and it was Sridhar Acharya who had told him that the notes belonged to the temple and had been taken out from the temple treasury.

The applicant made it clear in his statement that he had no personal knowledge as to the source from where the high denomination bank notes came. From his statement it was further clear that to his knowledge there existed in the temple treasury and tosha khana some two or three high denomination bank notes. The applicant made it further clear in his statement that he had exchanged the high denomination bank notes in his capacity of a general attorney or mukhtar-e-am of the temple.

(24) On 19-3-1946 Drigpal Singh sent a complaint to the Superintendent of Police alleging that there was to his knowledge, no high denomination bank notes in the temple treasury and that the alleged exchange of the 50 high denomination bank notes through the Imperial Bank were not apparently made on behalf of the temple. Drigpal Singh, therefore, requested for an inquiry in respect of the matter. On 14-4-1946 the police examined the double-locked treasury of the temple and recovered therefrom five hundred notes of the value of Rs. 100/- each.

Further, they recovered a sum of Rs. 11,943/- in notes and coins of other denomination. The recovered money was kept in two separate stocks. The police after completing their investigation submitted a report to the Secretary in the Finance Department of the Provincial Government. The Secrtary in this Department wrote to the Government of India in the Finance Department on 24-10-1946 seeking sanction for the prosecution of the applicant and some other persons under S. 7(1) of the Ordinance.

Sanction was accorded by the Deputy Secretary to the Government of India in the Finance Department on 25-11-1946. A copy of this sanction was forwarded to the Government of U. P. by Sri O. P. Gupta, an Assistant Secretary to the Government of India in the Finance Department. Curiously enough, this sanction which was conveyed to the U. P. Government by Sri O. P. Gupta did not bear any signature.

The omission was discovered at a subsequent stage and on 16-4-1947 another sanction bearing proper authentication was sent to the U. P. Government. Curiously enough again, a charge-sheet had been submitted to the Court accompanied by that sanction which borne no signature; the prosecuting agency, however, rectified their error by withdrawing that charge-sheet and immediately putting in another charge-sheet accompanied by the properly signed sanction dated 16-4-1947. This

was done on 29-9-1948. The charge-sheet was against four persons, Sridhar Acharya, Lakshmi Narain, Parshotam Das and Ram Lal Asthana (the applicant). Sridhar Acharya died during the pendency of the proceedings before the Magistrate, while Lakshmi Narain and Parshotam Das were discharged by the Magistrate and a charge against the applicant alone was framed under S. 7(1) of the Ordinance on 9-4-1949.

(25) Several defences were raised on behalf of the applicant before the trial Court. One such defence was that the sanction had not been proved in accordance with law and further that the sanction which had been produced in Court did not show that the sanctioning authority had considered all the relevant facts before according sanction. This contention was raised before the Magistrate by the applicant on 6-7-1949.

On the 12th of July, the Magistrate considered it proper to examine a C. I. D. Inspector under S. 540, Criminal P. C., in order to prove the sanction. The Magistrate after receiving all the evidence that was tendered before him convicted the applicant in the terms referred to above. On appeal, the learned Sessions Judge considered all the points that were raised before him. He too upheld the conviction of the applicant, for he found no force in any of the contentions raised before him.

(26) The applicant has come up in revision to this Court and has raised several points. It was contended on his behalf—

(1) that the sanction had not been proved in accordance with law and further that the sanction was not a proper sanction, inasmuch as, it did not show on the face of it that the sanctioning authority had either the relevant facts, on which he had given his sanction, before him or that he had applied his mind to the facts before according the sanction;

(2) that the declaration which had been made by the applicant was not false; at any rate, it had not been shown that the applican knew that the declaration, he was making, was false;

(3) that the Ordinance having lapsed before the prosecution was launched, the conviction could not stand;

(4) that Ss. 3 and 4 of the Ordinance were of a confiscatory nature and were therefore void in view of Art. 19(1)(f) of the Constitution of India and that Ss. 5, 6 and 7, being merely subsidiary sections, fell with the main Ss. 3 and 4; and

(5) that, in any event, the order of forfeiture or confiscation, which was passed by the Magistrate in respect of the currency notes of the value of Rs. 50,000/-, was unjustified and illegal.

(27) I shall now take up the questions that were raised on behalf of the applicant for decision.

(28) As I have already stated, the sanction which was made the basis of this prosecution, was attempted to be proved by a C. I. D. Officer. The evidence of this officer was placed before us and we were of the opinion that the evidence, which had been led, was not sufficient to prove the sanction on which reliance had been placed by the Courts below. We accordingly gave the State an opportunity to adduce further evidence to satisfy us that the sanction, which had been produced in this case, was a sanction that had been made or given in accordance with the requirements of S. 7(3) of the Ordinance.

The State summoned Shri O. P. Gupta, Deputy Secretary to the Government of India in the Ministry of Finance, to prove the sanction. The sanction bore the signature of Shri Gupta so that, 'prima facie', he was the appropriate person to prove the sanction. Shri Gupta stated that the papers, which had been sent to the Government of India by the U. P. Government, had been carefully scrutinised and the facts which appeared on those documents, were considered by a number of officers before sanction was given for the prosecution of the applicant.

Shri Gupta was unable to state, however, whether the then Deputy Secretary consulted higher officers of Government, or, even consulted the Governor-General himself before he accorded his approval to the proposal made by the witness for giving sanction. On behalf of the State, reliance was placed on S. 40 of the 9th Schedule of the Government of India Act, 1935, for the argument that the sanction, having been authenticated by an officer authorised to make such authentication, could not be challenged before a Court.

(29) Section 40 of the 9th Schedule of the Government of India Act, 1935, is in these words:

"40 (1) All orders and other proceedings of the Governor-General in Council shall be expressed to be made by the Governor-General in Council, and shall be signed by a Secretary to the Government of India, or otherwise as the Governor-General in Council may direct, and, when so signed, shall not be called into question in any legal proceedings on the ground that they were not duly made by the Governor-General in Council.

(2) The Governor-General may make rules and orders for the more convenient transaction of business in his Executive Council and every order made or act done, in accordance with such rules and orders, shall be treated as being the order or the act of the Governor-General in Council."

I may here point out that, under Home Department Resolution No. 18/3/39-Public, dated 28-7-1939, the Governor-General in Council had directed, in pursuance of S. 40(1) of the 9th Schedule of the Government of India Act, 1935, that all orders and other proceedings of the Governor-General in Council be signed by a Secretary, Deputy Secretary or Assistant Secretary to the Government of India.

In view of the aforementioned resolution, the authentication by one of the three classes of Secretaries mentioned above was to be treated as proper authentication within the meaning of S. 40(1) of the 9th Schedule. Under S. 40(1), any order expressed to have been made by the Governor-General in Council and signed by a Secretary, Deputy Secretary or Assistant Secretary was to be deemed to be an order duly made by the Governor-General in Council and such an order could not be called into question in any legal proceeding.

Under S. 40(2), there was the relevant notification which gave expression to an order of the Governor-General for a more convenient transaction of business in his Executive Council; in other words, an Assistant Secretary to the Government of India was authorised to issue an order under his signature which had to be treated as an order or as an act of the Governor-General in Council.

(30) Shri O. P. Gupta was, therefore, authorised to sign the sanction and, after his signature, the sanction was to be deemed to be the sanction given by the Governor-General in Council. Under S. 40, what could not be challenged is the fact

that the order, which had been properly authenticated by a Secretary, was not order 'duly made'.

On behalf of the applicant, reliance was placed on the case of — 'AIR 1945 PC 156 (E)' for the argument that it was open to the applicant to show that the sanction, which had been authenticated by Shri O. P. Gupta and had been exhibited in the case and made the basis of the prosecution, had not been accorded by the Governor-General in Council.

In — 'Sibnath Banerji's case (E)', their Lordships of the Privy Council did not consider the provisions of S. 40 of the 9th Schedule but considered the provisions of S. 59(2), Government of India Act, 1935. Section 59(2) of that Act is in these words:

"59(2)— Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor."

Section 59(2) creates a bar to questioning the 'validity' of an order on the ground that such an order was not an order made by the Governor. Section 40(1), on the other hand, creates a bar in the way of the applicant from raising the question that the order, which was duly authenticated, had not been 'duly made' by the Governor-General in Council. To my mind, there is a distinction between questioning the 'validity' of an order and raising the question that an order, duly authenticated, had not been 'duly made'. Their Lordships of the Privy Council quoted, with approval, a passage from the judgment of the learned Chief Justice of the Federal Court. The passage, which they quoted, was this:

"It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly, where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid-making of that order. In the normal case, the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a prima facie case that the recital is not accurate."

Their Lordships expressed the opinion that the contention of the Crown in that case went too far, inasmuch as, sub-s. (2) of S. 59 related only to one specified ground of challenge and that was that the order or instrument was not made or executed by the Governor. What was really decided was that where the power of the Governor to make the order was being challenged, or, a challenge to the order was being made on the ground that the power, which could only have been exercised on the existence of certain circumstances or on the existence of certain facts, then a challenge could be made on the ground that the Governor had no power to make the order, or, the circumstances or the facts, on which the order could have been made, did not exist.

In — 'Sibnath Banerji's case (E)', what was argued on behalf of the detenu was that the Governor had not the power to make the order because the Governor had not complied with the conditions precedent to making the order — in effect, the power of the Governor to make the order was questioned. Under the above circumstances, their Lordships of the Privy Council approved of the statement made by the learned Chief Justice of the Federal Court which I have quoted above.

In the case before us, the applicant did not challenge the power of the Governor-General to accord the sanction. It was not contended that there were any pre-requisites to making the sanction by the Governor-General. What was challenged was that the sanction, which had been produced in the case, was not the sanction of the Governor-General in Council but was a sanction that had been given by some officer of Government. In my judgment, S. 40 (1) of the 9th Schedule in terms applies to such a contingency and bars such an argument being raised.

(31) It was next contended on behalf of the applicant that the Governor-General had no materials before him, on which he could accord a proper sanction. It was further argued that there was nothing in the sanction to indicate that the Governor-General considered the relevant facts of the case before he accorded the sanction, assuming that the sanction was accorded by the Governor-General in Council. Reliance was also placed on the case of — 'AIR 1948 PC 82 (B)'. In that case, the Privy Council had to interpret Cl. 23 of the Cotton Cloth and Yarn (Control) Order, 1943. That Clause was in these words:

"23. No prosecution for the contravention of any of the provisions of this Order shall be instituted without the previous sanction of the Provincial Government (or of such officer of the Provincial Government not below the rank of District Magistrate as the Provincial Government may by general or special order in writing authorise in this behalf)."

Their Lordships further held that where a sanction simply names the person to be prosecuted and only specifies the provisions of the Order which are alleged to have been contravened, it was not a sufficient compliance with Cl. 23. Their Lordships went on to point out that, in order to comply with the provisions of Cl. 23, Cotton Cloth and Yarn (Control) Order, 1943, it must be proved that the sanction was given "in respect of the facts constituting the offence charged". That is to say, there was to be proof that the sanction, which was being produced in a case, related to the facts of that particular case.

If a sanction did not relate to a particular case which was being supported by that sanction, then, obviously, the sanction could not be used to support that case. Their Lordships further pointed out in — 'Gokulchand Dwarkadas's case (B)' that it was desirable that the facts should be referred to on the face of the sanction but they were careful to observe that this was not essential since Cl. 23 did not require a sanction to be in any particular form, or, even to be in writing.

But if the facts, constituting the offence charged, were not shown on the face of the sanction, then it was open to the prosecution to prove by extraneous evidence that those facts had been placed before the sanctioning authority. The sanction in the case before us was in these words:

"In pursuance of sub-s. (3) of S. 7 of the High Denomination Bank Notes (Demonetization) Ordinance (3 of 1946), the Central Government is pleased to sanction the institution of prosecution against Messrs. Ram Lal, Shridhar

Acharya, Laxmi Narain and Parshottam respectively, mukhtaran-e-am, ex-manager, accountant and ex-munim of Shri Rangji's Temple, Brindaban, Muttra, for having made or abetted the making of a declaration on behalf of Shri Ragji's Temple, Brindaban, in circumstances which constitute an offence punishable under S. 7 of the said Ordinance."

From the aforequoted sanction, it would appear that the sanction on the face of it did not show which particular declaration was thought to have been false and in respect of which the prosecution had been ordered. Therefore, it was necessary for the State to prove which particular declaration it was, in respect of which the sanction had been accorded, and this the State in this case has done so that there was no invalidity in the sanction.

The evidence given by Shri O. P. Gupta also indicated that the sanctioning authority had all the material facts necessary for according the sanction before it. In my view, it was not necessary for the prosecution to prove that the material facts before the sanctioning authority were sufficient for according the sanction. According to the rules of business framed by the Governor-General, allocation of duties was made between the various departments and officers serving in those departments.

The allocation of these duties was evidenced by a publication called 'The Administrative Directory of the Government of India'. This Directory was produced before us and we found that, on page 125 of that Directory, currency matters were to be dealt with by the Deputy Secretary (F) through the Assistant Secretary (F). During the relevant period in question, Shri K. N. Kaul was the Deputy Secretary (F) and it was he who sanctioned the prosecution in the present case. The breach complained of was a breach in respect of a currency matter, for the Ordinance, under which the prosecution was launched, dealt with a currency matter, namely, the demonetization of high denomination notes.

(32) A similar question was raised before the Bombay High Court in the case of — 'AIR 1952 Bom 184 (C)' and a Bench of that Court held that a sanction given by a Deputy Secretary to the Government of India under S. 7 (3) of the High Denomination Bank Notes (Demonetization) Ordinance, 1946 (No. 3 of 1946) was a valid sanction. Reliance was also placed by learned counsel for the applicant on the case of — 'AIR 1952 Orissa 200 (D)'.

That case was in respect of the public safety —Preventive Detention Act. The Provincial Government had to be 'satisfied' before an order under S. 3 of the Preventive Detention Act could be made. In that case, the detention order had been made by the Home Secretary and the question, that was raised, was whether the Home Secretary had the necessary authority to make that order. It was contended on behalf of the State that a presumption as regards the validity of the sanction should be drawn under S. 114, Illustration (e) of the Indian Evidence Act. To that contention, the learned Judges observed as follows:

"The contention strongly urged by the learned Advocate-General is that this subsidiary rule validates the order passed by the Home Secretary in this case and that the authority of the Minister-in-charge to the Home Secretary to deal with these cases is to be presumed in accordance with the ordinary presumption that all official acts are to be taken to have been regularly performed, 'vide' S. 114, Illustration (e) of the Evidence Act. The presumption, however, is one that 'may' be drawn by a Court.

In a matter so fundamental and important as the liberty of a subject which can be deprived of only by strict compliance with the statutory requirements of S. 3 of the Preventive Detention Act, we are not prepared to uphold the validity of the orders in question by reliance on any such presumption.

We specifically put it to the Advocate-General, whether he was in a position to substantiate that the Home Secretary had the requisite authority either generally, or directed to these specific cases and we were prepared to consider, if necessary, a request for short time for production of any such material, if available.

But the learned Advocate-General frankly pleaded his inability. It must, therefore, be taken as a fact that the Home Secretary had no such authority which would enable him to pass the orders now under challenge in purported reliance on Rule 2 of subsidiary rules of business."

The position of an order of detention made under the Preventive Detention Act stands on a footing different from that of a sanction which has to be accorded under S. 7 (3) of Ordinance 3 of 1946. Under S. 7 (3), there was no question of there first being any 'satisfaction' in the sanctioning authority before according sanction so that there could be no question of the prosecution showing that the sanctioning authority had accorded the sanction after being satisfied on the facts and materials placed before it that sanction should be accorded.

There were before the sanctioning authority all the relevant facts on which a sanction could be given. Therefore, in my view, the sanction, that had been accorded and was made the basis of this prosecution, was beyond challenge.

(33) The question whether the declaration, which the applicant made, was a false declaration within his knowledge was a question of fact. The Courts below have found it as a fact that the declaration, that the applicant made, was a false declaration. There was before the Courts below sufficient material to come to that conclusion and, sitting as a revisional Court, I do not think it appropriate to go into that question of fact over again. The declaration, which the applicant gave, was certainly partially false.

Under S. 6 (5) of the Ordinance, a person, who signs a declaration, is to be deemed to be the owner of the high denomination bank notes, to which the declaration relates. The applicant, on his own case, was not the owner of those notes. The declaration, which the applicant made and signed, was in the following words:

"I hereby declare that the particulars furnished above are fully true and correct to the best of my knowledge and belief. I further declare that the bank notes tendered herewith belong to me and are not 'benami' holdings.

I undertake to advise 'to' Reserve Bank of India Bombay, if, any other high denomination bank notes were tendered for exchange by me at any other station.

Sd/- Ram Lal Asthana Mukhtaram of Mahant Govind Das Mahtamim Shri Rangji Temple, Brindaban."

The bank notes admittedly did not belong to the declarant and, consequently, his declaration that they belonged to him and were not 'benami' holdings was clearly false. Evidence was led in

this case to show that the high denomination bank notes in question did not belong to the temple of Shri Rangji. The prosecution also showed that the applicant had the means of knowing, and, in fact, he did know, that those high denomination bank notes were not in the temple treasury.

That evidence was believed by the Courts below and I have seen no reason to disbelieve that evidence. Learned counsel appearing for the applicant made a good deal of argument on the various books of account of the temple that had been produced in the case to show that the applicant did not know that the high denomination bank notes, that he was tendering, did not belong to the temple.

In my opinion, the attempt of learned counsel in this respect was futile for there was nothing in the books of account, that had been produced, and to which our attention was drawn during the course of argument, to show that the applicant did not or could not know that the high denomination bank notes, which he was tendering for exchange, were not the temple property.

(34) Learned counsel for the applicant, although he raised an argument to the effect that, the Ordinance having lapsed before the prosecution had been launched, the conviction of the applicant under that Ordinance was illegal, did not press this argument before us in view of the decision which had been given in this very case by this Court in earlier proceedings.

(35) Learned counsel argued that Ss. 3 and 4 of the Ordinance were confiscatory in nature and, therefore, they were void on account of the guarantee contained in Art. 19 (1) (f) of the Constitution. Section 3 of the Ordinance was in these words:

"3. On the expiry of the 12th day of January, 1946, all high denomination bank notes shall, notwithstanding anything contained in S. 26 of the Reserve Bank of India Act, 1934 (2 of 1934), cease to be legal tender in payment or on account at any place in British India."

There was 'prima facie', therefore, nothing in S. 3 to make it confiscatory in its operation. Currency notes are token money and their validity as money is dependent upon certain enactments and it is, therefore, open to the authority, which gives validity to such money, to withdraw that validity whenever it is thought necessary to withdraw that validity. It may perhaps be open to challenge in cases where the withdrawal operates to cause a kind of forfeiture or confiscation of the money in respect of which the bank note or the currency note was a token.

In the case of these high denomination bank notes, the Ordinance made provision for the exchange of these notes in the event of a person, holding these notes, following a certain prescribed procedure. There was, therefore, no confiscation of the money, which these notes represented, by the State under the terms of the Ordinance.

(36) Section 4 of the Ordinance read as follows:

"4. Save as provided by or under this Ordinance, no person shall after the 12th day of January, 1946, transfer to the possession of another person or receive into his possession from another person any high denomination bank note."

On the afore-mentioned words of the section, no confiscation in any sense of that word could arise. Under Art. 19 (1) (f) of the Constitution, what has been guaranteed is the right of every citizen to acquire, hold and dispose of property. Section 4 undoubtedly places a restriction on the power of disposing of and acquiring high denomination bank notes after a certain date, and high denomination bank notes must be held to be property but Art. 19 (1) (f) is subject to the restrictions mentioned in Cl. (5) of that Article.

Under Cl. (5), the State could make any law, imposing reasonable restrictions on the exercise of the right of a citizen to acquire and dispose of or hold property in the interest of the general public. The impugned Ordinance was passed because an emergency had arisen because of great currency inflation and restrictions were placed because such restrictions were necessary in the interest of the general public.

Section 4 of the Ordinance, it should be noticed, did not place any restriction on the right of any citizen to acquire or receive the equivalent in smaller denomination bank notes, the value that was represented by high denomination bank notes, nor did it prohibit the transfer of an equivalent value of a high denomination note to another citizen: What was prohibited was the receiving or the transfer of the high denomination notes in species and this prohibition was made, as I have already said, in the interest of the general public. In my view, therefore, the provisions of Ss. 3 and 4 of the Ordinance were not in conflict with the guarantee given by the Constitution under Art. 19 (1) (f).

(37) The last major argument on behalf of the applicant was that the order of forfeiture or confiscation made by the Magistrate in respect of the currency notes of the value of Rs. 50,000/- was unjustified. It is clear that there is no provision in the Ordinance for confiscation either of the high denomination notes or the equivalent thereof. The Ordinance only prescribes punishment for any breach of any of the conditions provided for by the Ordinance.

The order of confiscation was made by the Magistrate apparently because the Magistrate took the view that the sum of Rs. 50,000/-, which was recovered from the treasury of the temple, was money obtained by changing the fifty high denomination bank notes improperly through the agency of the Imperial Bank of India. It is clear that the applicant did not lay any claim to these fifty thousand rupees himself.

On behalf of the temple, no one has come forward to claim this sum of Rs. 50,000/- but one thing is clear, namely, that the sum of Rs. 50,000/- in currency notes, which has been forfeited to the State under the orders of the Magistrate, was recovered from the treasury of the temple. The money, therefore, at the time of its having been recovered by the police, was in the temple treasury and if nothing else was known, the money should be presumed to belong to Shri Rangji from whose treasury it was obtained by the police.

(38) The order of confiscation has been attempted to be justified on the ground that a Magistrate has the power to order confiscation of any property, or, to make an order in regard to the disposal of any property when such property has come before the Magistrate during the course of any trial. Reliance was placed for this argument on Ss. 516-A and 517, Criminal P. C. Section 516-A says:

"516-A. When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for

the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of."

This section, to my mind, has no application to the facts and circumstances of the present case.

(39) The relevant portion of S. 517, Criminal P. C. is in these words:

"517 (1). When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal (by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise) of any property or document 'produced before it' or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

The question is whether a Court under S. 517 (1), Criminal P. C., has the power to order confiscation of property which has been produced before it, or, which is in its custody irrespective of the fact whether any offence regarding such property has been committed or not, or, whether such property was used for the commission of any offence.

A plain reading of the sub-clause makes it clear that the power of the Magistrate to order disposal either by destruction, confiscation or otherwise of property comes into play even when the property is just produced before him irrespective of the fact whether any allegation that any offence in respect of that property has been committed or that property has been used for the commission of that offence is made or not. The explanation to the section makes it clear that the word 'property' in the section includes not only the original property regarding which an offence appears to have been committed but also any property which has come into being as a substitute of that property. The high denomination bank notes in this case were the subject-matter of the offence, in essence; in essence also, the high denomination bank notes were used for purposes of committing an offence, or, in respect of which an offence had been committed by the applicant.

According to the prosecution, the notes, which were ordered to be confiscated, had been converted or exchanged for the high denomination bank notes and, therefore, an order in respect of those notes could be made in the same manner in which an order could have been made in respect of the high denomination bank notes themselves.

There is no satisfactory proof on the record to enable me to hold that the notes, that were produced in the case, had been taken from the bank in exchange for the fifty high denomination bank notes. Even so, there being power in the Magistrate to order the disposal, by confiscation, of property which is produced before him, or, is in his custody irrespective of whether that property was used for the commission of an offence, or, an offence was committed in respect of it, the order of confiscation, which the Magistrate made in regard to the notes, could not be said to be either without jurisdiction or illegal.

The order must be maintained because there was nobody before the Court, claiming this sum of money as his. As I have already said, the applicant laid no claim to this money, nor was any claim laid to this money on behalf of Shri Rangji and, consequently, the order, which has been made by the Magistrate, appears to me to have been the only possible order in respect of this money.

(40) For the reasons given above, I agree with my brother Desai, J., that this application in revision should fail and should be dismissed.

(Leave to appeal to the Supreme Court was prayed but was refused).

V.R.B. Revision dismissed.

A.I.R. 1954 ALLAHABAD 768 (Vol. 41, C.N. 303)

(LUCKNOW BENCH): H. S. CHATURVEDI AND RANDHIR SINGH JJ. (27-7-1954)

Angnu, Applicant v. Mahabir and another, Opposite Parties.

Civil Ref. No. 1 of 1952, made by Judicial Officer II, Sub-Division, Sidhauli, D/- 23-11-1951.

Civil P. C. (1908), S. 9 — Suit relating to agricultural land — When entertained by Civil Court.

If a suit is brought in respect of an agricultural plot of land for possession as also for the removal of constructions standing on it, for damages and also for an injunction, such a suit would evidently lie in the Civil Court. The Revenue Court is not competent to grant all the reliefs and if all the reliefs cannot be granted by the Revenue Court, the suit would lie only in the Civil Court.

(Para 4)

Anno: Civil P. C., S. 9 N. 9, 51.

Kesri Bir Pd., for Applicant; Sri Ram, for Opposite Parties (Nos. 1 and 2).

ORDER: This is a reference under Section 289 (2), U. P. Tenancy Act, by the Judicial Officer, sub-division Sidhauli, through the Deputy Commissioner, Sitapur.

(2) It appears that a suit for the possession of a plot of land, and for some other reliefs which included the removal of certain constructions standing on this plot and a permanent mandatory injunction to require the defendant to close a certain door and damages, was instituted in the Court of the Munsif, Sitapur.

(3) The defendants contested the suit and also raised a plea of jurisdiction. This plea of jurisdiction found favour with the learned Munsif who ordered presentation of the plaint to the proper Court. Thereafter the plaint was presented in the Court of the Assistant Collector, first class. The learned Assistant Collector found that the suit did not lie in the Revenue Court and should have been instituted in the Court of the Munsif. He, therefore, made the reference, which is before us, through the Deputy Commissioner, Sitapur.

(4) Both parties are represented in this reference and learned counsel concede that the proper forum for the suit was the Civil Court and not the Revenue Court. If a suit is brought in respect of an agricultural plot of land as also for the removal of constructions standing on it and for damages and also for an injunction, such a suit would evidently lie in the Civil Court. The Revenue Court is not competent to grant all the reliefs and if all the reliefs cannot be granted by the Revenue Court, the suit would lie only in the Civil Court. The view taken by the learned Assistant Collector appears to us to be correct.

(5) We, therefore, direct that the plaint be returned by the Revenue Court for presentation to the Civil Court.

D.R.R. Order accordingly.

A.I.R. 1954 ALLAHABAD 769 (Vol. 41, C.N. 304)

(LUCKNOW BENCH) MALIK C. J. AND RANDHIR SINGH J. (19-7-1954)

Jagannath Singh and others, Appellants v. Tirloki Singh and others, Respondents.

First Appeal No. 39 of 1947, against decree of Civil Judge, Gonda, D/- 21-12-1946.

(a) Registration Act (1908), S. 17 — Family arrangement — No written document.

If there has been an oral agreement between two contending parties in respect of disputed rights, and such an agreement is subsequently reduced to writing, registration would become necessary. If, however, there has been an oral agreement, but there has been no document in which the agreement has been recorded, the agreement cannot be held to be bad in the absence of a registered document. Where the parties had arrived at an agreement through the intervention of some other persons and then ultimately they signed the reports made by the patwaris for mutation in accordance with the terms of the agreement, this cannot by any stretch of imagination be called a record of an agreement. (Para 3)

Anno: Reg. Act, S. 17 N. 83.

(b) Family settlement — Bona fide dispute — Division of property according to arrangement arrived at.

Where there has been a bona fide dispute amongst the family members with regard to the existence of a custom of succession, one party alleging one custom and the other denying it, and they subsequently come to terms and divide the property by a family arrangement, such an arrangement cannot be said to be in variance with law, nor can it be said to be bad. (Para 3)

CASE REFERRED: Para

(A) (V15) AIR 1928 All 641: 51 All 79 (FB) 3

H. Husain, for Appellants; S. C. Das and J. S. Trivedi, for Respondents 1 and 2.

RANDHIR SINGH J.:

This is a plaintiffs' first appeal arising out of a suit for possession of certain properties of which one Gappu Singh was the last holder.

(2) It appears that Gappu Singh, who was possessed of considerable property, died on 3-8-1941, leaving five collaterals as his heirs. They are mentioned in the pedigree given in the judgment of the lower Court.

On the death of Gappu Singh there was a dispute amongst his heirs who belonged to three different branches. The sons of Ram Charan and Sheo Nandan claimed a one-third share each as each of them represented a separate branch; while Mahadeo Singh's three sons claimed a one-fifth share each. This dispute was then referred to the arbitration of some persons and ultimately mutation was made in favour of the three branches in respect of one-third share of the property left by Gappu Singh.

The suit which has given rise to this appeal was then instituted by the three sons of Mahadeo Singh for possession of one-fifth share each in the property left by Gappu Singh. The suit was resisted mainly on the ground that there was a custom in the family under which succession was to go 'per stirpes' and not 'per capita'. It was also pleaded that there had been a family settlement on the death of Gappu Singh and the parties had agreed to take the property of Gappu Singh 'per stirpes' and not 'per capita'.

Lastly a plea of S. 233 (K), Land Revenue Act, was also taken up in respect of 9 out of 75 items in the property which was the subject of the suit on the allegation that there had been a partition in respect of 9 items of the property.

The trial Court held the custom not proved, but found that there had been a family settlement and that the property had been divided by an oral agreement according to the family settlement. The plaintiffs' claim was ultimately dismissed. The plaintiffs have now come up in appeal.

(3) In this Court the factum of the agreement between the parties after the death of Gappu Singh has not been challenged and learned counsel for the appellants Chaudhry Haider Husain has stated that he would not challenge the agreement set up on behalf of the defendants. The only point pressed was that the agreement amounted to a variation in the rule of succession under the Hindu law and as such it was open to the plaintiffs to get out of the agreement and claim a one-fifth share each in the property of Gappu Singh. Reliance has been placed on a ruling of this Court reported in — 'Ram Gopal v. Tulshi Ram', AIR 1928 All 641 (FB) (A).

A perusal of this ruling, however, shows that the point urged on behalf of the plaintiffs does not find support in the ruling cited above. If there has been an oral agreement between two contending parties in respect of disputed rights, and such an agreement is subsequently reduced to writing, registration would become necessary. If, however, there has been an oral agreement, but there has been no document in which the agreement has been recorded, the agreement cannot be held to be bad in the absence of a registered document.

In the present case the defendants and the plaintiffs had arrived at an agreement through the intervention of some other persons and then ultimately they signed the reports made by the patwaris for mutation in accordance with the terms of the agreement. This could by no stretch of imagination be called a record of an agreement. It was the duty of the patwaris of the various villages to make a report for mutation on the death of Gappu Singh and they waited till the parties had come to terms. Reports were made by the patwaris after the parties, who claimed to be the heirs of Gappu Singh, had arrived at an agreement.

There was between the parties a bona fide dispute with regard to the existence of the custom. One party alleged a certain custom which was denied by the other and if the parties subsequently came to terms and divided the property by a family arrangement, such an arrangement cannot be said

to be in variance with any law nor can it be said to be bad.

The view taken by the lower Court that the agreement had been proved and that it was given effect to by the parties appears therefore to be correct. It is, therefore, not open to the plaintiffs to challenge the division of the property arrived at by an agreement between the parties before mutation was made.

(4) No other point has been pressed in arguments on behalf of the appellants.

(5) The appeal has no force and is dismissed with costs to the respondents.

R.G.D. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 770 (Vol. 41, C.N. 305)

MALIK C. J. AND GURTU J. (16-7-1954)

Mewa Ram and others, Appellants v. Deo Prakash minor through Mst. Chandravati, Respondent.

Letters Patent Appeal No. 27 of 1947, against decision of Sapru J. in E. S. A. No. 324 of 1946, D/- 6-5-1947.

(a) Transfer of Property Act (1882), S. 128 — Gift not of whole property does not make a universal donee.

Where under the deed of gift A gifted to B a 1/54th share of the property and he remained owner of the 1/54th share that he had purchased the fact that B got his name mutated over the entire 1/27th share would not make him a universal donee. (Para 4)

Anno: T. P. Act, S. 128 N. 4.

(b) Civil P. C. (1908), S. 11, O. 21, Rr. 58, 63 — Matter heard and finally decided by two decisions — Subsequent decision operates as res judicata.

A in execution of his decree against B attached property in hands of C—C's objection under O. 21, R. 58, Civil P. C., dismissed on ground that gift-deed executed by B in favour of C was fictitious — Suit under O. 21, R. 63 not filed by C but execution also not proceeded with and possession of property remained with C — After C's death his son brought suit for recovery of profits impleading A in it — In that suit it was held that gift-deed was not fictitious — After A's death his sons starting execution of decree and attaching decree obtained by C's son — Question whether order under O. 21, R. 58 was binding on parties and decision in subsequent suit was not 'res judicata' — Held that in case C had filed a suit under O. 21, R. 63 and that suit had failed with the result that it had been finally decided that the gift-deed was fictitious and in spite of that decree, a competent Court had subsequently held 'inter partes' that the gift-deed was valid, the decision subsequent in date would operate as 'res judicata' and not the previous one, if the other conditions of S. 11 of the Code were fulfilled. (Para 6)

Anno: Civil P. C., S. 11 N. 100; O. 21, R. 58 N. 23; O. 21, R. 63 N. 16.

B. Dayal, for Appellants; S. B. L. Gaur, for Respondent.

MALIK C. J.:

This appeal raises rather an interesting question though, on a careful examination, it is clear that the decision of the learned single Judge was right and that the points raised have no substance.

There was a decree obtained by one Chheda Lal against Muktal for unpaid purchase money by enforcement of the unpaid purchaser's lien. This decree was in suit No. 47 of 1926.

Muktal purchased a 1/54th share in village Pohena from Chheda Lal on 16-2-1925, for Rs. 1,000/-. He paid Rs. 450/- in cash but the balance had remained unpaid. It was for the balance that the decree was obtained on 28-1-1927.

The decree was then put under execution and 1/54th share that had been purchased was sold by auction. For the balance remaining unpaid a personal decree under O. 34, R. 6 was obtained on 22-6-1931.

In between these dates on 9-3-1928, Muktal had made a gift of a 1/54th share (not the share that he had purchased from Chheda Lal) to his daughter's son, Murari Lal. The fact that the 1/54th share gifted was other than the 1/54th share purchased from Chheda Lal was specifically mentioned in the gift-deed. Murari Lal, instead of getting his name mutated over that 1/54th share, got his name mutated over the whole of the 1/27th share i.e., the 1/54th that Muktal had purchased from Chheda Lal and the 1/54th that Muktal owned from before and which he had gifted to Murari Lal.

Muktal then died and Chheda Lal, in execution of his decree, attached the 1/54th share in the hands of Murari Lal on the allegation that the gift-deed executed by Muktal in favour of Murari Lal was a fictitious document. Murari Lal filed objections under O. 21, R. 58, Civil P. C., when the property was attached, but those objections were dismissed on 29-7-1937, on the ground that the gift-deed was a fictitious document. Murari Lal did not file any suit within one year, as required under O. 21, R. 63 and the order under O. 21, R. 58 thus became final. But somehow the decree-holder did nothing further and did not proceed to sell up the property. Murari Lal died in 1941. He was succeeded by his son, Deo Prakash, who continued to remain in possession of the entire 1/27th share.

Deo Prakash filed suit No. 149 of 1942 in the revenue Court claiming profits of the 1/27th share and Chheda Lal was impleaded in the suit as a defendant as he was the owner of another share in the village. Chheda Lal filed an objection that he was the owner by purchase of a 1/54 share in execution of a decree against Muktal in May, 1929, and that as regards the other 1/54 share the gift-deed executed by Muktal in favour of Murari Lal was fictitious. An issue was remitted to the civil Court on the question of title and the civil Court held in favour of Deo Prakash that he was the owner of 1/27th share in the property. On the

finding having been returned to the revenue Court, that Court decreed Deo Prakash's suit.

(2) The original decree-holder Chheda Lal having died in the meantime, his sons, Mewa Ram and another, on 27-2-1944, put the decree under O. 34, R. 6 in suit No. 47 of 1926 in execution and attached the decree in suit No. 149 of 1942. Various objections were raised. The trial Court decided against Deo Prakash.

The lower appellate Court on appeal held that the decision in suit No. 149 of 1942 that the deed of gift was a valid document and Deo Prakash was the owner of 1/27th share operated as 'res judicata'. A new plea was raised before it that Murari Lal, as a universal donee, was liable to pay the decretal amount. On the question, whether Murari Lal was or was not a universal donee, an issue was remitted and the trial Court held that he was not a universal donee.

After the finding was returned, however, the lower Court, which was by that time presided over by another officer, came to the conclusion that the decree in suit No. 149 of 1942 was not 'res judicata', that the gift-deed was fictitious and that Murari Lal was a universal donee inasmuch as though he had not got the entire property under the deed of gift dated 9-3-1928, he must have got the rest of the property of Muktal under some oral gift.

(3) On a second appeal to this Court, a learned single Judge of this Court set aside the order of the lower appellate Court and allowed the appeal of Deo Prakash. He held that Murari Lal was not a universal donee, that the decree in suit No. 149 of 1942 operated as 'res judicata' and the question, therefore, could not be gone into whether the gift-deed was or was not a fictitious document.

(4) This Letters Patent Appeal was filed against that decision. On the question whether Murari Lal was a universal donee, learned counsel has not been able to challenge the judgment of the learned single Judge. Under the deed of gift, Muktal gifted to Murari Lal a 1/54th share of the property and he remained owner of the 1/54th share that he had purchased. The fact that Murari Lal got his name mutated over the entire 1/27th share would not make Murari Lal a universal donee. Learned counsel has, therefore, not challenged this finding.

(5) On the question of 'res judicata' learned counsel has urged that the order under O. 21, R. 58 dated 29-7-1937, being in these very proceedings, it was binding on the parties and no question of 'res judicata' arose and it could not, therefore, be said that the gift-deed was not fictitious and was not binding on Murari Lal. The proceedings under O. 21, R. 58 were as much separate proceedings as the suit No. 149 of 1942. Order 21, R. 58 provides that:

> "Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit."

(6) In case Murari Lal had filed a suit under O. 21, R. 63 and that suit had failed with the result that it had been finally decided that the gift-deed was fictitious and in spite of that decree, a competent Court had subsequently held 'inter partes' that the gift-deed was valid, the decision subsequent in date would operate as 'res judicata' and not the previous one, if the other conditions of S. 11, Civil P. C., were fulfilled.

(7) There is, therefore, no force in this appeal and it is dismissed with costs.

H.G.P. Appeal dismissed.

A.I.R. 1954 ALLAHABAD 771 (Vol. 41, C.N. 306)

BRIJ MOHAN LAL AND ROY JJ. (6-7-1954)

Ram Autar and others, Appellants v. State.

Criminal Appeal No. 575 of 1953, from judgment of S. J., Banda, D/- 19-4-1953.

(a) Penal Code (1860), Ss. 105, 97 and 99 — Commencement of right under S. 105 — Exercise of right not on property threatened — Permissibility.

All that is required to give rise to the right of private defence of property is that a reasonable apprehension of danger to the property should commence. It has always to be found out in the particular circumstances of each case whether in those circumstances the person who claims the benefit of the right of private defence had a reasonable apprehension of danger to the property. If the question is answered in the affirmative the right exists; and it is not necessary that the offence or an attempt should actually have been committed. (Para 7)

Where a body of persons (the complainant's party) armed with lathis and accompanied with bullocks and a plough were going with the avowed object of upturning the crop which had previously been sown by the opposite party there could be no doubt about their intention and their act, if completed, would have amounted to mischief and criminal trespass. When there was no time for having recourse to lawful authorities because the police station was far away, the restriction imposed by S. 99 did not come into play and the opposite party had a right to protect their property. The mere circumstance that the property was situate at a distance of 6 or 7 furlongs from the place at which the parties met did not prevent the right of the opposite party from coming into existence. Even if a person who is claiming the right of defence of property happens to be placed at some distance from the property, he can exercise that right provided he finds that damage to property will accrue if the right is not exercised. Therefore, the right of private defence of property could, in the circumstances of the case, be exercised at the place where the two parties met. The right of private defence of property however did not extend to

the causing of any one's death, and the opposite party could only commit any offence short of death in their attempt to save the property, by preventing the complainant from proceeding towards the property. (Paras 6, 8)

Anno: Penal Code, S. 105 N. 1; S. 97 N. 5; S. 99 N. 5.

(b) Penal Code (1860), Ss. 146, 141, 149, 34, 304, 323 and 325 — Private defence.

Persons who are asserting their right of private defence of property are doing a perfectly legitimate act and the assembly is not an unlawful assembly. Consequently the provisions of S. 149, I. P. C., cannot be invoked so as to make every one of those persons vicariously liable for the acts of their comrades. If any one of them exceeds that right and gives a blow which causes death that is his individual act and he alone would be liable for the consequences thereof. If there is no evidence whatsoever to fix the identity of the individual who delivered that blow the result would be that no one of those persons could be convicted of an offence under S. 304. (Paras 9, 11)

Similarly as regards the grievous hurt and simple hurt caused, apart from the fact that the causing of them is legitimate in the exercise of the right of private defence, in the absence of evidence as to who caused the hurts, there can be no presumption that the lathi wielded by every one of the appellants must have necessarily struck one or the other of the injured persons on the complainant's side. As those who did not hit any one committed no offence every one is entitled to the benefit of doubt. (Para 10)

Section 34 also will not apply because there was no pre-arranged plan. (Para 11)

Anno: Penal Code, S. 146 N. 5; S. 141 N. 1; S. 149 N. 10; S. 34 N. 1; S. 304 N. 2, 3; S. 323 N. 4; S. 325 N. 3, 5, 7.

Makund Lal, J. N. Agarwal and C. S. Saran, for Appellants; Sri Ram, Deputy Govt. Advocate, for the State.

BRIJ MOHAN LAL J.:

This is an appeal by six persons, viz., Ram Autar, Bharosa, Binda, Ram Kumar, Raja Ram and Sheo Moorat who have been convicted by the learned Sessions Judge of Banda under Ss. 302/149, 325/149, 323/149 and 147, I. P. C. Every one of them has been sentenced to transportation for life and to pay a fine of Rs. 100/ under S. 302/149, to three years' rigorous imprisonment and a fine of Rs. 50/- under S. 325/149, to six months' rigorous imprisonment under S. 323/149 and to one year's rigorous imprisonment under S. 147, I. P. C.

(2) It appears that there is a grove known as Gunji Bagh in village Mau in the district of Banda. This grove has an area of 3 bighas and 14 biswas. The owners thereof agreed on 1-5-1950 to sell one bigha and 17½ biswas of the grove to the appellants. On 15-5-1950 they agreed to sell one bigha and 17 biswas to the complainant's party. It will thus appear that the total area agreed to be sold exceeded the actual area of the grove by half a biswa.

Pursuant to these agreements the vendors executed a sale deed on 7-11-1950 in respect of one bigha and 17½ biswas of this grove in favour of the appellants and later on they sold 1 bigha and 17 biswas to the complainant's party. This led to a dispute between the parties in respect of an area of half a biswa. The appellants, however, succeeded in getting actual possession over the disputed area and in getting their names mutated over it. They actually sowed crop therein.

(3) The complainant's party also made an application for mutation of their names in respect of the disputed area but this petition was dismissed on 31-3-1952.

(4) On 11-7-1952 the complainant's party was proceeding towards the disputed grove with the avowed object of upturning the crop which had been sown previously by the appellants therein. The latter are said to have met the members of the complainant's party in the way at a distance of about 6 or 7 furlongs from the said grove and to have enquired of them as to where were they going. They were told that the complainant's party was going to replough the land.

Thereupon a quarrel took place between the two parties as a result whereof one Shankar was killed, Rameshwar received grievous hurt and four others received simple injuries out of the complainant's group. Three persons received injuries on the appellants' side also. Raja Ram received seven injuries, Ram Autar received eight while Bharosa received one injury only.

(5) From amongst the appellants, the injured persons admitted their presence. Others contended that they were not present at the time of occurrence. The persons who admitted their presence had alleged in the Court below that they were returning after attending to call of nature when they were attacked. We may mention at once that the learned counsel for the appellants has abandoned this theory before us and has accepted the findings recorded by the learned Sessions Judge, viz. that the complainant's party was proceeding towards Gunji Bagh to overturn the crop which had previously been sown by the appellants, that the latter on coming to know of the complainant's intention offered obstruction and this led to the fight.

(6) The first point that arises for decision is whether or not the appellants had the right of private defence of property in the circumstances mentioned above. Section 97, I. P. C., confers on every person a right, subject to the restrictions contained in S. 99, to defend the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit theft, robbery, mischief or criminal trespass. The complainant's party's act, if completed, would have amounted to mischief and criminal trespass.

(7) Under S. 105, I. P. C., the right of private defence of property commences when a reasonable

apprehension of danger to the property commences. It is not necessary that the intended offence should be actually committed. Nor is it necessary that an attempt to commit that offence must have actually taken place. All that is required to give rise to the right of private defence is that a reasonable apprehension of danger to the property should commence. It has always to be found out in the particular circumstances of each case whether in those circumstances the person who claims the benefit of the right of private defence had a reasonable apprehension of danger to the property. If the question is answered in the affirmative the right exists; and it is not necessary that the offence or an attempt should actually have been committed.

(8) The circumstances in the present case are that a body of persons armed with lathis and accompanied with bullocks and a plough were going with the avowed object of upturning the crop which had previously been sown by the appellants. There could be no doubt about their intention. As a matter of fact, they admitted that they were going to commit the very act which the accused apprehended. There was no time for having recourse to lawful authorities because the police station was five miles away. If any one of the appellants had run to the police station, the mischief would have been done before help could reach from the police station. In the circumstances, the restriction imposed by S. 99 did not come into play. The appellants had a right to protect their property. The mere circumstance that the property was situate at a distance of 6 or 7 furlongs did not prevent the right from coming into existence.

We find nothing in the language of the statute to warrant the conclusion that the right of private defence of property can be exercised on the property itself. Even if the person who is claiming that right happens to be placed at some distance from the property, he can exercise that right provided he finds that damage to property will accrue if the right is not exercised. It was not expected of the appellants to run back to the grove in question and there to arrange for the protection of the property. In our opinion, the right of private defence of property could, in the circumstances of the present case, be exercised at the place where the two parties met. We have no doubt that the appellants had the right of private defence of property. But certainly that right did not extend to the causing of any one's death. The appellants could prevent the complainant's party from proceeding towards the grove and could commit any offence short of death in their attempt to save the property.

(9) While the appellants were asserting that right they were doing a perfectly legitimate act and the assembly was not an unlawful assembly. The person from amongst the appellants who exceeded that right and gave the blow which caused Shankar's death did exceed that right. It was his individual act and he alone was liable for the consequences thereof. Unfortunately there is no evidence whatsoever to fix the identity of that individual. The result therefore is that we cannot convict any one of the appellants of an offence under S. 304, I. P. C.

(10) Apart from the fact that causing of grievous and simple hurts was a legitimate exercise of the right of private defence, there is no evidence whatsoever as to who caused the grievous hurt or even the simple hurt. There can be no presumption that the lathi wielded by every one of the appellants must have necessarily struck one or the other of the injured persons on the complainant's side. The person who did not hit any one committed no offence. Since it cannot, on the evidence on the record, be found out as to who hit the injured persons and who did not, every one is entitled to the benefit of doubt.

(11) As already stated there was no unlawful assembly and the provisions of S. 149, I. P. C., cannot be invoked so as to make the persons who did not give any blow vicariously liable for the acts of their comrades. Section 34, I. P. C., also will not apply because there was no prearranged plan.

(12) The result, therefore, is that every one of the appellants must get the benefit of the doubt and be acquitted.

(13) The appeal is, therefore, allowed. The convictions and sentences are set aside. The appellants shall be released forthwith unless their detention is required in connection with any other offence. The fine, if realised, shall be refunded.

M.K.S. Appeal allowed.

AIR 1954 ALLAHABAD 773 (Vol. 41, C.N. 307)

(LUCKNOW BENCH) BEG AND H. S. CHATURVEDI JJ. (24-3-1954)

Narsingh Das and others, Appellants v. Mian Safiullah Sha, Respondent.

First Appeal No. 136 of 1946, against decree of First Civil Judge, Bahraich, D/- 7-11-1946.

(a) **Easements Act (1882), S. 60 (b) — "Work of a permanent character" — Building of pucca wall.**

The expression 'work of a permanent character' is intended to denote some work which is not merely of a temporary nature. Where the land is given for building purposes, if the licensees do not put up costly constructions but merely build a pucca wall so as to include the land in their respective houses and to make it a part and parcel of their houses, it will be deemed to be a work of permanent nature. 28 All 741, Foll.

(Para 10)

Anno: Easements Act, S. 60, N. 4.

(b) **Easements Act (1882), S. 60(b) — "Work of a permanent character" — Presumption.**

If land was granted for building purposes to a person it is reasonable to infer that when it was again granted to other persons the purpose for which the permission was given could be no other than to grant the land for building purposes. The mere fact that the persons were not able to put up an expensive building will not justify an inference that the land was granted only for building an 'ahata' and not for any other type of building.

(Para 11)

Anno: Easements Act, S. 60 N. 4.

(c) **Easements Act (1882), S. 56 — Right of licensee to transfer house in city — General practice in U. P.**

The general practice prevailing in U. P. as to the rights of licensees to transfer their houses in cities is so well known that the Courts of law have consistently recognised that a licensee in urban areas will be presumed to have a right of transfer unless under the terms of any particular licence it was specifically provided that the licensee shall have no such right of transfer. In view of this presumption it is the duty of the licensor to establish that under the terms of the licence granted by his predecessor the licensees had no transferable rights.

(Paras 17 and 20)

Anno: Easements Act, S. 56, N. 1.

(d) **Easements Act (1882), S. 56 — "Save as aforesaid" — Duty of licensor.**

The words 'save as aforesaid' are important and they must be read with the opening words of the section 'unless a different intention is expressed or necessarily implied.' The intention may be gathered from the terms of the grant itself or from the local usage. In order to entitle a licensor to take advantage of S. 56 it is his duty to show that under the terms of a particular license no transferable rights were to be enjoyed by the licensee.

(Para 19)

Anno: Easements Act, S. 56 N. 1.

(e) **Easements Act (1882), S. 53 — Right of Sajjadanashin to grant license which would enure beyond his lifetime — (Muhammadan Law — Religious endowments — Sajjadanashin).**

The position of a Sajjadanashin in relation to endowed property is that of a prudent manager. If a Sajjadanashin deals with the endowed property for the benefit of the endowment, then his action will be binding upon his successor also. (Para 22)

Held on facts that the act of the previous Sajjadanashin in granting lands for building purposes was an act of a prudent manager and that the permission granted by him could enure beyond his lifetime. (Paras 22 and 23)

Anno: Easements Act, S. 53 N. 1.

CASES REFERRED: Paras

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(C) (V11) AIR 1924 All 112: 74 Ind Cas 760 13
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(F) (V27) AIR 1940 All 317: 189 Ind Cas 623 17
(G) (V9) AIR 1922 PC 123: 44 Mad 831 (PC) 22
(H) (V9) AIR 1922 PC 163: 46 Bom 481 (PC) 22

S. C. Das and R. N. Shukla, for Appellants; Niamatullah and Ali Hasan, for Respondent.

CHATURVEDI J.:

This is a defendants' appeal arising out of a suit for possession.

(2) The suit was filed in the Court of the Civil Judge of Bahraich by the plaintiff in his capacity as Sajjadanashin of Takia Kalan on 4-1-1946. The main relief claimed in the suit was for possession of a piece of land by demolition of the building standing thereon. The disputed land is enclosed by letters A E F B in the map of the commissioner, who was appointed by Court to prepare a site plan. For a better appreciation of the case, this area (A E F B) may be split in two portions, one lying within the letters A B C D and the other enclosed by letters C D E F. At the time when the suit was brought a completed pucca building stood on the land A B C D while on the other piece an incomplete building stood.

(3) There is a Muslim religious endowment known as Takia Kalan in the city of Bahraich owning considerable landed property in the various muhallas of the town. The land described above is situate in Muhalla Chhaoni Bazar and is about à furlong or so from the main building of the Takia. It is not disputed that the disputed land is endowed property belonging to Takia Kalan.

(4) Safiullah Shah, the present manager of the endowed property of the Takia Kalan, brought the suit alleging that the defendants had taken illegal possession of the land covered by letters A B C D about six years ago while the land covered by letters C D E F was encroached upon about four months prior to the suit. The plaintiff therefore claimed possession by demolition of the building standing on the land in suit.

(5) The three defendants, namely Narsingh Das, his brother Bhomraj, and his son Munna, contested the suit of the plaintiff on various grounds. They claimed to be the transferees of three houses under the sale deeds obtained by them from previous owners. It was asserted by them, and the fact has not been disputed, that originally there were three houses. One of them was owned by Ali Bakhsh and Nabi Bakhsh, the other by Ganga Prasad and Bhup Narain and the third one by Maiku Bhuj, who had built these houses with the permission of the then Sajjadanashin of the Takia.

These three houses existed on the site lying towards the east of the red line marked A.E. in the commissioner's map. (Note—This portion is not in dispute). In tracing the history of the disputed land it was alleged that the land in suit was lying 'parti' till about the year 1922 when one Kanhaiya Lal obtained the permission of the Sajjadanashin to build a house thereon. Thereupon the aforesaid owners of the three houses approached the Sajjadanashin (Miyan Hamid-ud-din) who revoked the permission previously given to Kanhaiya Lal and gave the land in suit for building purposes to the owners of each of the three houses mentioned above.

The owners then built pucca ahatas to include the land in their respective houses. It was alleged that after the purchase of the house of Ali Bakhsh and Nabi Bakhsh in 1934, the defendants constructed a double storeyed house in the year 1935. It is not disputed that this house stands on the land marked A B C D in the commissioner's plan. Similarly after the purchase of the house of Maiku Bhuj in 1943 and that of Ganga Prasad and Bhup Narain in 1945 the defendants got the old houses demolished and started new constructions. The

building, which lies on the disputed land C D E F, could not be completed when this suit was filed.

Shortly stated,, the defence was that the land in suit was given by the previous Sajjadanashin for building purposes to previous owners of the three houses who were in occupation of the land under an irrevocable license, and that the defendants acquired the rights which their vendors had in the disputed property. It was also pleaded that as the plaintiff had acquiesced in the constructions made on the disputed land, he was estopped from claiming demolition of the structures in suit. It is not necessary to refer to other pleas raised in defence.

Suffice it to say, that the defendants had challenged the right of the plaintiff to bring the suit. Though the point was not conceded, the appellant did not choose to advance any arguments before us. The learned Civil Judge has held that the plaintiff was the 'de facto' Sajjadanashin of the Takia Kalan as he has been managing the endowed properties ever since the death of the previous Sajjadanashin, which took place more than 18 years ago. This finding was arrived at after considering the oral evidence of the parties and nothing has been urged before us to enable us to interfere with the finding of the trial Judge.

(6) On the question of license set up by the defendants the learned Court below found the following facts proved.

(1) The land in suit was first granted to one Kanhaiya Lal for building purposes in or about the year 1922 but this permission was revoked by the then Sajjadanashin.

(2) Mian Hamid-ud-din Ali Shah (Sajjadanashin) after revoking the permission previously granted to Kanaiya Lal granted the disputed land to Ali Bakhsh, Ganga Prasad and Maiku Bhuj for building purposes.

(3) In the year 1923 or soon thereafter, the entire land in dispute was included in the houses of Ali Bakhsh, Ganga Prasad and Maiku Bhuj. Each had built an ahata so as to make it a part and parcel of his house.

(4) The three houses of Ali Bakhsh, Ganga Prasad and Maiku Bhuj were purchased by the defendants who rebuilt them after demolishing the old structure. The house on the land marked ABCD was built about 10 or 11 years prior to the suit, while the constructions on C D E F were started soon after the last purchase in the year 1945.

(7) The learned Civil Judge, while recognizing that the transferors of the defendants were holding the disputed land under an irrevocable license held that the appellants, as transferees, could not be treated as licensees as they had failed to establish, 'the exact terms of the permission'. On the question of estoppel the trial Court held that the constructions A B C D were made 10 or 11 years ago without any let or hindrance by the Sajjadanashin, who was estopped from questioning the rights of the defendants to occupy building with the site.

As regards the constructions on C D E F, it was held that they were recently started and no question of estoppel arose. The result was that part of the plaintiff's suit in respect of the land A B C D was dismissed; but the remaining part which related to the area covered by C D E F was decreed and the present appeal is directed against the decreed portion. The plaintiff has also filed cross-objection with regard to the portion of his claim which was dismissed.

(8) Learned counsel for the appellants has contended that on the facts found established by the trial Court, the position of the appellants in relation to the entire disputed property is that of a licensee under an irrevocable licence. The contention must prevail.

(9) It is not disputed before us that the entire land in suit was once included in the three houses of Ali Bakhsh, Ganga Prasad and Maiku Bhuj. The disputed land was at the back of these three houses and the owner of each had built a pucca compound wall enclosing his portion in the house. This was done by them in pursuance of the permission given to them by the Sajjadanashin, Miyan Hamid-ud-din, who did so after revoking the previous permission which had been granted to Kanhaiya Lal.

The evidence of Kanhaiya Lal assumes great importance in this case. He has deposed that the land in suit was originally granted to him on payment of Rs. 200/- as Nazrana to the Sajjadanashin and that subsequently he was called by the Sajjadanashin with a view to cancel his permission and to grant it in favour of the owners of the three houses, which were contiguous to the land in suit. He is definite that the land in suit was granted for building purposes to Ali Bakhsh, Ganga Prasad and Maiku Bhuj, who after obtaining the permission, made pucca enclosures to include the land in their respective houses.

It is, therefore, manifest that the land in suit was given finally to Ali Bakhsh, Ganga Prasad and Maiku Bhuj for building purposes. It is in the evidence of Balak Ram (D. W. 9), who was working as 'munim' at the shop of Ganga Prasad Bhup Narain that Ganga Prasad had given a sum of Rs. 200/- for a portion of the disputed land which was at the back of their shop. We are not impressed with the criticism of the Civil Judge about the veracity of his statement.

It is plain that the Sajjadanashin used to grant permission to build on receipt of 'nazrana', and there is nothing strange, if 'nazrana' were realised at the time of granting the disputed land in three portions, one to each of the owners of the three houses, which already existed there. Ladli Prasad (P. W. 14) has stated that in his presence Ali Bakhsh and Maiku Bhuj each paid Rs. 200/- for the land lying at the back of their respective houses.

We have been taken through the evidence of Ladli Prasad and we are satisfied that his evidence should be believed. Once the correctness of the story that Mian Hamid-ud-din had, after revoking the previous permission granted to Kanhaiya Lal, again granted permission to Ganga Prasad, Ali Bakhsh and Maiku is accepted, one would expect that he did so after realising the usual nazrana. We are satisfied that the fresh

permission to build on the land in suit was given by Mian Hamid-ud-din, the then Sajjadanashin, after receiving a sum of Rs. 600/- for the entire land in suit.

The learned counsel for the appellants has not disputed the finding of the learned Civil Judge that the land in suit was granted by the previous Sajjadanashin for inclusion of the land in suit in the respective houses of Ganga Prasad, Ali Bakhsh and Maiku. It is also not controverted that these persons had built ahatas so as to make the land given to them as part and parcel of their houses.

(10) The contention of the learned counsel for the respondents is that the construction of the ahatas by the predecessors of the appellants could not be regarded as a work of permanent nature so as to attract the provisions of cl. (b) of S. 60, Easements Act. We do not think that this contention has any force. We agree with the view enunciated in — 'Nasir-ul-Zaman Khan v. Azim-ullah', 28 All 741 (A) that the expression 'work of permanent character' occurring in S. 60 is intended to denote some work which is not merely of a temporary nature.

As pointed out above, the land in suit was given for building purposes and if the licensees did not put up costly constructions but merely built a pucca wall so as to include the land in their respective houses and to make it a part and parcel of their houses, it will be deemed to be a work of permanent nature within the meaning of cl (b) of S. 60.

(11) It was next argued that in view of the fact that licensees had constructed only enclosures (ahatas), it should be presumed that the license was granted for building an enclosure only and for no other type of building. We are unable to accept this contention also. We know it that originally the entire land in suit was given to Kanhaiya Lal for building a house. Indeed Kanhaiya Lal had obtained the sanction of the Municipal Board also for building a house on the land in suit but he could not do so as his license was revoked by the then Sajjadanashin, as pointed out above.

If the land in suit was granted for building purposes to Kanhaiya Lal, it is reasonable to infer that when it was again granted to the three persons named above, the purpose for which the permission was given could be no other than to grant the land for building purposes. The mere fact that the three persons were not able to put up an expensive building will not justify an inference that the land was granted only for building an 'ahata' and not for any other type of building.

The construction of a pucca 'ahata' by each of the three owners is sufficient to show that each of them had put up constructions of a permanent nature on the land given to them by the Sajjadanashin. We are, therefore, unable to hold that the land in suit was granted only for the purpose of building an 'ahata'.

(12) Section 60, Easements Act, is as follows:

"A license may be revoked by the grantor, unless:

(a) it is coupled with a transfer of property and such transfer is in force,

(b) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution."

As pointed out above, Ganga Prasad, Ali Bakhsh and Maiku each had erected construction of a permanent nature and in doing so each one of them had incurred expenses in the erection of their respective 'ahatas'. Under cl. (b) of S. 60, each of the three persons, namely Ganga Prasad, Ali Bakhsh and Maiku, was holding the land in suit under an irrevocable license.

(13) We now take up the main contention of the learned counsel for the respondent to the effect that a licensee, who has built a house, has no right to transfer it. In other words, the contention is that such rights are heritable but non-transferable. In support of this contention reliance has been placed upon a Division Bench case of the Court in — 'Kallu Shah v. Rahim Baksh', AIR 1924 All 825 (B). The matter came up before a Bench in a Letters Patent Appeal and the Division Bench merely approved of the decision of Gokul Prasad, J., by remarking as under:

"There is nothing in this appeal. It was clearly rightly decided."

We have, therefore, to fall back upon the judgment of Gokul Prasad, J. It was a suit brought by a mutawalli to eject defendant 2 from a house. It appears that defendant 1 in that case had built a house and it was found that defendant 1's position was that of a licensee holding the house under an irrevocable license. The question was whether the licensee could make a transfer. It was pointed out by Gokul Prasad, J. that

"a license is ordinarily only a personal right and carries with it the incident of non-transferability."

It is unfortunate that there is no indication in the judgment to show whether the house in dispute in that case was situate in a village 'abadi', or in a town. The broad proposition of law laid down by Gokul Prasad, J. would hold good if the house was built by a tenant in an agricultural village. The case is of little assistance to us. We might, however, point out that there is another Division Bench case reported in the same volume at p. 112 — 'Govind Prasad v. Kundan', AIR 1924 All 112 (C), wherein it was observed that the presumption of non-transferability of houses built by licensees in agricultural villages has no application to towns.

In that case a licensee under an irrevocable license had transferred the house along with the site, and the transfer was questioned by the licensor. The house was situate in the town of Nazibabad and it was held that the transfer could not be assailed as the presumption of non-transferability by the licensees in respect of houses in agricultural villages could not be applied to sites in towns. We are in accord with the observations made in 'Govind Prasad's case (C)'.

(14) In agricultural villages, the practice of allowing tenants to build houses on sites owned by zamindars had its origin in antiquity. Such riyayas of the zamindar were licensees holding under an irrevocable license under S. 60, Easements Act. The purpose for which the riyayas were permitted

to settle down on the land of the zamindar was to enable them to carry on their occupation of agriculture. It is evident that their occupation of houses was inseparably connected with their agricultural holding; and so long as they and their heirs continued to carry on cultivation in the village, they enjoyed the right of occupation of the house which was built with the leave and license of the zamindar.

If the tenant died without leaving any heir to succeed him to the agricultural holding or if he abandoned the village, the house would escheat to the zamindar. The prevailing practice in the case of the houses built by riyayas was that such houses were heritable but not transferable. It was to exclude any stranger creeping in the village community against the wishes of the zamindar that the practice of non-transferability of houses built by riyayas came into vogue. Keeping in view the conditions prevailing in agricultural villages, it was well understood that the riyayas who built houses with the permission of the zamindar had heritable rights in those houses but had no right to transfer them against the wishes of the zamindar.

(15) In cities and towns also, the practice of granting permission to build by landlords has been in vogue from time immemorial. The conditions prevailing in cities and towns were, however, different. The licensees in urban areas were in a position to built costly houses, and the houses were built on the understanding that a licensee had transferable rights in the house. Thus the prevailing practice that grew up was that in cities a licensee had a right to transfer his house.

It was, however, open to the licensor to impose a restrictive condition at the time when permission to built was granted, and in that event the case of such a licensee would not be governed by the general usage. It has been recognised by a long string of judicial decisions that under the general practice prevalent in urban areas licensees had transferable rights in the houses built by them with the permission of the owner of the land, while in rural areas the practice was that the tenants had no such right of transfer.

(16) Learned counsel for the appellant has placed reliance upon the decision of this Court in — 'Mohammad Sher Khan v. Amjad Hussain', AIR 1929 All 494 (D). The point that came up for decision was whether a licensee, who had built a house in the city of Kanauj, was competent to transfer it. The licensee had transferred the house to a third person and the owner of the site brought the suit to eject the transferee. Niamatullah J. made the following observation:

> "Having regard to conditions prevailing in agricultural areas, it is to be presumed till the contrary is proved that the right of transfer is not an incident implied in the license under which riyayas occupy sites of their houses. In urban areas the presumption is otherwise."

We entirely agree with the observation of Niamatullah, J. We need hardly emphasize that there is a clear distinction between the position of a licensee in rural area and that of a licensee in urban area relating to the transfer of houses built by them as licensees. In rural areas, non-transferability is the rule, while in urban areas the presumption is that the licensees occupying houses in cities and towns have a right to transfer them unless the contrary is established.

(17) The question whether a licensee in urban areas had a right to transfer his house again came up for decision before a Division Bench of this Court in — 'Ram Bharose v. Bishnath Prasad', AIR 1934 All 336 (E). The Division Bench upheld the view of Niamatullah, J. With regard to the transferability of a house built by a licensee in urban areas, the following observation may be quoted with advantage:

> "We are of opinion that in cases of houses built in cities on the land belonging to the landlords, there can be no presumption that they have no power of transfer. If the landlord contends that the tenant had no right to transfer the building which he had built and which he was occupying, it is for him to show that under the terms of the license the right of the tenant was limited and it was expressly agreed that he would be incompetent to make a transfer."

The general practice prevailing in this State as to the rights of licensees to transfer their houses in cities is so well known that the Courts of law have consistently recognised that a licensee in urban areas will be presumed to have a right of transfer unless under the terms of any particular licence it was specifically provided that the licensee shall have no such right of transfer. The existence of this usage was again recognised by the Court in the case of — 'Misri Lal v. Durga Narain Singh', AIR 1940 All 317 (F). Allsop J. pointed out that

> "the general rule in these provinces is that tenants in rural areas or agricultural villages are not entitled to transfer houses and the sites of houses but are entitled only to transfer the materials of which the houses are built, whereas tenants in urban areas are entitled to transfer the houses as they stand upon their sites."

We have, therefore, no hesitation in holding that the three original licensees in this case were entitled to transfer their respective houses along with enclosures and that the appellants' right to occupy these houses cannot be questioned.

(18) Learned counsel for the respondent has next argued that under S. 56, Easements Act, a licence is always treated to be a personal right and it cannot be made the subject of transfer. We are not impressed with this argument. Section 56 runs thus:

> "Unless a different intention is expressed or necessarily implied, a licence to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a licence cannot be transferred by the licensee or exercised by his servants or agents."

(19) The words 'save as aforesaid' are important and they must be read with the opening words of the section 'unless a different intention is expressed or necessarily implied." The intention referred to in S. 56 may be gathered from the terms of the grant itself or from the local usage. In order to entitle a licensor to take advantage of S. 56

of the Easements Act it is his duty to show that under the terms of a particular license no transferable rights were to be enjoyed by the licensee. We do not, therefore, think that S. 56 helps the respondent.

(20) The learned trial Judge has recognised the fact that the original licensees were holding the disputed land under an irrevocable licence. He has, however, pointed out that as the terms of the licence under which the licensees had built the houses were not established it was not possible for him to hold that the original licensees had a right to transfer the houses built by them under the licence. This was clearly an erroneous view of the law. We have already pointed out that there is a presumption that licensees have transferable and heritable rights in the houses built by them in cities and towns.

In view of this presumption it was the duty of the plaintiff to establish that under the terms of the licence granted by his predecessor the licensees had no transferable rights. This was not done. In view of what has been stated above, the appellants had stepped into the shoes of the original licensees and they had every right to reconstruct the building, as the disputed land was granted for building purposes and the licence had become irrevocable, as stated above.

(21) In view of our finding on the question of licence it is not necessary to consider the question of estoppel and we do not propose to express any opinion on that point.

(22) The last contention advanced by the learned counsel for the respondent was that the previous Sajjadanashin, who granted the permission to build on the disputed land, was holding the particular office for his life only and any act done by him is not binding upon his successor, the plaintiff. It appears that this plea was not raised before the trial Court. However, we have allowed the point to be argued although it is a new point. The aforesaid contention is based upon S. 53, Easements Act, which is as follows:

> "53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license."

From the language of S. 53 it is manifest that a person who has a transferable interest in land is competent to grant a license. It was therefore contended that the previous Sajjadanashin was holding his office for his lifetime and as such he could not grant a license which would enure beyond his life. In support of this contention reliance has been placed upon a Privy Council case of — 'Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar', AIR 1922 PC 123 (G). In that case their Lordships remarked as under:

> "According to the well-settled law of India (apart from the question of necessity which does not here arise) a Mohunt is incompetent to create any interest in respect of the Mutt property to enure beyond his life."

It has been pointed out to us, and rightly, that the position of a mahant is analogous to the position of a Sajjadanashin and it may be conceded as a general proposition of law that a Sajjadanashin is not competent to create any interest in respect of the endowed property which would last beyond his life. Their Lordships of the Privy Council were, however, careful in pointing out that in suitable cases a transaction entered into by a mahant may be justified on the ground of necessity.

The position of a Shebait or a Sajjadanashin in relation to endowed property is that of a prudent manager. If a Sajjadanashin deals with the endowed property for the benefit of the endowment, then his action will be binding upon his successor also. Let us examine the facts of this case in order to find out whether the act of the previous Sajjadanashin was that of a prudent manager.

As indicated in the earlier part of the judgment, the endowment known as Takia Kalan was owner of vacant lands lying in various muhallas in the city of Bahraich. This particular plot was in muhalla Chhawni Bazar. As a piece of vacant land it was not yielding any profit to the endowment. When the licence was given the disputed land, as pointed out above, brought an income of Rs. 600/- which was paid as 'nazrana' for the permission granted by the Sajjadanashin. Muhalla Chhawni Bazar gradually grew up to be a market place where carts laden with goods used to arrive.

It seems to us that when businessmen were allowed to settle down in this part of the muhalla and as trade increased, a larger number of carts began to pour in and thus the income of the Takia from realization of 'tahbazari' dues went up appreciably. It is in the evidence of Kanhaiya Lal (D. W. 4) that carts for selling grains used to go to muhalla Chhawni Bazar and from the owners of those carts 'tahbazari' dues were realised. We have it in the evidence of Balak Ram (D. W. 9) that formerly 'tahbazari' dues yielded an income of Rs. 100/- to Rs. 200/- per year and that the income from that very source increased to Rs. 7000/- to Rs. 8000/- per year.

Thus the granting of lands by the Sajjadanashin to various persons for building houses brought income to the Takia at first in the shape of 'Nazrana' and when businessmen began to settle down in this muhalla and a larger number of carts began to come in, the income from 'tahbazari' dues showed a marked increase. It cannot, therefore, be doubted that the act of the previous Sajjadanashin in granting lands for building purposes was an act of a prudent manager, as it had the effect of bringing more income to Takia Kalan.

In our opinion it is not open to the present Sajjadanashin plaintiff to question the act of his predecessor which was beneficial to the endowment. We might as well refer to another case of — 'Bawa Maniram Sitaram v. Kasturbhai Manibhai', AIR 1922 PC 163 (H). In that case their Lordships of the Privy Council observed that "the disability of a Shebait to make the permanent grant is not absolute" and that

> "under special circumstances it must be presumed that the grant would be valid beyond life of the grantor if a long time has elapsed after the grant."

It may be pointed out with advantage that the previous Sajjadanashin died in the year 1928 but no action was taken by the present Sajjadanashin to question the grants made by the predecessor. This conduct of the plaintiff-respondent leads to the inference that he had ratified the transactions which had been entered into by his predecessor. On that score too, we are not disposed to upset the arrangement under which the previous Sajjadanashin had granted the previous disputed land for building purposes, as he must have done so in conformity with the established practice under which the Sajjadanashins were working.

It is, therefore, not possible to accept the contention of the respondent's Counsel that the permission which was granted by the previous Sajjadanashin could not enure beyond his lifetime. The plaintiff Sajjadanashin brought the suit treating the appellants as rank trespassers. We have held that the appellants are holding the disputed land under the irrevocable licence and that they were quite justified in pulling down old structures in order to enable them to put up new constructions on the disputed land. In this view of the case, the plaintiff's suit should have been dismissed by the Civil Judge.

(23) The respondent also filed cross-objections in respect of that part of the decree by which the claim to possession of land covered by letters A B C D was dismissed. As indicated above, there is no substance in the cross-objections, as in our opinion the entire disputed land stands on the same footing.

(24) We, therefore, allow the appeal and dismiss the suit with costs in both the Courts. The cross-objections are also dismissed with costs.

V.R.B. Appeal allowed : Cross-objections dismissed.

A.I.R. 1954 ALLAHABAD 779 (Vol. 41, C.N. 308)

BRIJ MOHAN LAL AND ROY JJ. (30-7-1954)

Shankar Lal and others, Applicants v. The State.

Criminal Appeal No. 67 of 1953, against order of Addl. S. J., Kanpur, D/- 12-11-1952.

Criminal P. C. (1898), Ss. 162, 164 — Right of accused for copies of statements — Duty of prosecution — Effect of non-compliance.

It is a legitimate right of the accused persons to defend themselves by proving, if they can, that the prosecution witnesses had made different statements on previous occasions. By denying the copies of previous statements this precious right is taken away from them and they are to a great extent handicapped in their defence. It is immaterial for their purposes whether this unfortunate result accrues on account of any dishonest motive or sheer negligence on the part of the prosecution. (Paras 7, 10)

When the statements are in the possession of some third person it is the duty of the accused to summon them from that person and no blame can be attached to the prosecution if the statements are not secured. But when the statements are in the custody of the prosecution agency a heavy duty rests on the prosecution to produce them in Court because the statements are recorded in the absence of the accused and they have no means of finding out their contents except by calling upon the prosecution to produce them. AIR 1932 All 327, Relied on. (Para 9)

The mere fact that an opportunity of cross-examining the witnesses with reference to the previous statements and of contradicting them, has been denied to the accused is an unmistakable proof of prejudice to them. AIR 1947 PC 67, Relied. Case law Ref. (Para 13)

The principle with respect to the breach of S. 162 applies with equal force to the breach of S. 164 for the loss to the accused is the same whether it is occasioned by failure to supply copies recorded under S. 161, Criminal P. C., or those recorded under S. 164, Criminal P. C. (Para 14)

Anno: Criminal P. C., S. 162 N. 14, 20; S. 164 N. 2.

CASES REFERRED: Paras

(A) (V19) AIR 1932 All 327: 33 Cri LJ 752 9
(B) (V18) AIR 1931 All 262: 53 All 458: 32 Cri LJ 562 12
(C) (V38) AIR 1951 Mad 685: 1950-2 Mad LJ 766: 1952 Cri LJ 509 12
(D) (V39) AIR 1952 Mad 229: 1952 Cri LJ 481 12
(E) (V23) AIR 1936 Nag 249: 38 Cri LJ 936 12
(F) (V32) AIR 1945 Nag 1: 46 Cri LJ 448 12
(G) (V16) AIR 1929 Pat 268: 8 Pat 279: 30 Cri LJ 858 12
(H) (V26) AIR 1939 Pat 174: 40 Cri LJ 509 12
(I) (V34) AIR 1947 PC 67: 74 Ind App 65: 48 Cri LJ 533 (PC) 12

B. S. Darbari, for Applicants; Shri Rama, Deputy Govt. Advocate, for the State.

BRIJ MOHAN LAL J.:

This is an appeal by four persons, viz., Shankar Lal, Narain, Ram Sarup and Tulshi, who have been convicted by the learned Addl. Sessions Judge of Kanpur under Section 302, Penal Code. They have been sentenced to undergo transportation for life and to pay a fine of rupees one hundred each. The first three appellants are brothers while the fourth is their servant. They have been found guilty of having committed the murder of one Janki on 7-3-1952.

(2) The prosecution version is that about twenty days before the incident Janki's wife Shrimati Jai Devi was molested by Shankar Lal and Tulshi while she was in the 'Har'. She complained to her husband in the evening. The latter, accompanied by his brother Mewa Lal, went to Shankar Lal and Tulshi to protest against their misbehaviour towards his wife. Both Shankar Lal and Tulshi denied the charge. Narain and Ram Sarup, the other two appellants, also arrived and an altercation took place between the appellants on the one hand and Janki and Mewa on the other. Nothing serious happened at that time although the appellants are said to have held out a threat to Janki and Mewa Lal to deal with them in near future.

(3) The prosecution story goes on to say that on the 7-3-1952 Janki was returning home from his field with a bundle of Matar on his head and Mewa Lal was following him at a distance of 15 to 20 paces. It is alleged that the appellants were lying in ambush and as soon as Janki reached Raghubar's field they came out of their place of hiding and attacked him. Shankar Lal is said to have been armed with a 'Kanta' and the remaining three appellants with axes. Janki died on the spot.

(4) The incident is said to have taken place at about 5.30 in the evening. A report was lodged by Mewa Lal in police station Sikandra which is situate at a distance of five miles from the place of occurrence at 7 P. M. At that time the Station Officer Dhanpal Singh was absent from the police station. Ranjit Singh, the Second Officer, reached the place of occurrence at 9.30 P. M. and started investigation. Dhanpal Singh reached the village next day, i. e., on 8-3-1952 at 8 P. M. and took up investigation himself. He examined a number of witnesses and later on got the statements of five witnesses, viz., Shrimati Jai Devi, Dharam Das, Dulare, Devi Prasad and Bachchi Lal recorded under Section 164, Cr. P. C., by one Mr. Bhatnagar, a Magistrate on 14-3-1952. On 30-3-1952 he submitted a charge-sheet.

(5) The appellants have denied having made the assault. Their learned counsel has argued not only that the prosecution has failed to establish its case on merits but has also raised a point of law, viz., that copies of statements recorded by Mr. Bhatnagar under Section 164, Cr. P. C., were not delivered to his clients and they were thus deprived of the very valuable right of cross-examining the prosecution witnesses with reference to their previous statements and of contradicting them, if possible.

(6) It appears that on two different occasions petitions were made by the accused for being supplied with copies of those statements but the statements could not be found. It is provided by Section 164 (2), Cr. P. C., that such statements shall after being recorded, "be forwarded to the Magistrate by whom the case is to be inquired into or tried." This statutory duty was not performed by Mr. Bhatnagar. Dhanpal Singh S. O. made a petition through S. M. Singh, Assistant Public Prosecutor, to the learned Magistrate (Mr. Bhatnagar) for copies of the statements made by the witnesses under Section 164, Cr. P. C. The Magistrate replied that copies would be given if found. As a matter of fact, they have not been traced to this day. Nobody knows what has happened to them. The fact, however remains that those statements never reached the Committing Magistrate's Court and the appellants have not been able to find out the contents thereof.

(7) In our opinion the learned counsel for the appellants is perfectly correct in contending that he had a right to cross-examine the witnesses with reference to those previous statements. Section 145, Evidence Act (1 of 1872), gives a party a right to cross-examine a witness with reference to his previous statements made by him in writing or reduced to writing and imposes a duty on the cross-examiner, in case he intends to contradict him with such previous statements, to draw the attention of the witness to such portions thereof as are to be used for the purpose of contradiction. Section 155 (3) permits a cross-examiner to impeach the credit of a witness by proving a former statement inconsistent with any part of his evidence. Thus it is apparent that it was a legitimate right of the appellants to defend themselves by proving, if they could, that the prosecution witnesses on the basis of whose statements the charge of murder was sought to be proved against them had made different statements on previous occasions. By denying the copies of previous statements this previous right has been taken away from them. They have thus, to a great extent, been handicapped in their defence.

(8) So important is this right that it has been recognised by the Legislature also and has been preserved by the express provisions of Section 162, Cr. P. C. While it was thought fit to render statements made by witnesses during investigation and recorded under Section 162, Cr. P. C., inadmissible "for any purpose" it was considered expedient to make an exception in favour of the accused and to permit him to make use of such statements for the purpose of contradicting the prosecution witnesses. It is significant that no right has been conferred on the prosecution to make a similar use of these statements if the witness appears for the defence, but the accused's right has not been taken away from him. In the circumstances the importance of such a right for the accused cannot be too strongly emphasized.

(9) Had the aforesaid statements been in the possession of some third person it would have been the duty of the accused to summon them from that person in the manner prescribed by law and no blame would have attached to the prosecution if the statements could not be secured. But since the statements were in the custody of the prosecution agency a heavy duty rested on the prosecution to produce them in Court. The statements were recorded in the absence of the appellants and they had no means of finding out their contents except by calling upon the prosecution to produce them. The duty of the prosecution to produce such statements in Court was laid down in — 'Bashir Uddin v. Emperor', AIR 1932 All 327 (A) where Niamatullah J. remarked at p. 329 as follows:

> "An accused is undoubtedly entitled to inspect statements of prosecution witnesses recorded under Section 164, Cr. P. C. Such documents can be used by the prosecution for the purpose of corroborating the witnesses. They can likewise be used by the defence for the purpose of contradicting such witnesses."

Again on the same page one finds the following remarks:

> "A Magistrate is expected to afford all facilities to the accused not only when he is compelled by law to do so but also when he has a discretion in the matter and the ends of justice require that the accused should be apprised of what certain prosecution witnesses had previ-

ously stated in proceedings under Section 164, Cr. P. C."

(10) This duty was not performed by the prosecution in this case and thus the appellants were placed at a great disadvantage. It is true that in the absence of any definite evidence on the point we are not in a position to hold that prosecution had any dishonest motive in not making the statements available to the appellants. Very likely it was an act of sheer negligence to lose those statements. Neither Mr. Bhatnagar nor his Reader has been examined and we are not in a position to know the exact cause of the loss of those statements. The fact, however, remains that the appellants were denied a valuable right conferred on them by law. It is immaterial for their purposes whether this unfortunate result accrued on account of any dishonest motive or sheer negligence on the part of the prosecution.

(11) It may be pointed out that the witnesses whose statements have thus been placed beyond the reach of the appellants were four out of the five eye-witnesses examined against them in the Sessions Court, and Shrimati Jai Devi who was the main witness about the event of molestation — the alleged motive for the crime. All of them were very important witnesses in the case. Without these previous statements the defence could not effectively cross-examine these witnesses. It is not safe to convict an accused person on the statements of witnesses who have not been effectively and completely cross-examined. We find support for our view from several decided cases in which failure to supply copies of statements made by witnesses under Section 161, Cr. P. C., was held to have vitiated the trial.

(12) In the case of — 'Emperor v. Bansidhar', AIR 1931 All 262 (B) this Court set aside a conviction because copies of statements recorded under Section 161 had not been furnished to the accused. A similar view was taken by the Madras High Court in — 'Re: Chinna Lingappa AIR 1951 Mad 685 (C)', and in — 'Re: Latchigadu, AIR 1952 Mad 229 (D)'. Nagpur High Court has also subscribed to the same view in the cases of — 'Vishwanath v. Emperor', AIR 1936 Nag 249 (E) and — 'Baliram Tikamram v. Emperor', AIR 1945 Nag 1 (F). Patna High Court also has laid down the same rule of law in the cases of — 'Jhari Gope v. Emperor', AIR 1929 Pat 263 (G), and — 'Dinanath Sahai v. Emperor', AIR 1939 Pat 174 (H). The question came up for decision before their Lordships of the Privy Council as recently as in 1946 in the case of — 'Pulukuri Kotayya v. Emperor', AIR 1947 P. C. 67 (I). Their Lordships also upheld this view and remarked at p. 69 as follows:

"The right given to an accused person by this section is a very valuable one and provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to guage its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate breakdown of the whole of his evidence: and in the present case it is to be remembered that the accused's contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to Section 162 as a matter of gravity. — 'AIR 1945 Nag 1 (F)' where the record of statements made by witnesses had been destroyed, and — 'AIR 1931 All 262 (B)' where the Court had refused to supply to the accused copies of statements made by witnesses to the police, afford instances in which failure to comply with the provisions of Section 162 led to the convictions being quashed. Their Lordships would, however, observe that where, as in these two cases, the statements were never made available to the accused an inference, which is almost irresistible, arises of prejudice to the accused."

(13) In the present case also the statements were never supplied at all and the accused were, in our opinion, certainly prejudiced. It is not possible to speculate what discrepancies, if any, those statements contained, but the mere fact that an opportunity of cross-examining the witnesses with reference to those previous statements and of contradicting them, if possible, has been denied to the appellants is an unmistakable proof of prejudice to them.

(14) We are alive to the fact that in the aforesaid cases the Courts emphasized the fact that failure to supply copies was a breach of statutory provisions contained in Section 162, Cr. P. C. In the present case also there has been a contravention of a statutory provision inasmuch as the statements recorded under Section 164 were not forwarded to the Committing Magistrate. Had they been sent to his Court as required by law the appellants could obtain copies therefrom. We are, therefore, of the opinion that the principle laid down by the aforesaid authorities applies with equal force to the present case. Loss to the appellants was the same whether it was occasioned by failure to supply copies recorded under Section 161, Cr. P. C., or those recorded under Section 164, Cr. P. C.

(15) In the circumstances, the trial was vitiated and the convictions cannot be allowed to stand.

(16) It will serve no useful purpose to send back the case for retrial because circumstances are such that even now those statements cannot be found. A search was made for them while the case was pending in the Sessions Court but all attempts to trace them proved futile. In the circumstances any further search will lead to no useful result.

(17) In the view which we have taken of the question of law it is not necessary to record any finding on the question of fact.

(18) The appeal is allowed and the conviction and sentences are set aside. The appellants shall be released forthwith unless their detention is required in connection with any other offence. The fine, if realised, shall be refunded.

H.G.P. Appeal allowed.

AIR 1954 ALLAHABAD 782 (Vol. 41, C.N. 309)

MALIK C. J. AND GURTU J. (27-7-1954)

Gainda Lal, Defendant-Appellant v. Ram Singh and others, Plaintiffs-Respondents.

F. A. F. O. No. 3 of 1951, against order of Civil Judge, Agra, D/- 12-9-1950.

(a) Suits Valuation Act (1887), S. 4 — United Provinces amendment — Suit for declaration of title to and injunction restraining execution of decree by sale of suit property — (Civil P. C. (1908), O. 21, R. 63 and S. 15).

It cannot be denied that when a particular property is attached, the property becomes wholly involved because the proprietary rights in any part of the property can no longer pass to any vendee from the owner after the attachment has taken place. Moreover, when a sale takes place, it is the whole of the property that is liable to sale and before an application is made to the Court to sell only a part of the property, it cannot be said that any part of the property is not liable to sale or will be necessarily exempted from sale. Moreover, in a suit under Order 21, R. 63 of the Code, the rights 'inter se' the judgment-debtor and the plaintiffs in regard to the whole of the property are determined. Thus, though the property is attached for the realisation of the decretal amount, which may be less than the market value of the property concerned, the property becomes wholly involved and affected notwithstanding the fact that the decretal amount may ultimately be satisfied by sale of only a portion thereof. Therefore upon a correct interpretation of the language of S. 4, Suits Valuation Act, the contention that although the property attached might be of a greater value than the value of the decree sought to be executed, none the less the sale of property was only effected for the purpose of realising the decreed amount, and therefore that on the basis of the value of the decreed amount the suit for declaration of title to the suit property should have been instituted in the Munsiff's Court and not in the Court of the Civil Judge must be rejected. (Paras 8, 9)

Anno: Sts. V. Act, S. 4 N. 3; Civil P. C., O. 21, R. 63 N. 21; S. 15 N. 10 and 16.

(b) Civil P. C. (1908), O. 39, R. 1 — Injunction against execution.

Suit under O. 21, R. 63 to declare that plaintiff is the owner of half the property attached in execution of a decree — Property of the value of Rs. 10,000 while the decree was only for Rs. 406 — It is not improper in the circumstances to order stay of sale in execution pending the decision of the suit. (Para 10)

Anno: Civil P. C., O. 39, R. 1 N. 7.

CASE REFERRED: Para

(A) (V20) AIR 1933 All 249: 55 All 315 (FB) 5

S. N. Katju, for Appellant; G. Kumar, for Respondents.

GURTU J.:

A suit was filed under the provisions of Order 21, Rule 63, Civil P. C., by the plaintiffs whose father had preferred an objection to the attachment of the house in suit in connection with a decree obtained by defendant 1 as against defendant 2 in another suit No. 1455 of 1948, for Rs. 406/1/. The objection had been disallowed by the execution Court. The plaintiffs prayed for a declaration that they are the owners of the whole house or, in the alternative, of half the house. The suit was valued at Rs. 203/0/6 being half the amount of the decree (in connection with which execution had been sought) for the purpose of court-fee, and at Rs. 10,000/-, the market value of the house, for purposes of jurisdiction.

(2) Along with the plaint, the plaintiffs made an application for issue of an 'interim' injunction restraining defendant 1 from executing the said decree against defendant 2 by sale of the house in suit. Notices were issued on this application and defendant 1 filed an objection to the 'ad interim' injunction granted and the application came up for final disposal. Defendant 1's objection was dismissed. The application for injunction was allowed and the sale of the house in execution of the decree was stayed. Defendant 1 has preferred this appeal.

(3) The learned Civil Judge granting the injunction rejected the argument of defendant 1 that the suit was not properly filed in the Civil Judge's Court but should have been filed before the learned Munsif. On the merits, the learned Civil Judge was of the view that the decree being only for a sum of Rs. 406/1/- while the house, according to the allegation, being of the value of Rs. 10,000/-, the stay would not operate to the prejudice of the decree-holder in any way.

(4) Before us, it has been contended that the order of the learned Civil Judge granting the injunction was without jurisdiction as the suit itself was not filed in a Court having jurisdiction. It was contended that the valuation of the suit for the purposes of jurisdiction should have been the value of the decree in connection with which the house stood attached. It was urged that, in effect, the suit was brought merely for the purpose of having that attachment removed.

The matter falls to be determined by the language of the amended Section 4, Suits Valuation Act. The amended section will be quoted later. Prior to the amendment, Section 4, however, read as follows:

"Where a suit mentioned in the Court-fees Act, 1870, Section 7, paragraph (iv) or Schedule II, Article 17, relates to land or an interest in land of which the value has been determined by rules under the last foregoing section, the amount at which for purposes of jurisdiction the relief sought in the suit is valued shall not exceed the value of the land or interest as determined by these rules".

(5) The view taken by the Full Bench in — 'Moolchand Moti Lal v. Ram Kishen', AIR 1933 All 249 (FB) (A) under the unamended section was to the effect that a suit for a declaration that

the plaintiffs were the owners of certain immovable properties and that these properties were not liable to be attached and sold in execution of a decree obtained by one of the defendants as against another and valued at Rs. 1,342/- was correctly filed in the Munsif's Court, even though the property attached was worth Rs. 20,000/-. It was held that it is the amount of the decree sought to be realized that determines the value of the suit, where the property involved is of larger value than the amount due under the decree, but where the decretal amount is large and the market value of the property involved is smaller, it is the market value of the property that determines the value of the suit.

(6) So far as the valuation for purposes of court-fee is concerned this view stands, in essence, accepted so far as the United Provinces (now Uttar Pradesh) are concerned because under an amendment made to Section 7, Court-fees Act, in 1938, an amended sub-section (viii) stands added which runs as follows:

"In suits to set aside or to restore an attachment including suits to set aside an order passed under Order 21, Rule 60, 61 or 62 of the Code of Civil Procedure, according to half of the amount for which attachment was made, or according to half of the value of the property or interest attached.. .. ..".

The only question is whether the valuation for purposes of Court-fee can now be also the valuation for purposes of jurisdiction in view of amendment made to Section 4, Suits Valuation Act which amendment was brought into force by the U. P. Act 8 of 1939.

(7) The amended Section 4, in so far as it is relevant to this discussion, runs as follows:

"Suits mentioned in paragraphs .. .. .. of S. 7 and articles .. .. .. of Schedule II of the Court-fees Act, 1870, as in force for the time being in the United Provinces, shall be valued for the purposes of jurisdiction at the market value of the property involved in or affected by or the title to which is affected by the relief sought, or at the amount involved in or affected by or the title to which is affected by the relief sought, and such value shall, in the case of land, be deemed to be the value as determinable in accordance with the rules framed under S. 3".

(8) The view pressed before us by the appellant was that the property involved or affected by the suit under Order 21, Rule 63, in effect, was only so much of the property as it would be necessary to sell in order that the decree in connection with which the property stood attached could be satisfied. Attention was invited to Order 21, R. 64 which gives power to the Court to order that only such portions of the property, as may seem necessary to satisfy the decree, may be sold. It was argued that, in effect, the relief sought by the plaintiffs in a suit under Order 21, Rule 63 was to get the attachment removed. It was urged that although the property attached might be of a greater value than the value of the decree sought to be executed, none the less the sale of property was only effected for the purpose of realising the decreed amount.

On the other hand, it was urged by the respondents' counsel that in a suit under Order 21, R. 63, the plaintiffs' right to the entire property attached is established. Attention was also drawn to the relief, as prayed for in the suit, which was in the following words:

"The plaintiffs claim a declaration that they are the owners of the whole house or, in the alternative, of half the house".

Section 4, Suits Valuation Act, in terms, enjoins that the suit shall be valued for the purposes of jurisdiction at the market value of the property involved in or affected by or the title to which is affected by the relief sought. It cannot be denied that when a particular property is attached, the property becomes wholly involved because the proprietary rights in any part of the property can no longer pass to any vendee from the owner after the attachment has taken place. Moreover, when a sale takes place, it is the whole of the property that is liable to sale and before an application is made to the court to sell only a part of the property, it cannot be said that any part of the property is not liable to sale or will be necessarily exempted from sale. Moreover, in a suit under Order 21, Rule 63, of the Code, the rights 'inter se' the judgment-debtor and the plaintiffs in regard to the whole of the property are determined. Thus though the property is attached for the realisation of the decretal amount, which may be less than the market value of the property concerned, the property becomes wholly involved and affected notwithstanding the fact that the decretal amount may ultimately be satisfied by sale of only a portion thereof.

(9) Under the circumstances, upon a correct interpretation of the language of Section 4, Suits Valuation Act, the contention of the appellant cannot be accepted and the objection in regard to the jurisdiction of the Court must be overruled.

(10) In regard to the merits of the appeal, the learned Judge has rightly pointed out that the decree is only for a sum of Rs. 406/- and in the circumstances, it does not seem improper that the sale of a property valued at Rs. 10,000/- should be stayed pending the decision of the suit.

(11) The result, therefore, is that this appeal is dismissed with costs.

M.K.S. Appeal dismissed.

AIR 1954 ALLAHABAD 783 (Vol. 41, C.N. 310)

(LUCKNOW BENCH) H. S. CHATURVEDI AND RANDHIR SINGH JJ. (27-7-1954)

Bhulan Lal, Applicant v. The State.

Criminal Revn. No. 21 of 1952, against order of S. J., Lucknow, D/- 19-1-1952.

(a) Criminal P. C. (1898), Ss. 439 and 431 — Revision — Sentence of fine — Death of accused — Abatement.

An appeal does not abate if it involves a sentence of fine even on the death of the appellant and the same principle has been made applicable to an application for revision. If a sentence of fine is involved, the question

of conviction and sentence will have to be gone into even on the death of the applicant in revision as the fine is recoverable from the assets of the deceased in the hands of the legal representatives. (Para 6)

Anno: Criminal P. C., S. 439 N. 43; S. 431 N. 1.

S. C. Das and S. N. Trivedi, for Applicant; Addl. Govt. Advocate, for the State.

RANDHIR SINGH J.:

This is an application in revision on behalf of one Bhullan Lal who was convicted under Section 161, Penal Code, and sentenced to one year's rigorous imprisonment and a fine of Rs. 200/- by a Special Magistrate, First Class, Anti-Corruption, U. P.

(2) The applicant has, since the filing of this application for revision died, but as the sentence involved a fine of Rs. 200/- also, the application for revision has been pressed on behalf of the legal representatives of Bhullan Lal.

(3) The case against Bhullan Lal was that he was a supervisor in the Defence Savings Branch. One Bhajan Teli had a deposit of about Rs. 18/- in the Defence Savings Fund which amount he wanted to withdraw and with this end in view, he went to the Defence Savings Office with an application for withdrawal. He was, however, told that according to the records of the Defence Savings Office, the depositor was entered as dead and that payment could not be made to him. He then approached the supervisor, namely Bhullan Lal, who promised to get the money repaid to him if he paid him a sum of Rs. 5/-.

Bhajan Teli then came away when he met one Thakur Singh and another person, Zamin Ali on the road. He told them his difficulty as also the fact that a sum of Rs. 5/- was being asked as illegal gratification by the supervisor. Thakur Singh then took Bhajan to the District Information Officer and was ultimately directed to go to the Additional District Magistrate who arranged for the laying of a trap. Sri Ghiasuddin a Magistrate of First Class and Sri B. N. Rai were deputed by the Additional District Magistrate to go and lay the trap.

A five rupee note was marked and made over to Bhajan Teli who was to deliver this to Bhullan Lal. The party then proceeded towards the Defence Savings Office. The two Magistrates, however, stopped in the hospital in front of the office while Bhajan and his companion Thakur Singh proceeded towards the office of Bhullan Lal. Bhullan Lal was seen coming out of the verandah and going to a 'pan' shop. While he was returning from the 'pan' shop Bhajan Teli passed the five rupee note to the accused, Bhullan Lal on his demand, and this was noticed by Thakur Singh who stood at a distance of a few steps.

Thakur Singh then went to the hospital and informed the Magistrates who were waiting. The Magistrates then came up and searched Bhullan Lal. A coat belonging to the accused was found hanging on a chair and from the pocket of this coat a marked five rupee currency note was recovered. Some money amounting to Rs. 3/- and odd was also recovered from the shirt pocket of the accused. The articles recovered were then sealed and the accused was taken into custody. The accused was ultimately sent up for trial.

(4) The defence of the applicant was that he had been implicated on account of enmity with one Mohammad Hanif who was sitting in the same office with him and bore him illwill. The note, according to the version given by the applicant, must have been planted by some of his enemies in his coat pocket while it was hanging on the chair.

(5) The prosecution has examined Sri Ghiasuddin Magistrate, First Class, Thakur Singh, Bhajan and some other witnesses to prove that the applicant had accepted Rs. 5/- as illegal gratification. The learned Magistrate who tried the case believed the evidence for the prosecution and convicted the applicant. The applicant then went up in appeal to the Sessions Judge who concurred with the view taken by the trial Court and maintained the conviction and sentence of the applicant. He then came up in revision to this Court.

(6) Section 431, Cr. P. C., provides that an appeal shall not abate if it involves a sentence of fine even on the death of the appellant and the same principle has been made applicable in some of the reported cases, to an application for revision. We need not express any opinion as to whether an application for revision should not be heard on the death of the applicant as the principles governing an application for revision are somewhat different as compared to the provisions in respect of appeals. In any case if a sentence of fine is involved, the question of conviction and sentence will have to be gone into even on the death of an applicant in revision as the fine is recoverable from the assets of the deceased in the hands of the legal representatives.

(7) Learned counsel for the applicant, Sri S. C. Das, has placed all the relevant facts before us as also the relevant evidence. Neither of the two Magistrates who were members of the raiding party actually saw the payment of the money by Bhajan to the applicant. All that they did was to go to the office of the applicant after they had received information that a five rupee currency note had been paid to Bhullan Lal. The search was made by Sri Ghiasuddin in the presence of Sri Rai and the five rupee currency note was recovered not from the person of the applicant but from the pocket of his coat which was hanging on a chair.

The learned Magistrate who tried this case as also the learned Sessions Judge have remarked in their judgments that the possibility of the currency note having been planted in the pocket of the applicant cannot be ruled out altogether. Evidently as the coat was not on the person of the applicant at the time of the search it was not impossible for anybody to have put the currency note into the pocket of the coat without the applicant knowing anything about it.

The only evidence, therefore, on which the applicant has been convicted is the testimony of the two witnesses, Bhajan and Thakur Singh. Bhajan was considerably annoyed, as appears from

the circumstances of this case, at the refusal of the applicant to arrange for the payment of the money due to him. Although he may not be an accomplice he cannot be said to be a wholly disinterested witness in the circumstances of this case.

The only other witness was Thakur Singh. In his statement he claims to be a member of the Revolutionary Socialist Party but there is nothing on the record to show as to what his status in life was. His companion, Zamin Ali, whom he called his 'Comrade' was an ex-convict in two cases of embezzlement and theft although Thakur Singh in his statement deposed that his companion Zamin Ali had not been convicted of theft or embezzlement but had been convicted for political dacoity, a statement which has been belied by the statement of Zamin Ali himself. It would be difficult to place implicit reliance on the statement of Thakur Singh alone in recording a conviction of the applicant for a serious offence under S. 161, Penal Code, especially when Bhullan Lal had put in a service of thirty years and was due to retire at the time when the occurrence is said to have taken place.

The matter cannot be said to be altogether free from reasonable doubt and the benefit of this doubt should go to the applicant. Taking, therefore into consideration all the evidence and the circumstances of this case, we find that the offence was not proved against the applicant beyond all reasonable doubt and the applicant should get the benefit of this doubt.

(8) We accordingly allow the revision and set aside the conviction and sentence of the applicant. The applicant is already dead and the only effect of the setting aside of the conviction and sentence would be that the fine if paid shall be refunded.

R.G.D. Revision allowed.

A.I.R. 1954 ALLAHABAD 785 (Vol. 41, C.N. 311)

MALIK C. J. AND V. BHARGAVA J. (26-7-1954)

Ghulam Husain, Appellant v. District Magistrate, Fatehpur and another, Opposite Parties.

Civil Misc. Writ No. 113 of 1952.

Influx from Pakistan (Control) Act (1949), S. 7 — Permit for resettlement in India issued — Fraud when alleged must be proved and cannot be presumed.

Fraud cannot be assumed; it must be clearly alleged and properly proved. A vague assertion by the Government that unless fraud had been practised, no permit for permanent resettlement in India would have been issued to the applicant is no proof that the permit was obtained by fraud or misrepresentation. The Court will not be justified in presuming that fraud was, as a matter of fact, practised on the High Commissioner's office:

Held in the circumstances of the case that the permit issued to the applicant could not be cancelled and the applicant could not be deported out of India and his arrest and detention were illegal. (Para 6)

Ishaq Ahmad, for Applicant; Standing Counsel, for Opposite Parties.

MALIK C. J.:

This is an application under Article 226 of the Constitution of India by one Ghulam Husain who has applied for a writ of habeas corpus or any other suitable writ or order so that he may be released forthwith as he has been illegally detained.

(2) The undisputed facts now are that, in December, 1947, Ghulam Husain migrated to Pakistan. In June, 1950, he got a permit for permanent resettlement in India and returned to India in July 1950. On 8-7-1950, he reached his village Alamganj in the district of Fatehpur. On 9-7-1950, he deposited the permit for permanent resettlement at police station Bindki. He remained in his village for several months when, on 17-1-1951, notice was issued by the District Magistrate of Fatehpur requiring him to leave India within fourteen days. On 22-1-1951, he made an application to the District Magistrate praying that the order of 17-1-1951, be vacated. He made a representation to the State Govt. on 10-8-1951. But these were of no avail and, on 29-9-1951, his movable property was taken possession of by the Deputy Custodian and was put in the charge of one Nasimullah, the Mukhia of that village.

In the meantime, the applicant had gone to Bombay and he says that he went there to seek employment. On 7-12-1951, he was arrested in Bombay under a warrant of arrest issued by the District Magistrate of Fatehpur under the Influx from Pakistan (Control) Act, 1949, and was brought back to Fatehpur. He was released on bail on 15-1-1952, but was arrested again on 15-2-1952, and sent to the Jullundar Camp. He was released on bail from there also and, on 2-4-1952, he moved this application in this Court, of which notice was issued.

(3) The case was heard by a learned Single Judge of this Court who referred it to a Bench as certain important questions of law might have arisen for our consideration if the permit for permanent resettlement in India had been obtained by the applicant by fraud and misrepresentation of facts. The permit was cancelled by the Chief Secretary of the U. P. Government on 21-12-1950, on the ground that the applicant had returned to India under a permit issued to him under the Delhi Agreement of 1950 but he did not fulfil the requisite condition of that agreement which was that he should have migrated to Pakistan during the period from 1st February to 31st May, 1950. The permit was, therefore, cancelled and he was directed to leave India within 15 days from the date of the service of the order, failing which he was to be deported to Pakistan.

(4) Under Article 7 of the Constitution, a person, who has, after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan, is not to be deemed to be a citizen of India within the meaning of Articles 5 and 6 of the Constitution unless he has returned to the territory of India under a permit for resettlement or permanent return

"issued by or under the authority of any law and every such person shall, for the purposes of Clause (b) of Article 6, be deemed to have

migrated to the territory of India after the nineteenth day of July, 1948."

(5) There can be no doubt that the applicant had migrated to Pakistan after 1-3-1947. There can also be no doubt that he had returned to the territory of India under a permit for permanent resettlement issued by the authority entiteld to issue the same. The only question is whether he managed to get this permit for permanent resettlement by fraud in which case it was claimed on behalf of the State Government that it had authority to cancel the permit and deport the applicant. So far as we can find, there is only one application for grant of a permit made by the applicant and that is dated 2-12-1949. In that application, it is mentioned that he migrated to Pakistan in December, 1947. The applicant denies that he ever made a second application for issue of a permit and, from the counter-affidavit filed on behalf of the State Government, it does not appear that he had made a second application.

There is no mention made in the courter-affidavit that the applicant had ever claimed that he was entitled to the benefit of the Delhi Agreement of 1950 as he had migrated to Pakistan between 1-2-1950, and 31-5-1950. Learned counsel on behalf of the State Government has urged that the permit would not have been issued to him unless he had asked for the issue of a permit on that ground. He has urged that the usual practice was that when an application was made for a permit on the basis of the Delhi Agreement, the person making it had to obtain a certificate from the Government of Pakistan to the effect that the person concerned had entered Pakistan between 1-2-1950, and 31-5-1950, and it was only on the basis of the information provided in this certificate issued by the Ministry of Refugees, Government of Pakistan, that the permit for permanent resettlement was normally issued to the person concerned.

It does not appear from the affidavit or from the papers in the possession of learned counsel appearing for the State that any certificate was obtained from the Government of Pakistan. If there was such a certificate issued by the Ministry of Refugees, Government of Pakistan, on the basis of which the permit was issued, that certificate, presumably, would be in the office of the High Commissioner for India in Pakistan. This case has been pending since 2-4-1952. There has, therefore, been sufficient time for the State Government to make enquiries and place before us all the facts and circumstances to show that the permit for permanent resettlement was obtained by the applicant by fraud or misrepresentation.

(6) The law on the point is well settled that fraud cannot be assumed and it must be clearly alleged & properly proved. Barring the vague assertion that unless fraud had been practised, no permit for permanent resettlement would have been issued to the applicant, there is no proof that the permit was obtained by fraud or misrepresentation. We will not be justified in presuming that fraud was, as a matter of fact, practised on the High Commissioner's office. It may well be that the High Commissioner's office made a mistake and issued a permit for permanent resettlement without fully going into the matter and verifying the fact whether the case of the applicant came or did not come under the Delhi Agreement. In the circumstances we are of the opinion that the permit could not be cancelled and the applicant cannot be deported out of India and his arrest and detention are, therefore, illegal.

(7) As a result, the application is granted. The applicant is on bail. He need not surrender to his bail. The bail bonds are discharged.

V.S.B. Application allowed.

A.I.R. 1954 ALLAHABAD 786 (Vol. 41, C.N. 312)

RAGHUBAR DAYAL AND ASTHANA JJ.

(27-7-1954)

Onkar Singh and another, Appellants v. Rameshwar minor and others, Respondents.

First Appeal No. 386 of 1943, against decree of Special Judge, First Grade, Budaun, D/- 27-2-1943.

(a) Civil P. C. (1908), O. 22, R. 4 — Abatement of appeal as a whole against all respondents — Joint decree.

In a case of joint decree where there is no specification of shares of several decree-holders and where the decree is one and indivisible the entire appeal should fail if one or more of the decree-holders dies during the pendency of the appeal and his heirs are not brought on the record within the period of limitation. It is not open to the appellate Court to determine the extent of the share of the deceased respondent in the absence of his legal representatives. Where the legal representatives have not been brought on the record during the period of limitation for the hearing of the appeal they cannot be so brought later on for the determination of the share of the deceased respondent in the disputed property. If, however, there is any admission of the deceased decree-holder, on the record indicating the extent of his share in the disputed property or there is anything in the judgment describing his share in the property then in that case the appeal would abate only to the extent of his interest so admitted or described. Case law referred to. (Para 11)

Anno: C. P. C., O. 22, R. 4 N. 23.

(b) Civil P. C. (1908), O. 22, R. 4 — Abatement of appeal as a whole — Test.

To determine whether the appeal fails as a whole or only to the extent of the interest of the deceased respondent the test is whether in case the appeal is allowed against the respondents who are already on the record there would be two inconsistent decrees in the same case with respect to the same subject-matter or not. In case there will be two inconsistent decrees which will be infructuous the appeal should fail as a whole because it would be fruitless to pass a decree which will be ineffective and incapable of execution in view of the decree in favour of the deceased respondent which has become final. Where, however, there is no likelihood of two incon-

sistent decrees in case the appeal is allowed against the respondents who are on the record, and the decree passed in appeal can be executed, then in that case the appeal does not fail as a whole: Case law referred to. (Para 11)

Held that in the instant case there would be inconsistent decrees if the appeal were to be allowed against the surviving respondents and therefore the appeal abated as a whole. (Para 12)

Anno: C. P. C., O. 23, R. 4 N. 23.

CASES REFERRED: Paras

(A) (V9) AIR 1922 Pat 606: 1 Pat 699 4
(B) (V11) AIR 1924 All 95: 74 Ind Cas 14 5
(C) (V7) AIR 1920 Cal 264: 30 Cal LJ 217 5
(D) (V13) AIR 1926 All 234: 48 All 251 6
(E) (V15) AIR 1928 All 172: 50 All 559 (FB) 7, 10
(F) (V18) AIR 1931 All 235: 132 Ind Cas 31 8
(G) (V17) AIR 1930 All 369: 129 Ind Cas 371 10

A. K. Kirty, for Appellants; Shambhu Prasad, for Respondents.

JUDGMENT: The appellants made an application under Section 4, Encumbered Estates Act, which was forwarded to the Special Judge, 1st Grade, Budaun. In the written statement which was filed by them under Section 8, Encumbered Estates Act, they mentioned the villages Deorania and Jarauna among their property which was liable for the payment of their debts. Dori Lal and others filed a joint written statement under Section 11 of the Act wherein they claimed that they were the owners of these villages and were in possession of them and this property was therefore not liable to attachment and sale in satisfaction of the debts of the landlord applicants.

There is nothing in the written statement to indicate the extent of the shares of each of the persons who filed the joint written statement.

The learned Special Judge after a consideration of the evidence produced by the parties found that the objectors were the owners of these two villages and that they did not belong to the landlord-applicants. He therefore allowed the objection and deleted these two villages from the list of the property which was liable for the payment of the debts of the applicants. It is against this decision that the present appeal has been filed by the applicants.

(2) Dori Lal, one of the respondents, died during the pendency of the appeal and his heirs were not brought on the record. The question for determination is whether the entire appeal fails or only to the extent of the share of Dori Lal.

(3) It has been contended on behalf of the appellants that the share of Doli Lal in the property in dispute was only 3 annas 6 pies out of eight annas share as would appear from the sale deed dated 6-4-1937, which was on the record and in view of this evidence the appeal did not abate as a whole but only to the extent of Dori Lal's share. It has also been contended that merely because the share of Dori Lal in the property in dispute was not mentioned in the objection filed by him and others jointly or in the judgment of the Court that would not prevent the Court from determining his share in order to decide as to what extent the appeal had abated.

(4) In — Tej Narain Sahu v. Dal Ram Sahu,' AIR 1922 Pat 606 (A) it was held that where the plaintiffs had obtained a joint decree for possession and the defendants appealed against that decree but during the pendency of the appeal one of the plaintiffs died and his legal representatives were not brought on the record the entire appeal failed and not only to the extent of the interest of the deceased plaintiff.

The reason for the decision was that in case the appeal was allowed against the plaintiffs who were already on the record it would result in two inconsistent decrees and the decree which would be obtained by the defendants, in case their appeal was allowed, could not be executed against the heirs of the deceased plaintiff who were not brought on the record and they would be entitled to execute the joint decree which had become final so far as they were concerned against the defendants. The test in such cases is whether the interest of the defendants in the suit was joint and indivisible and whether if the appeal were allowed there would be two inconsistent decrees in the same case with respect to the same subject-matter.

(5) In — 'Gajraj Tewari v. Bhagirathi Pande', AIR 1924 All 95 (B) Daniels, J. held that where a joint decree had been given in favour of the respondents, the entire appeal would fail if the appellant failed to bring the legal representatives of the deceased respondent on the record. In this case two of the plaintiffs, who had obtained a joint decree for a declaration that they were the owners and in possession of certain plots, died and their legal representatives were not brought on the record in the appeal which had been filed by the defendants against whom the joint decree had been obtained.

His Lordship among other cases made reference to the case of — 'Kali Dayal Bhattacharya v. Nagendranath', AIR 1920 Cal 264 (C) in which the whole case law on the subject was reviewed and the reason for the decision was given. His Lordship made the following observations in that case:

"The ground of decision was that although O. 22, Rule 4 only provides for the appeal abating as against the deceased respondent the result of its abating against him may be in certain cases that the appeal has thereafter become imperfectly constituted, so that the appellant can no longer invite the Court to adjudicate upon the matters in controversy. The representatives of the deceased decree-holders, against whom the appeal has abated, have obtained an unassailable decree declaring that they jointly with the other decree-holders are proprietors in possession of the suit land. If the appeal were allowed as against the other decree-holders the result would be two contrary declarations; one declaring that the proprietors of the respondent's village are entitled to and in possession of the land in question and the other declaring that they are not so entitled and in possession. It has been held in these cases that this is a state of things

which the law does not contemplate and which cannot be allowed and that it would result in very serious inconveniences."

(6) In support of the contention that the entire appeal does not fail but it abates only to the extent of the share of the deceased respondent and that this share even if it is not clear from the judgment can be determined by the Court hearing the appeal, the first case relied on is of — 'Narain Das v. Sheo Din', AIR 1926 All 234 (D).

In this case Sheo Din and Debi brought a suit for redemption against certain persons. This suit was decreed by the trial Court. The defendants filed an appeal and there was a cross-objection by the plaintiffs. Both the appeal and the cross-objections were dismissed. The defendants preferred a second appeal to the High Court. During the pendency of the appeal one of the respondents Sheo Din died and no application was made to bring his legal representatives on the record.

The question which arose in this appeal was whether on account of the failure of the appellants to implead the heirs of the deceased respondent Sheo Din within the period of limitation the entire appeal had abated or only to the extent of the interest of Sheo Din. It was held that the entire appeal did not fail and the reason was that even if the appeal were allowed the result would be that Debi would be disentitled from executing his decree and his right thereunder would be extinguished though that would not necessarily affect Sheo Din and his heirs who might be allowed to execute the whole decree or at any rate a part of the decree. There will be no conflicting or inconsistent decrees.

In the case before us the appeal would become infructuous if it is allowed against the respondents who are on the record. The result of the decision would be that a portion of the property would become liable to attachment and sale but in view of the fact that the decree obtained by the deceased respondent Dori Lal has become final the entire property cannot be attached or sold in satisfaction of the debts of the landlord applicants. There can be no doubt that there would be two inconsistent decrees, one holding that part of the property is liable to attachment and sale in satisfaction of the debts of the applicants whereas another holding that the entire property is not liable to such attachment and sale. In view of these two inconsistent decrees the property could not be attached and sold in satisfaction of the debts of the applicants.

(7) Another case relied on by the appellants is — 'Faqira v. Hardewa', AIR 1928 All 172 (E). In this case the plaintiffs instituted a suit for a declaration of title. Their case was that in the khewat their proper share was 60 out of an entire quantity of 146 shares, the share of defendants 1 to 3 was 79 out of the same quantity, and that of the defendants 4 to 8 seven out of the same quantity. According to the khewat the entire share was divided into 89 portions and the plaintiffs were recorded in respect of 3, defendants 1 to 3 in respect of 79 and the remaining defendants 4 to 8 in respect of 7 shares. After the institution of the second appeal defendant 4 died and his heirs were not brought on the record. It was held that the appeal did not abate against the defendants 1 to 3 but abated only against the defendants 4 to 8.

In our opinion this decision is not of much help to the appellants because the share of the defendants 4 to 8 in the property in dispute had been clearly defined and it was distinct from the shares of the defendants 1 to 3 who formed another set. As the share of the defendants 4 to 8 had been separately defined the appeal abated against them only. This decision also shows that the appeal did not abate only to the extent of the interest of defendnat 4 who had died but against the defendants 4 to 8 who formed one set and who jointly were cosharers of seven shares.

(8) The next case is of — 'Haibat Shah v. Bohra Tarachand', AIR 1931 All 235 (F). This was a suit brought by a mortgagee for the recovery of the mortgage money against four mortgagors. During the pendency of the suit one of the mortgagors died and his legal representatives were not brought on the record within the period of limitation. The question which arose in the case was whether the entire suit had abated or only to the extent of the interest of the deceased mortgagor.

The trial Court found that from the terms of the mortgage deed itself it appeared that Saadat Shah had no interest in the mortgaged property and therefore it was unnecessary to implead his widow Jamila Begam. It accordingly decreed the claim with costs. It was contended in appeal that the entire suit had abated on account of the failure of the plaintiff to implead the heirs of Saadat Shah. The contention was not accepted and the appeal was dismissed.

On second appeal to the High Court it was held that the entire suit did not fail but it abated only to the extent of the interest of Saadat Shah in the hypothecated property and that the plaintiff was entitled to a decree for a proportionate amount of the mortgage money and for a sale of the proportionate share of the mortgaged property. It remanded the case for the determination of the share of Saadat Shah in the mortgaged property.

(9) The question which had arisen in this connection is whether this share could be determined by the Court in the absence of the legal representatives of Saadat Shah and if it was determined in their absence how far the decision would be binding on them. It is not clear from the judgment whether for the purpose of determining the share of Saadat Shah in the mortgaged property his legal representatives were to be brought on the record after the period of limitation.

It appears somewhat inconsistent that though they could not be brought on the record after the period of limitation for the purpose of deciding the appeal yet they could be so brought for the purpose of determining the share of Saadat Shah. In any case, the determination of the share of Saadat Shah in the absence of his legal representatives will be of no effect on them and will not bind them. Moreover, this is not a case where there is a possibility of two contradictory or inconsistent decrees. The original decree provides for

the sale of the entire mortgaged property while the decree passed by the High Court exempts the share of Saadat Shah from the sale and it is capable of execution.

(10) The next case is of — 'Raghunath Das v. Shah Durga Prasad', AIR 1930 All 369 (G). In this case the plaintiff brought a suit for a declaration that he was the owner of a certain property and the names of the defendants against that property were fictitiously entered in the revenue papers. During the pendency of the suit one of the defendants died and his legal representatives were not brought on the record within the period of limitation. One of the questions which arose in the case was whether the entire suit had abated or whether it had abated only against the heirs of defendant 4 who had died.

The case of — 'AIR 1928 All 172 (E)' cited above was referred to in this case. It was held by their Lordships that the whole basis of the decision in — 'AIR 1928 All 172 (E)' was that the consequence of holding that the whole suit did not abate or the whole appeal did not abate would be that there would be two contradictory decrees. Their Lordships did not dispute the above proposition and rather affirmed that in case there was a possibility of two inconsistent decrees in the same case in case the appeal was allowed against the respondents other than the deceased one the entire appeal should be dismissed.

On the contrary, they found that in case the appeal was allowed there was no possibility of two contradictory decrees and the learned counsel for the respondents had not been able to show how there could be two contradictory decrees in case the appeal were allowed; the plaintiffs would get a decree for a declaration against the respondents who were on the record though that would not in any way affect the rights of the heirs of the deceased defendant 4 against whom the suit had been dismissed.

(11) After a consideration of the above authorities we are of the opinion that in a case of joint decree where there is no specification of shares of the several decree-holders and where the decree is one and indivisible the entire appeal should fail if one or more of the decree-holders dies during the pendency of the appeal and his heirs are not brought on the record within the period of limitation. If, however, there is any admission of the deceased decree-holder, on the record indicating the extent of his share in the disputed property or there is anything in the judgment describing his share in the property then in that case the appeal would abate only to the extent of his interest so admitted or described. We do not think that it is open to the appellate Court to determine the extent of the share of the deceased respondent in the absence of his legal representatives. We are also of the opinion that where the legal representatives have not been brought on the record during the period of limitation for the hearing of the appeal they could not be so brought later on for the determination of the share of the deceased respondent in the disputed property.

Another test which has to be applied in order to determine whether the appeal fails as a whole or only to the extent of the interest of the deceased respondent is whether in case the appeal is allowed against the respondents who are already on the record there would be two inconsistent decrees in the same case with respect to the same subject matter or not. In case there will be two inconsistent decrees which will be infructuous the appeal should fail as a whole because it would be fruitless to pass a decree which will be ineffective and incapable of execution in view of the decree in favour of the deceased respondent which has become final. Where, however, there is no likelihood of two inconsistent decrees in case the appeal is allowed against the respondents who are on the record and the decree passed in appeal can be executed then in that case the appeal does not fail as a whole.

(12) In the present case the objection has been allowed in respect of the entire property and it cannot, therefore, be sold for the satisfaction of the debts. As already pointed out above, in case the appeal is allowed against the respondents who are on the record there will be two inconsistent decrees, one saying that some of the property can be sold in satisfaction of the debts whereas the other saying that the entire property cannot be sold in satisfaction of the decree.

The sale deed of 6-4-1937, which according to the appellant is said to be the basis of the title of the respondents is not in respect of the entire villages Decrania and Jarauna. By means of this sale deed only eight annas share was sold and in this eight annas share the share of Dori Lal was 3 annas 6 pies. This sale deed does not explain how Dori Lal and others obtained the remaining share in the two villages. If this sale deed is accepted then the share of Dori Lal in the two villages comes to 3 annas 6 pies in 10 biswas share. According to the contention on behalf of the appellants the appeal abates only to the extent of this share in the two villages though according to the decree of the Special Judge the objection of Dori Lal has been allowed in respect of the entire two villages. There can be no doubt that there would be two conflicting and inconsistent decrees in the case if the appeal is allowed against the respondents on the record.

In the circumstances we are of opinion that the appeal fails as a whole and not only to the extent of the share of the deceased respondent.

(13) We, therefore, dismiss this appeal.

M.K.S. Appeal dismissed.

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MALIK C. J. AND ROY J. (7-5-1954)

Shanti Lal, Appellant v. Madan Lal and others, Respondents.

First Appeal No. 429 of 1944, against Order of Civil J., Agra, D/- 28-1-1944.

(a) Civil P. C. (1908), S. 96 — Parties empowering Court to grant permission to Commissioner to take additional evidence — Agreement that order of Court will not be appealable — Ultimate decision in case whether appealable.

Where parties to a suit come to an agreement that the ultimate decision of the Court would be final and it would not be open to appeal, the decree passed in such circumstances would, in essence, amount to a consent decree based on agreement arrived at between the parties and would not be appealable. Case law referred. (Para 9)

The agreement provided as follows: "The parties empower the Court to grant permission to the commissioner aforesaid to take additional evidence if the latter thinks it necessary. The Court may after hearing the parties pass order which it may deem suitable and the order will not be appealable or subject to a revision."

Held, that these words related only to the grant of permission to the commissioner to take additional evidence, if necessary. It was not in respect of the ultimate decision of the suit and the agreement did not preclude the parties from preferring an appeal from the ultimate decision of the case. (Para 10)

Anno: Civil P. C., S. 96 N. 15.

(b) Contract Act (1872), S. 182 — Pakka Adatia and Kachha Adatia — Basis of distinction.

The basis of the distinction between a 'Kachha' and a 'Pakka arhatia' is that a 'kachha arhatia' acts as an agent on behalf of his constituent and never acts as a principal to him. The person with whom he enters into a transaction on behalf of his constituent is either brought into contact with the constituent or at least the constituent is informed of the fact that the transaction has been entered into on his behalf with such and such other person. Although the 'kachha arhatia' may not communicate the name of his constituent to the third party, he informs the constituent of the name of the party. In the case of a 'pakka arhatia', the agent makes himself liable on the contract not only to the third party, but also to the constituent and he does not inform his constituent as to the person with whom he has entered into the contract on his behalf. (Para 19)

Anno: Contract Act, S. 182 N. 5.

(c) Contract Act (1872), Ss. 30, 182 — Pakka Adat transaction — Test — Option of demanding delivery or acceptance does not make 'wagering' contract a 'delivery' transaction.

In the case of a 'pakka arhat' transaction the real question is to ascertain what as between the parties was the real intention when they entered into the contract in question: Whether it was ever within their contemplation that goods should be delivered, or whether their real intention was only to pay a difference on or after the due date. The mere circumstance that in the printed contract form an opportunity is left open to the parties to complete their contract by actual delivery will not be allowed to deprive the Court of the power to consider whether that was their real intention. A contract may nonetheless be a contract by way of gaming or wagering because it purports to give the buyer or seller an option of demanding delivery or acceptance, as the case may be, of the subject matter of the contract. In short the parties will not be allowed to "camouflage" their transaction by getting it up as a "delivery" transaction when, in fact, it was never their intention that it should be.

Held, on the facts and circumstances of the case and the evidence, that the parties "camouflaged" their transactions by getting them up as "delivery" transactions when, in fact, it was never their intention that delivery was to be demanded or to be given. The forward contracts in respect of the two 'khatas' sued upon having been wagering contracts, they could not be enforced in view of the provisions of S. 30, Contract Act. AIR 1942 All 170, Relied on. AIR 1928 PC 30, Ref. (Paras 19, 22)

Anno: Contract Act, S. 30 N. 2; S. 182 N. 5.

(d) Contract Act (1872), S. 30 — Evidence and proof — Terms of contract have to be proved.

What has to be proved in order to establish that a transaction of sale or purchase was a wagering one is the fact that it was agreed between the parties that no delivery was ever to be demanded or given; that the mere fact that delivery was, in fact, not given does not prove that it was not given because there was a term in the original contract to that effect; in every case the terms of the contract have to be proved; and if the terms of the contract have been proved, and they show on their face that delivery was to be given or taken, and it was alleged by the defendant that it was agreed that the term about delivery was not to take effect but the differences alone were to be paid, then the fact of non-delivery, coupled with certain other facts may induce the Court to believe the defendant instead of the plaintiff. AIR 1950 All 352, Relied on. (Para 20)

Anno: Contract Act, S. 30 N. 5.

(e) Hindu Law — Joint family — Trade — Liability of.

Where in a suit to recover sum on accounts on Khatas, the evidence produced by the parties showed that defendants B and C who were alleged to have been members of joint family never entered into any transaction with the plaintiff and that they have been separate from defendants A and D and have since long been in service,

Held that defendants B and C were not liable. (Para 16)

CASES REFERRED: Paras

(A) (V8) AIR 1921 All 310: 43 All 266 9
(B) (V11) AIR 1924 All 570: 46 All 710 9
(C) V12) AIR 1925 All 271: 23 All LJ 251 9
(D) (V12) AIR 1925 All 558: 23 All LJ 525 9
(E) (V13) AIR 1926 All 90: 89 Ind Cas 586 9
(F) (V17) AIR 1930 All 127: 122 Ind Cas 685 9
(G) (V27) AIR 1940 All 190: ILR (1940) All 185 9
(H) (V10) AIR 1923 All 490 (2): 45 All 506 (FB) 11

(I) ('07) 29 All 730: 4 All LJ 587
(J) ('10) 33 All 51: 7 Ind Cas 156
(K) ('08) 1908 All WN 211: 4 Mad LT 172
(L) ('10) 33 All 151: 7 Ind Cas 909
(M) ('11) 9 Ind Cas 667 (All)
(N) ('13) 35 All 187: 19 Ind Cas 76
(O) ('20) 18 All LJ 40
(P) (V14) AIR 1927 Lah 289: 8 Lah 384 (FB)
(Q) (V30) AIR 1943 Mad 139: ILR (1943) Mad 235 (FB)
(R) (V33) AIR 1946 Oudh 33: 20 Luck 339 (FB)
(S) (V40) AIR 1953 SC 419: 1950 SCR 754 (SC)
(T) (V29) AIR 1942 All 170: ILR (1942) All 289
(U) (V37) AIR 1950 All 352: 1950 All LJ 172
(V) (V15) AIR 1928 PC 30: 51 Mad 96 (PC)

B. Ch. Kedarnath and Satish Chandra, for Appellant; J. Swarup and S. B. L. Gaur, for Respondents.

ROY J.:

This appeal has been preferred by Seth Shanti Lal, the plaintiff, whose suit No. 42 of 1940 instituted against four persons, namely, Madan Lal, Phondi Lal, Nathi Mal, and Lallu Mal had been dismissed by the learned Civil Judge of Agra on 28-1-1944. The suit was instituted on 22-10-1940.

Shanti Lal alleged that the defendants formed a joint Hindu family and dealt in ready grain and also entered into forward contracts for the sale and purchase of grain and other commodities; that the defendants opened three different 'khatas' with the plaintiff, the one in the name of "Madan Lal Lallu Mal", the other in the name of "Lallu Mal Dalal", and the third in the name of "Brij Kishore" and they did business in the commission agency of the plaintiff who acted as their 'pakka arhatia'; that the defendants entered into transactions in 'arhar, bajra', cotton seed, etc. in the commission agency of the plaintiff; that on account of these transactions ranging between 18-12-1939 and 14-3-1940, there was a debit balance of Rs. 5661/9/9 due to the plaintiff by the defendants under the khata of Madan Lal Lallu Mal; that in the 'khata' of Lallu Mal Dalal a sum of Rs. 125/14/6 was due to the plaintiff from the defendants, and in the 'khata' of Brij Kishore there was a credit balance of Rs. 140/4/- due to the defendants from the plaintiff, and that upon an adjustment of these amounts a sum of Rs. 5647/4/3 as principal and Rs. 352/11/9 as interest, total Rs. 6,000/-, was due from the defendants to the plaintiff which they had not paid in spite of repeated demands. The claim was, therefore, for a sum of Rs. 6,000/-.

(2) Phondi Lal and Nathi Mall, defendants 2 and 3, pleaded that they had nothing to do with these transactions and they never did any business with the plaintiff. They contended that they were separate from Madan Lal and Lallu Mal, defendants 1 and 4, and they never gave them any authority to do any business on their behalf.

(3) Defendants Madan Lal and Lallu Mal contended that the plaintiff was not their 'pakka arhatia', but he was only their commission agent; that these defendants had dealings with the plaintiff under 'khatas' styled as "Madan Lal Lallu Mal", "Lallu Mal Dalal", and "Brij Kishore", that the 'khata' styled as "Brij Kishore" related to transactions of ready goods and the other two 'khatas' related to forward contracts which were wagering in nature and could not, therefore, be enforced; that since the plaintiff had not rendered accounts as commission agent and since he exceeded the authority given to him as a commission agent, he was not entitled to any relief.

(4) Madan Lal and Lallu Mal instituted a suit No. 557 of 1941 in the Court of the Munsif of Agra on 16-9-1941, against Seth Shanti Lal for rendition of accounts in respect of all the three khatas aforesaid and for the recovery of such sum as may be ultimately found due after accounting. The suit was tentatively valued at the sum of Rs. 1,500/-.

(5) At the instance of the parties the suit instituted in the Court of the Munsif was transferred to the Court of the Civil Judge of Agra and both the suits were consolidated and heard together. On 17-5-1943, both parties gave a statement before the Civil Judge of Agra saying that the evidence which may be recorded in suit No. 42 of 1940 may be read in evidence in the other case as well; that in suit No. 557 of 1941 the parties do not propose to produce any separate oral evidence; and that the documentary evidence filed in the one case or in the other be read in evidence in both the suits.

The learned Civil Judge recorded the oral evidence produced by the parties. Thereafter on 30-7-1943, the counsel for the parties made the following statement, which was recorded on paper No. 464B of suit No. 42 of 1940:

> "Babu Ram Krishna Garg may be appointed as commissioner for preparing accounts in both the cases. All the issues may be decided after the commissioner's report has been filed. This would not mean that the defendant would give up the plea of wagering. The commissioner aforesaid on the basis of the evidence produced by the parties in the suit would decide that in which item (?) the alterations have been made. The parties empower the Court to grant permission to the commissioner aforesaid to take additional evidence if the latter thinks it necessary. The Court may, after hearing the parties, pass order which it may deem suitable and the order will not be appealable or subject to a revision. For the present the parties shall deposit Rs. 100/- as commissioner's fee half and half."

(6) The commissioner, after hearing the parties, submitted a report on 29-11-1943. Objections were taken to it, both by the plaintiff and by defendants 1 and 4. The learned Civil Judge, after hearing the parties, held that the transactions entered in the 'khatas' styled as "Madan Lal Lallu Mal" and "Lallu Mal Dalal" were wagering contracts relating to forward transactions in which no delivery was ever contemplated to be given or taken,

that such contracts were, therefore, not enforceable; that defendants 2 and 3 were separate from the other two defendants and they never did any business with the plaintiff and never authorised defendants 1 and 4 to do business on their behalf; that suit No. 42 of 1940 was liable to be dismissed, and suit No. 557 of 1941 could be decreed with respect to the ready goods under khata of "Brij Kishore" for a sum of Rs. 270/13/3.

The learned Civil Judge upon those findings dismissed suit No. 42 of 1940 with costs and decreed suit No. 557 of 1941 for a sum of Rs. 270/13/3 and directed the parties to receive and to pay costs in proportion to success and failure.

(7) The present appeal, as we have already said, has been preferred from the decision in suit No. 42 of 1940.

(8) An appeal was preferred also in the other suit before the District Judge by Seth Shanti Lal, but since the memorandum of appeal was deficiently stamped and the deficiency was not made good, the memorandum of appeal was rejected.

(9) A preliminary objection has been taken by learned counsel for the respondent that when the parties entered into the agreement embodied on paper No. 464B quoted above, they intended that the proceedings should take place before the trial Court and not before an appellate Court and that consequently the decree passed by the Subordinate Judge was in essence a consent decree passed on an agreement arrived at between the parties, which amounted to a compromise and that no appeal lay against that decree.

On the other hand, it has been contended on behalf of the appellant that the agreement contained in the statement recorded on paper No. 464B related only to the appointment of the commissioner and the procedure to be followed by the commissioner and did not apply to the ultimate judgment in the case, and the words:

> "the Court may after hearing the parties pass order which it may deem suitable and the order will not be appealable or subject to a revision,"

in the agreement were intended to apply only to the immediately preceding sentence of the same agreement namely:

> "the parties empower the Court to grant permission to the commissioner aforesaid to take additional evidence if the latter thinks it necessary."

This argument is further based upon the circumstances that the word used in the agreement is "order" and not "final judgment". In our view this contention of the appellant is correct and must be accepted. There is, of course, a long series of decisions of this Court and of other Courts in support of the argument put forward on behalf of the respondent that where parties to a suit come to an agreement that the ultimate decision of the Court would be final and it would not be open to appeal, the decree passed in such circumstances would, in essence, amount to a consent decree based on an agreement arrived at between the parties and would not be appealable.

The earliest case that need be mentioned is that of — 'Shahzadi Begam v. Muhammad Ibrahim', AIR 1921 All 310 (A). The next case is that of — — 'Himanchal Singh v. Jatwar Singh', AIR 1924 All 570 (B). Then there are the decisions in — 'Ram Sunder Misra v. Jai Keran Singh', AIR 1925 All 271 (C); — 'Sita Ram v. Peare', AIR 1925 All 558 (D); — 'Ballabh Das v. Sri Kishen', AIR 1926 All 90 (E); — 'Jaggu Mal v. Brij Lal', AIR 1930 All 127 (F); and — 'Banwari Lal v. Ram Gopal', AIR 1940 All 190 (G). The principle underlying all these decisions is the same, although the facts were different. As the learned Chief Justice remarked in AIR 1925 All 271 (C):

> "It is surely open to a litigant, be he plaintiff or defendant, at any stage of the proceedings to make an offer to the other side to bring litigation to a close."

In AIR 1926 All 90 (E) Sulaiman J. (as he then was) has thus explained the underlying principle:

> "Where in pursuance of an agreement between the parties the Court proceeded outside its ordinary jurisdiction, the proper inference would be that there was to be no appeal from the decision as would be the case if the trial were in the ordinary way."

The learned Judge further made it clear that it is not only where the Court has proceeded outside its ordinary jurisdiction that an appeal is barred, and that there can be other circumstances because of which the parties to a case may have no right of appeal.

(10) Reading the agreement contained on paper No. 464B we are of the opinion that this agreement was not in respect of the ultimate decision of the suit when it provided that:

> "The parties empower the Court to grant permission to the commissioner aforesaid to take additional evidence if the latter thinks it necessary. The Court may after hearing the parties pass order which it may deem suitable and the order will not be appealable or subject to a revision."

and that these words related only to the grant of permission to the commissioner to take additional evidence, if necessary. In our judgment, it cannot be urged that the agreement contained on paper No. 464B precludes the parties from preferring an appeal from the ultimate decision of the case.

(11) The next question which has been urged before us on behalf of the respondents is that since the appeal preferred against the decision and decree in suit No. 557 of 1941 has been allowed to be dismissed by the non-payment of the requisite fee, the decision in that suit has become final and consequently that decision operates as 'res judicata' so far as the present appeal is concerned.

In the Full Bench decision of this Court in — 'Ghanshiam Singh v. Bhola Singh', AIR 1923 All 490 (2) (H), it has been held that where it appears to the Court that there are two decrees arising out of two suits heard together or raising the same question between the same parties and arising out of two appeals to a subordinate appellate Court, and only one of such decrees is brought before the High Court in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought, which is not raised and cannot be set right if the

appeal which he has brought succeeds, the right of appeal is not barred either by the rule of 'res judicata' or at all by reason of his failure to appeal from the decree which does not prejudice him; and that it would be wrong indeed for an appellant to appeal against a decree which did not prejudice him and to which he did not object or to appeal against two duplicate decrees where an appeal against one of them would be sufficient and he is certainly under no obligation to do so.

It was further observed that the ultimate rights of the parties must be adjusted and regulated according to the final decision of the last Court of appeal. In that case it was held that the case of — 'Damodar Das v. Sheo Ram Das', 29 All 730 (I) was rightly decided and that the Court rightly treated the two decrees as being in substance one, though drawn up in duplicate; that the earlier Full Bench decision in — 'Zahari v. Debi', 33 All 51 (J) did not lay down a rule of universal applicability and had been misapplied in some of the subsequent cases, and that the decisions in — 'Abdul Basit v. Asfaq Husain', 1908 All WN 211 (K), — 'Dakhni Din v. Ali Asghar', 33 All 151 (L), — 'Ram Charan v. Lachman Prasad', 9 Ind Cas 667 (All) (M), — 'Anant Das v. Udai Bhan', 35 All 187 (N) and — 'Balhari Pande v. Shiva Sampat', 18 All LJ 40 (O) must be treated as no longer good law.

(12) A Full Bench of the Lahore High Court in — 'Mt. Lachhmi v. Mt. Bhulli', AIR 1927 Lah 289 (P) held that where two widows were jointly in possession of certain land and each sued the other for a declaration that she was the exclusive owner of that land and that the other had no right in it of any kind, and both suits were disposed of by a single judgment which decided that one of them was the owner but that the other was entitled to hold possession of half the land in lieu of maintenance, and a separate decree was drawn up in each suit declaring the rights of the plaintiff according to that decision, and one of them appealed against one of those decrees only, namely, the decree given in the suit in which she was the plaintiff, the fact that no appeal had been preferred by her against the decree in the other suit could not prevent her appeal from proceeding.

(13) In — 'Pappammal v. Meenammal', AIR 1943 Mad 139 (Q) three suits were tried together and disposed of by a common judgment. The only issue which had been determined by the Court of first instance was the heirship of the plaintiff with the deceased, and the three suits were dismissed and separate decrees were passed in each of them. An appeal was, however, preferred against one decree only. A Full Bench of the Madras High Court held that the object of the appeal being in substance to get rid of the very adjudication which is put forward as constituting 'res judicata' that adjudication in the other two suits, which had become final not being appealed against, should not be held to bar the appeal, and it was immaterial whether the suits were cross suits or not.

(14) In — 'Shankar Sahai v. Bhagwat Sahai', AIR 1946 Oudh 33 (R) a Full Bench of the Oudh Chief Court held that where two suits between the same parties involving common issues are disposed of by one judgment but two decrees, and an appeal is preferred against the decree in one but it is either not preferred in the other or is rejected as incompetent, the matter decided by the latter decree does not become 'res judicata' and it can be reopened in appeal against the former, and that this rule is subject to exceptions depending on the circumstances of each case.

(15) In the recent case of — 'Narhari v. Shanker', AIR 1953 SC 419 (S), which went up from Hyderabad from the decree of the trial Court in favour of the plaintiff, two separate appeals were taken by two sets of the defendants. The appellate Court allowed both the appeals and dismissed the plaintiff's suit by one judgment and ordered a copy of the judgment to be placed on the file of the other connected appeal. Two decrees were prepared. The plaintiffs preferred two appeals. One of the appeals was time-barred and on the principle of 'res judicata' the High Court dismissed both the appeals.

It was held by the Supreme Court that it was not necessary to file two separate appeals in this case; that the question of 'res judicata' arose only when there were two suits; and even when there are two suits a decision given simultaneously cannot be a decision in the former suit. It was further observed that when there was only one suit, the question of 'res judicata' does not arise at all because both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit.

We do not think that it would be necessary for us to express our opinion as to whether the present appeal is hit by the principle of 'res judicata' because after hearing the parties on merits we have come to the conclusion that the decision of the Court below on the two vital questions, viz., (1) that the defendants 2 and 3 were not liable and (2) that the forward contracts were wagering contracts and were not enforceable in law, was correct.

(16) We would first decide the question about the liability of Phondi Lal and Nathi Mall defendants 2 and 3. The plaintiff-appellant came upon the allegation that these defendants along with defendants 1 and 4, namely, Madan Lal and Lallu Mal formed a joint Hindu family and they entered into the transactions by opening three 'khatas' with the plaintiff in the names of Madan Lal Lallu Mal, Lallu Mal Dalal, and Brij Kishore.

The defendants pleaded that defendants 2 and 3 were separate from the other two defendants and they never entered into these contracts and they never authorised defendants 1 and 4 to transact any business on their behalf. Of the three 'khatas' mentioned above, the 'khata' styled as Brij Kishore was in respect of ready goods, and the other two khatas were in respect of forward transactions. The forward contracts were 385 in number and they were signed either by defendant 1 or by defendant 4, or by both. None of them was signed by defendants 2 and 3. The evidence produced by the parties showed that defendants 2 and 3 never entered into any transaction with the plaintiff. They have been separate from defendants 1 and 4 and have since long been in service. The Court below

was, therefore, right in coming to the conclusion that defendants 2 and 3 were not liable.

(17) In respect of the transactions of ready goods under the 'khata' "Brij Kishore", it was not contended that those transactions were wagering and were not enforceable in law. The plea of wagering had been raised with respect to the 385 forward contracts which had been entered into with the plaintiff by defendants 1 and 4 under 385 contract forms and it was contended that those contracts were wagering. The terms of contract are printed on the reverse of each contract form. One of them is to be found at pages 331 to 333 of the paper-book. One of the conditions of the contract says that defendants 1 and 4 would at all times be entitled to profit and liable for loss in respect of sale or purchase transactions which the defendants have entered into through their commission agency in accordance with the rules noted on the contract.

Rule 1 of the Rules says that in all forward transactions, delivery of goods is given and taken, that is to say, they are transactions in which delivery is made and the said delivery shall be made in accordance with the Rules of the Agra Gram Panchayat.

Rule 2 says that if it is a purchase transaction, defendants 1 and 4 shall have to send money to the plaintiff at Agra at least three days before the time fixed for delivery, so that the plaintiff may take delivery of the goods under the account of these defendants.

Rule 3 provides that if it is a sale transaction and defendants 1 and 4 want to give delivery of the goods in order to square up the transaction they should send the goods to the plaintiff at Agra at least three days before.

Rule 6 provides that in respect of each transaction defendants 1 and 4 shall have to deposit with the plaintiff 25 per cent. of the price as margin money on being demanded by the plaintiff at any time before the date fixed for delivery and the said margin money shall remain in deposit with the plaintiff up to the expiry of the time fixed for delivery.

Rule 10 provides that the plaintiff shall be liable to pay the profit and shall be entitled to realise the amount of loss, and that the plaintiff shall not be bound to tell defendants 1 and 4 to which particular person he has paid the money.

(18) 'Prima facie', the contracts do provide for delivery, but there is satisfactory evidence on the record to prove that in regard to these forward contracts no delivery was ever contemplated and no delivery was ever demanded or given and what was contemplated really was that only the difference would be paid on or after the due date.

The contracts cover about 25,200 maunds of grain and upon the most modest computation the price thereof will come to about five lakhs of rupees. There was nothing to show that 25 per cent. of the price as contemplated by paragraph 6 of the Rules was ever deposited in any case. In one case a notice was sent to take delivery, but that was all.

What according to the plaintiff's own showing had happened was that on the due dates the transactions had been adjusted. 8660 maunds of 'arhar' had to be delivered towards the transactions of Kartik Sudi 15, Samvat 1996. The transactions of that date were adjusted and the account-books disclosed that liability of the promisee was struck. 13,400 maunds of grain were to be delivered on Kartik Badi 15 Samvat 1996, and those transactions were also adjusted.

The learned Civil Judge got lists prepared showing the adjustments and those lists disclosed that the plaintiff had been setting off 'saudas' one against the other. It was in the evidence of Lallu Mal defendant that no delivery was ever contemplated. Lallu Mal acts as a 'dalal' and he never stocks any grain.

Moti Lal, a witness for the plaintiff, deposed that on Magsar Sudi 15 there was no delivery of goods and profit and losses were paid to customers. Sat Narain, a witness for the plaintiff, stated that no delivery was made in respect of 'saudas' of Samvat 1996. Hazari Lal, witness for the plaintiff, stated that the names of defendants 1 and 4 are not to be found in the books of account of the sellers and that these defendants never gave any money for taking delivery or purchasing goods. The plaintiff's own evidence, therefore, discloses that delivery was never intended and that the real intention of the parties was to settle the accounts merely upon differences.

It has been contended on behalf of the plaintiff that at least in one instance delivery was given. But this instance was in respect of the 'khata' of Brij Kishore, which, as we have already stated, was in respect of ready goods and not in respect of forward transactions. Any delivery, therefore, made in respect of the 'khata' of ready goods would not help the plaintiff in contending that delivery could be demanded and could be given in the case of forward transactions as well.

(19) There was controversy between the parties regarding the question as to whether the plaintiff was a 'pakka arhatia' or was only a commission agent or 'kachha arhatia'. The plaintiff contended that he was a 'pakka arhatia'. The answering defendants, on the other hand, contended that they were only commission agents and were liable to render accounts. The basis of the distinction between a 'kachha' and a 'pakka arhatia' is that a 'kachha arhatia' acts as an agent on behalf of his constituent and never acts as a principal to him. The person with whom he enters into a transaction on behalf of his constituent is either brought into contact with the constituent or at least the constituent is informed of the fact that the transaction has been entered into on his behalf with such and such other person. Although the 'kachha arhatia' may not communicate the name of his constituent to the third party, he informs the constituent of the name of the party. In the case of a 'pakka arhatia', the agent makes himself liable on the contract not only to the third party, but also to the constituent and he does not inform his constituent as to the person with whom he has entered into the contract on his behalf. In the present case the contract shows that the position of the plaintiff was that of a 'pakka arhatia'.

In the case of a 'pakka arhat' transaction the real question is to ascertain what as between the parties was the real intention when they entered into the contract in question: Whether it was ever within their contemplation that goods should be delivered, or whether their real intention was only to pay a difference on or after the due date. The mere circumstance that in the printed contract form an opportunity is left open to the parties to complete their contract by actual delivery will not be allowed to deprive the Court of the power to consider whether that was their real intention. A contract may none the less be a contract by way of gaming or wagering because it purports to give the buyer or seller an option of demanding delivery or acceptance, as the case may be, of the subject matter of the contract. In short, the parties will not be allowed to "camouflage" their transaction by getting it up as a "delivery" transaction when, in fact, it was never their intention that it should be.

We may in this connection refer to a decision of a Bench of this Court in — 'Firm Ram Krishna Das Jawahar Lal v. Firm Mutsaddi Lal Murli Dhar', AIR 1942 All 170 (T).

(20) Having regard to the facts and circumstances of the present case, we have not the least doubt in our minds that the forward transactions were wagering in nature and no delivery was ever contemplated and the contracts cannot, therefore, be enforced in view of the provisions of S. 30, Contract Act.

We may refer to another single Judge decision of this Court in — 'Sheo Narain v. Bhallar', AIR 1950 All 352 (U), where it was said that what has to be proved in order to establish that a transaction of sale or purchase was a wagering one is the fact that it was agreed between the parties that no delivery was ever to be demanded or given; that the mere fact that delivery was, in fact, not given does not prove that it was not given because there was a term in the original contract to that effect; that in every case the terms of the contract have to be proved; and that if the terms of the contract have been proved, and they show on their face that delivery was to be given or taken, and it was alleged by the defendant that it was agreed that the term about delivery was not to take effect but the differences alone were to be paid, then the fact of non-delivery, coupled with certain other facts may induce the Court to believe the defendant instead of the plaintiff; and that these facts are the financial condition of the parties and their capacity to deliver the goods in fulfilment of the contract.

(21) Their Lordships of the Privy Council in — 'Sukhdevdoss Ramprasad v. Govindoss Chathurbhujadoss and Co.', AIR 1928 PC 30 (V) laid down that the mere fact that contracts are highly speculative is insufficient in itself to render them void as wagering contracts; that to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded but that differences only should become payable.

(22) Having regard to the facts and circumstances of the present case and the evidence that was produced by the parties it is abundantly clear that the parties "camouflaged" their transactions by getting them up as "delivery" transactions when, in fact, it was never their intention that delivery was to be demanded or to be given. The forward contracts in respect of the two 'khatas' sued upon having been wagering contracts, they could not be enforced in view of the provisions of S. 30, Contract Act. Our conclusion, therefore, is that the decision of the learned Subordinate Judge was correct, and he was right in dismissing the plaintiff's suit No. 42 of 1940 from which the present appeal has been taken to this Court. In the result the appeal fails and is dismissed with costs.

H.G.P. Appeal dismissed.

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(LUCKNOW BENCH)

KIDWAI AND H. S. CHATURVEDI JJ. (2-8-1954)

Chunnoo and others, Appellants v. State.

Criminal Appeal No. 76 of 1952, against order of Addl. J., Sitapur, D/- 5-3-1952.

(a) Interpretation of Statutes — Redundancy — (Civil P. C. (1908), Pre.).

The Legislature having inserted a word in a section the Court must, so far as possible, give it a meaning and not treat it as redundant. (Para 10)

Anno: Civil P. C., Pre. N. 7.

(b) Criminal P. C. (1898), Ss. 233, 235, 239 — Distinct offences — Same transaction.

Every distinct offence in S. 233 cannot be treated as having the same meaning as every offence. The only meaning that the word "distinct" can have in the context in which it occurs is to indicate that there should be no connection between the various acts which give rise to criminal liability. It cannot be contended that there were three separate dacoities in a case merely because three different persons living in three separate houses were the victims. The fact that the offence of dacoity was completed the moment that the dacoits removed goods from any one of the three houses and that they could all have been convicted for dacoity even if they had not proceeded to loot any other house also is no criterion. On the other hand, it is equally impossible to say that because the same group of persons are accused of offences of the same nature committed on the same night within a short time of each other and at the same place or at places in close proximity to each other, there was only one transaction and only one offence was committed. The question really turns upon the circumstances of each case:

Held that there was sufficient evidence to prove that the looting of all the houses was carried on simultaneously. After all, the dacoits had to commence with some house or other but the fact that they commenced with one house does not mean that they had completed ransacking it before passing on to the next house. Even, however, if the ransacking of all the houses was not going on at the same

time and the three houses were looted one after the other, that would not have the effect of proving three "distinct" offences. There would even in such a case be sufficient continuity of purpose to make it one offence. If the cases were dealt with separately the evidence would have to be exactly the same in each case and would prove exactly the same facts. Case law discussed.

(Paras 10, 11, 12, 13, 22, 23, 24)

Anno: Criminal P. C., S. 233 N. 3; S. 235 N. 2; S. 239 N. 4.

(c) Interpretation of Statutes — Construction defeating object of law — (Civil P. C. (1908), Pre.) — (Criminal P. C. (1898), S. 367) — (Evidence Act (1872), Ss. 101 to 103).

While it is true that the benefit of every doubt even in the matter of interpretation must be given to the accused, a construction which would defeat the very object of the law must be avoided if it is reasonably possible to do so. (Para 12)

Anno: Civil P. C., Pre. N. 7; Criminal P. C., S. 367 N. 6; Evidence Act, Ss. 101 to 103 N. 3.

(d) Criminal P. C. (1898), Ss. 234, 239 (c) — Separate trial.

Section 234 and S. 239 (c) are not mandatory but are permissive. If each of the offences is to be proved by distinct and separate evidence and this is likely to lead to confusion in the trial, the Court might well—and indeed should —refuse to try more than one offence at one time. (Para 20)

Anno: Criminal P. C., S. 234 N. 5; S. 239 N. 5a.

(e) Criminal P. C. (1898), Ss. 235, 239 — Same transaction.

In order to constitute one transaction there must be some continuity of purpose. (Para 21)

Anno: Criminal P. C., S. 235 N. 2; S. 239 N. 4.

(f) Evidence Act (1872), S. 9 — Identification — (Criminal P. C. (1898), S. 367).

Identification by one out of four persons held not sufficient for conviction. (Para 33)

Anno: Evidence Act, S. 9 N. 5; Criminal P. C., S. 367 N. 6.

(g) Evidence Act (1872), S. 9 — Identification — (Criminal P. C. (1898), S. 367)).

Correct identification by three out of four persons held sufficient to bring home the guilt to the accused. (Para 34)

Anno: Evidence Act, S. 9 N. 5; Criminal P. C., S. 367 N. 6.

(h) Evidence Act (1872), S. 9 — Identification — (Criminal P. C. (1898), S. 367).

According to the six identifying witnesses they had last seen the accused during the course of the commission of a dacoity at which firing was taking place and did not see him again till a year later. Still all of them identified him and not one of them made mistake:

Held, that the whole identification became suspicious. (Para 43)

Anno: Evidence Act, S. 9 N. 5; Criminal P. C., S. 367 N. 6.

(i) Constitution of India, Art. 134(1)(c) — Certificate of fitness.

The High Court had not differed from the earlier decision of the High Court and had only held that each case depended upon its own circumstances:

Held, that this was not a fit case for the grant of leave. (Para 47)

Anno: Const. of India, Art. 134 N. 7.

CASES REFERRED: Paras

(A) (V21) AIR 1934 Oudh 325: 11 Oudh WN 731: 35 Cri LJ 1048 9, 14, 18

(B) ('49) Cri. Revn. No. 103 of 1949, D/- 18-10-1949 (All) 9, 18

(C) (V40) AIR 1953 All 448: 1953 All LJ 64: 1953 Cri LJ 1003 9, 21

(D) (V41) AIR 1954 All 201: 1953 All LJ 700: 1954 Cri LJ 426 9, 21A

G. G. Chatterji and Babu Ram Gir, for Appellants; Addl. Govt. Advocate, for the State.

KIDWAI J.:

On the night between the 10th and the 11th October 1950, the three houses of Umrao Gaderia, Chutta Ahir and Tulsi Teli, facing each other in village Bakania, were looted by dacoits said to number between 30 and 40. Param Sukh (P. W. 1), a neighbour, was woken up by the noise of the dacoity and went to Nimsar, where the police was posted in connection with Mela duty, for help. At the temple of Lalta Debi he met Head Constable Hem Singh and some Constables including P. W. 4, Ram Saran and told them about the dacoity. The Head Constable directed him to the Station Officer Misrikh, Sub-Inspector Ram Karan Singh (P. W. 38) who was staying in a Dharamshala nearby. The Sub-Inspector recorded a first information report dictated by Param Sukh, (Ex. 12), and proceeded to the spot immediately with the police Constables armed with muskets but they adopted different routes so as to reach the spot from two different directions.

(2) The dacoity was still in progress. There was an exchange of fire between the dacoits and the police party. Most of the dacoits managed to escape with much of the stolen property but Chunnu was beaten down with lathis and arrested on the spot with some stolen property. Ram Dayal who had a pistol, Ram Lal and Badlu received gunshot injuries and were also arrested immediately: Ram Dayal and Ram Lal being arrested at the scene of the dacoity while Badlu who had managed to screep away was captured in a Bajra field.

(3) Various other persons were arrested on various dates and all, except the four persons arrested on the spot, were put up for identification on the 11th of November and the 13th and 21st December, 1950. After the completion of investigations the persons who had been identified and the four persons caught on the spot were prosecuted and Badlu, Chunnu, Ram Dayal, Ram Lal, Faqirey, Chaudhi, Bhikari, Bindra, Jia Lal, Tilak, Gulzari, Puttu, Sukha, Maiku and Dularey were committed to stand their trial in the Court of Session at Sitapur, while Ram Singh and Lachhman were discharged.

(4) In the Sessions Court Chunnu pleaded that he was not arrested on the spot but at the mela.

Ram Dayal, Ram Lal and Badlu pleaded that they were together proceeding about their lawful business and were implicated because of police enmity. Puttu, Faqirey, Bindra, Bhikari, Maiku, Jia Lal and Chaudhi also pleaded enmity with the police. Sukha pleaded enmity with the village Chaukidar. Gulzari and Tilak pleaded enmity with local zamindars. Dularey pleaded enmity between his Samdhi and the witnesses.

(5) The prosecution produced 40 witnesses. Of these only P. W. 1 Param Sukh, P. W. 2 Dalla son of Chutta, P. W. 3 Shrimati Mohana, daughter-in-law of Umrao, P. W. 4 Constable Ram Saran, P. W. 5 Shrimati Janka, wife of Umrao, P. W. 6 Umrao himself, P. W. 7 Kishan, son of Chutta, P. Ws. 8, 12, 19, 20, 21, 22, 23, 24 Mangrey, Pragi, Simma, Pitambar, Bishnu, Shankar, Natha, and Jhalloo neighbours, P. Ws. 9 and 11 Chiddu and Misri, sons of Umrao, P. W. 10 Jai Rani, daughter of Tulsi, P. W. 13 Narain brother of Tulsi, P. W. 34 Tulsi and P. W. 38 Sub-Inspector Ram Karan Singh deposed to the factum of the dacoity and the participation of the accused in it. The rest are more or less formal witnesses.

(6) The learned Additional Sessions Judge convicted all the accused before him, except Gulzari, against whom he did not consider that there was sufficient evidence. All the persons convicted have appealed, but only Chunnu, Ram Dayal, Badlu Tilak and Jia Lal appellants in Appeal Nos. 76 and 98 of 1952 are represented by counsel; the others have filed jail appeals. Their appeals are Nos. 181 to 189 of 1952.

(7) Ram Dayal was also convicted in a separate trial under S. 19(f), Arms Act. He has appealed in that case also and his appeal is No. 77 of 1952.

(8) Manna was tried separately in respect of the same case and he has also been convicted. He has filed an appeal through counsel which is No. 427 of 1952.

(9) The appeals came up for hearing before one of us but at that hearing a point of law was taken as to the validity of the trial by the Sessions Judge since it was contended that there was not one dacoity, but three—the dacoity in each house being treated as a separate offence—that separate and distinct charges should have been framed and that they should have been tried separately by reason of S. 233, Cr. P. C. It was further contended that, if by reason of S. 239(c) read wtih S. 234, Cr. P. C., the three offences could be tried together, separate charges should, in any case, have been framed. Failure to do this was at least an irregularity and, since it has caused prejudice to the accused, the trial was bad and the convictions should be set aside.

In support of this contention reliance was placed by the learned counsel for the appellants upon — 'Gunno v. Emperor', AIR 1934 Oudh 325 (A); — 'Criminal Revn. No. 103 of 1949, D/- 18-10-1949 (All) (B)'; — 'Raj Narain v. The State', AIR 1953 All 448 (C) and — 'Jai Dayal v. The State', AIR 1954 All 201 (D). Since the matter is of considerable importance and requires an authoritative decision, the appeals were referred to a Division Bench for disposal. We have now heard full arguments in the case.

(10) Section 233, Cr. P. C., requires a separate charge to be framed and a separate trial to take place "for every 'distinct' offence of which a person is accused". The use of the word "distinct" is of great significance and the Legislature having inserted it, we must, so far as possible, give it a meaning and not treat it as redundant. "Every distinct offence cannot be treated as having the same meaning as "every offence". The only meaning that the word "distinct" can have in the con text in which it occurs is to indicate that there should be no connection between the various acts which give rise to criminal liability. If there i such a connection, one action is not "distinct" from other actions and each of them, even if it con stitutes an offence, does not constitute a "distinct' offence.

(11) The sole ground upon which it is contended that there were three separate dacoities in the pre sent case is that three different persons living in three separate houses were the victims. This is not a proper criterion. There is no difference in principle between such a case and a case in which the victims are three members of a family living jointly in one house but each having a separate room for his personal use and each having his separate personal property. It is not even contended that in the latter case there are three separate dacoities and three separate charges should be framed.

(12) It is true that the offence of dacoity was completed the moment that the dacoits removed goods from any one of the three houses and that they could all have been convicted for dacoity even if they had not proceeded to loot any other house. This also is no criterion. As soon as the dacoits remove any one article, no matter how small its value, the offence of dacoity is completed and all persons participating may be convicted for dacoity, but it does not follow that any other property stolen thereafter from other rooms or even the same room, would become the subject-matter of a distinct offence and a separate charge would have to be framed. Such an interpretation of the law would create an impossible situation and, while it is true, that the benefit of every doubt, even in the matter of interpretation, must be given to the accused, a construction which would defeat the very object of the law must be avoided if it is reasonably possible to do so.

(13) On the other hand it is equally impossible to say that because the same group of persons are accused of offences of the same nature committed on the same night within a short time of each other and at the same place or at places in close proximity to each other, there was only one transaction and only one offence was committed. The question really turns upon the circumstances of each case. For instance, a group of persons commits a dacoity in a particular house and is then running away because the villagers have assembled. While passing another house in the same village only a short distance away they find that it has a deserted appearance, and they enter and loot it. In such a case it might well be contended that two separate

offences were committed and two separate charges should have been framed. The cases upon which the appellants' learned counsel relied were really cases of this nature.

(14) In — 'AIR 1934 Oudh 325 (A)' the same group of persons robbed different persons between the hours of 6 and 9 in the evening at different places on the Kaoria-Colonelganj Road. They were charged with having committed six different dacoities but there was only one trial and the learned Sessions Judge justified this on the ground that all the offences were committed in the course of the same transaction within the meaning of S. 239(d), Cr. P. C. Nanavutty J. held:

"Now it is quite clear that every offence of dacoity committed by the accused was complete as soon as the person attacked was robbed and his property taken away from him. The mere fact that in the course of one night six dacoities were committed by a gang of dacoits will not make these six dacoities form part of one and the same transaction."

(15) If we may say so with respect the decision of the learned Judge was perfectly correct. The charge itself indicated that there were six different offences. On the facts proved none of the offences was in any way connected with each other except that the culprits were common. The evidence required to prove them would be different. Even if, by chance, some witnesses were the same, they would have to prove entirely different facts in respect of each offence. The six charges were rightly framed under S. 233, Cr. P. C.

(16) Once separate charges have been framed under S. 233, Cr. P. C., a joint trial could only take place where only one individual was involved if the conditions laid down either in S. 234 or in S. 235 were fulfilled and, where several persons were concerned, if the conditions of S. 239 were fulfilled. Clauses (c) and (d) of S. 239 correspond to Ss. 234 and 235 respectively. Section 239(c) and S. 234 deal with the case of offences of the same kind committed even at long intervals of time provided that the interval is not more than 12 months in all. Under these sections, however, only three of such offences can be tried together and obviously the trial of six similar offences would not be justified.

(17) Section 235 and S. 239(d) do not deal with offences of the same kind but with 'different' offences. In this case there is no limitation as to the number of offences which might be tried together, but the condition is that they must be the result of acts done in the same transaction. This is made perfectly clear by the illustrations to S. 235, and a very common instance is a riot in which persons may be charged under Ss. 147, 148, 323, 325 and 304/149 in one trial. It is obvious that in the case before Nanavutty J., it could not possibly be said that any one of the six dacoities arose out of any act done during the course of any preceding or succeeding dacoity. Section 239(d), Cr. P. C., did not, therefore, justify a joint trial and a conviction resulting from a joint trial had to be set aside.

(18) Sapru J. in — 'Criminal Revn. No. 103 of 1949, D/- 18-10-1949 (All) (B)', followed the case of — 'AIR 1934 Oudh 325 (A)' and held:

"There is no force in the argument that as the offences were committed on one and the same night they must be deemed to form part of a series of acts so connected together as to form the same transaction."

(19) We see no reason to differ from this exposition of the law. In that case it was assumed that two separate and distinct dacoities had been committed. We do not know on what data this conclusion was based but we see no reason to doubt the correctness of the inference drawn by the learned Judge. On the basis of two separate dacoities S. 239(d), Cr. P. C., would have no application. The learned Judge was, however, considering, as the language used by him indicates, only Ss. 235 and 239(d), Cr. P. C. His attention does not seem to have been drawn to S. 239(c), Cr. P. C., read with S. 234, Cr. P. C., and we cannot say what his decision would have been had he been called upon to consider those sections.

(20) We would like to make it clear at this point that Ss. 234 and 239(c), Cr. P. C., are not mandatory but are permissive. If each of the dacoities (or other offences) were to be proved by distinct and separate evidence and this was likely to lead to confusion in the trial, the Court might well—and indeed should—refuse to try more than one offence at one time. That might have been one of the considerations present in the mind of Sapru J. when he set aside the trial and the conviction resulting from it. In the present case, as we will presently show, that consideration does not apply.

(21) In — 'AIR 1953 All 448 (C)' our learned brother Brij Mohan Lal J., followed the two earlier decisions. In that case, although the dacoities were committed the same night in the same hamlet by the same persons, it was assumed that there were 8 'distinct dacoities' and on this assumption it was held that it could not be said that they were committed in the course of the same transaction. The criterion laid down is that in order to constitute one transaction there must be some continuity of purpose. We respectfully agree that this is the true criterion. In the present case the evidence which we will discuss later, does establish a continuity of purpose.

(21A) The last case upon which reliance was placed was that of — 'AIR 1954 All 201 (D)'. In that case also there were separate and distinct offences although they were all committed by the same group of persons at the same time and place within a short space of time. It was held that the framing of a composite charge in such a case infringed the provisions of S. 233, Cr. P. C., and that if it was shown that the accused had been prejudiced the trial was vitiated.

(22) In the present case the position is entirely different. It cannot be said that the looting of the houses of three persons were distinct offences. It is true that the looting commenced at Umrao's house, and then the dacoits went to Chutta's house and finally to Tulsi's house, but there is sufficient evidence to prove that the looting of all the houses was carried on simultaneously. After all the dacoits had to commence with some house or other but the fact that they commenced with Umrao's

house does not mean that they had completed ransacking it before passing on to the next house.

(23) Param Sukh (P. W. 1) states that when he came back with the Sub-Inspector he saw "dacoits going in and coming out of these houses". The same statement is made by P. W. 4 Constable Ram Saran, who was one of the police party, P. W. 8 Mangrey, a neighbour, P. W. 9 Chiddu, P. W. 21 Bishunu, P. W. 23 Natha and P. W. 24 Jhalloo. P. W. 3, Mohana, daughter-in-law of Umrao, also states that the dacoits left her house only when the police arrived which obviously means that they were still looting her house while the houses of Chutta and Tulsi were being looted. P. W. 6 Umrao also says that when the police party arrived the dacoits were in front of his house as well as the houses of Chutta and Tulsi. Even, however, if the ransacking of all the houses was not going on at the same time and the three houses were looted one after the other, that would not have the effect of proving three "distinct" offences. There would even in such a case be sufficient continuity of purpose to make it one offence.

(24) It was in connection with the looting of the three houses that gunshots were exchanged between the dacoits and the police. The witnesses are all the same and except for the four persons caught on the spot the rest of the accused were sent for trial as a result of identification by various persons. It would be impossible for the identifying witnesses to connect any accused person with the looting of any particular house. All that is said is that they were seen coming in and going out of the various houses during the course of the dacoity. It is obvious, therefore, that if the cases were dealt with separately the evidence would have to be exactly the same in each case and would prove exactly the same facts. There was thus only one dacoity and it is unnnecessary for us to consider whether, if there were several dacoities, a composite charge has caused any prejudice to the accused.

(25) The trial not having been vitiated by any illegality or irregularity the question that arises is how far the case against each of the accused is established.

(26) The first set of appellants, (Criminal Appeal No. 76 of 1952) are Chunnu, Ram Dayal and Badlu. Of these the first two are alleged to have been arrested the same night on the spot and the third in a 'Bajra' field a short distance off in a wounded condition. Ram Lal appellant in Criminal Appeal No. 182 of 1952 is also said to have been captured on the spot. They all deny that they were arrested at the spot. Chunnu pleaded that he was suddenly caught in the Mela area and has been implicated out of enmity. The other three also pleaded implication out of enmity. Their case was that Ram Dayal had brought his tobacco shop to the fair and, because his stock had been exhausted, he had gone home to Rampura with the other two to fetch some more during the early hours of the morning. When they were returning they were challenged by some persons sitting by the road side and, on their refusal to stop, they were fired upon and caught. A pistol is said to have been recovered from the possession of Ram Dayal and he was prosecuted under S. 19(f), Arms Act. He was convicted in that case also and he has appealed. His appeal is No. 77 of 1952.

(27) There is overwhelming evidence to prove the capture of three of the persons in front of the house of Umrao and others on the night of the dacoity and of the capture of one person in the 'Bajra' field. It is objected, however, that there is nothing in the prosecution evidence to prove that it was Ram Dayal, Chunnu and Ram Lal that were captured at night or that it was Badlu who was captured in the Bajra field. It is further contended that there is no evidence to show that any of them took part in the dacoity since they were not put up for identification.

(28) Whether the four appellants mentioned above were or were not known to the witnesses from before, it is clear that they got to be known when they were captured. There was no question, therefore, of their being put for identification. P. W. 1 Param Sukh deposes to the capture of the four persons and refers to them by name and states that, although he did not know them from before, he came to know their names at the time of the arrest. P. W. 4 Police Constable Ram Saran, P. W. 19 Simma, P. W. 21 Bishunu and P. W. 23 Natha pointed out in Court to Ram Dayal, Ram Lal, Chunnu as the three persons captured and to Badlu as the person captured in the Bajra field. P. W. 38 Sub-Inspector Ram Karan Singh also proves that it was the four persons arrested on the spot that he brought to the police station and sent to jail and they were the four appellants named above. There can thus be no doubt as to the identity of the persons arrested on the spot.

(29) As to their connection with the dacoity, it is clear from the evidence, leaving aside the evidence of the recovery of stolen property from their possession that Ram Dayal, Ram Lal and Chunnu were captured in front of the three houses looted after an exchange of fire with the police. Two of them Ram Dayal and Ram Lal had gun-shot injuries and the evidence satisfactorily proves that the gunshots were received during the course of police firing. Apart from the inmates of the houses looted, it was only the dacoits who were in the open space in front of the three houses looted. The spectators were at some distance and were keeping behind corners, as was quite natural when firing was going on both sides. This evidence is quite sufficient to establish that they were among the dacoits.

(30) As to Badlu, his whereabouts were traced by reason of the track he left in proceeding from the scene of the dacoity to the Bajra field. He was injured in both his feet and must have dragged himself to the field beyond which he could not go owing to his injuries. He must, therefore, have left a distinct track and this track connects him with the dacoits since it establishes that he received injuries during the police firing i.e. that he was among the persons in front of the three looted houses and that it was from there that he proceeded to the field.

(31) The defence story cannot be accepted. There was no reason why persons—presumably a police party— would start firing at passersby on a road at a time when the mela was in full swing and pil-

grims would be passing at all hours. The evidence therefore, satisfactorily brings home the guilt to Chunnu, Ram Dayal Badlu and Ram Lal and Criminal Appeals Nos. 76 and 182 of 1952 are dismissed.

(32) The fact that a pistol was recovered from the possession of Ram Dayal is proved by all the witnesses produced against him in the Arms Act case, i.e. P. W. 1 Param Sukh, P. W. 3 Sub-Inspector Ram Karan Singh and P. W. 4 Sub-Inspector Jai Karan Singh. There is no reason to disbelieve this evidence. The conviction of Ram Dayal under the Arms Act must also be maintained and Criminal Appeal No. 77 of 1952 is dismissed.

(33) Criminal Appeal No. 98 of 1952 has been filed by Tilak and Jia Lal. Tilak was identified by four persons P. W. 11 Misri, P. W. 9 Chhidu, P. W. 22 Shanker and P. W. 21 Bishnu. In the parade at which Tilak was put up, Misri identified two persons correctly and four wrongly. Bishnu identified three correctly and picked out three wrong persons. Shanker identified two persons correctly and made two mistakes. None of the three persons can be relied on and only the evidence of Chhidu remains, but one identification is not sufficient. The appeal of Tilak must be allowed and his conviction set aside.

(34) Jia Lal has also been identified by four witnesses P. W. 1 Param Sukh, P. W. 2 Dalla, P. W. 7 Kishin and P. W. 22 Shanker. The results shown by the last three are good, while Param Sukh is worthless as an identifying witness. Correct identification by three persons is, however, sufficient to bring home the guilt to Jia Lal and his appeal must fail.

(35) Sukh (appellant in Criminal Appeal No. 181 of 1952) was arrested on 21-11-1952 and he was brought to the Sitapur Jail according to the finding of the learned Sessions Judge, on 22-11-1952. Some of the identifying witnesses also came from the same locality on the same day by the same train and the appellant was put up for identification by them on the same day. He pleaded that he was shown to them on the way while travelling with them. This is a possibility which is not excluded. The case against him becomes doubtful. His appeal must be allowed and his conviction set aside.

(36) Dularey (appellant in Criminal Appeal No. 183 of 1952) has been identified by no less than nine witnesses at the identification parade. Some of them, however, failed to identify him in the Committing Magistrate's Court and others in the Sessions Court. The only witnesses that remained consistent in their identification are P. W. 3 Mangrey and P. W. 24 Jhallo. Of these in one of the earlier parades Mangrey identified three persons correctly and made five mistakes and in the other he identified three persons correctly and made one mistake. These identifications by him are about 50 per cent. and it is only Jhallo's evidence that can be treated as reliable. It would, however, be unsafe to convict on one good evidence of identification only. His appeal must also therefore be allowed and his conviction set aside.

(37) Puttoo appellant in Criminal Appeal No. 184 of 1952 was correctly identified by P. W. 7 Kishan, P. W. 9 Cheddu, P. W. 19 Simma all of whom are good identifying witnesses. The case has, therefore, been brought home against him and his appeal must be dismissed.

(38) Bindra is appellant in Criminal Appeal No. 185 of 1952. He has been correctly identified by P. W. 2 Dalla, P. W. 7 Kishan, P. W. 23 Natha and P. W. 19 Simma all of whom are good identifying witnessess. His participation in the dacoity is thus established by good evidence and his appeal must fail.

(39) Bhikhari (Criminal Appeal No. 186 of 1952) was correctly identified by a very large number of persons. The evidence of most of them has been rejected by the learned Additional Sessions Judge but there is no reason to reject the evidence of P. W. 7 Kishan, P. W. 10 Jai Rani, P. W. 19 Simma and P. W. 24 Jhallo. This evidence is sufficient to bring home the guilt to Bhikhari whose conviction must be upheld.

(40) Maiku (Criminal Appeal No. 187 of 1952) has been identified by P. W. 7 Kishan, P. W. 19 Simma, P. W. 21 Bishan, P. W. 23 Natha, P. W. 24 Jhallo. Identification by Bishan is not trustworthy by reason of the large number of mistakes which he made and it must be rejected but there is no reason to doubt the correctness of the identification by the remaining witnesses. The participation of Maiku in the dacoity is established by sufficient evidence and his appeal must fail.

(41) Faqirey (Criminal Appeal No. 188 of 1952) has been correctly identified by four witnesses of whom P. W. 1 Param Sukh is unreliable as a witness of identification. There is, however, good evidence of identification by P. W. 5 Srimati Janka, P. W. 9 Chedda and P. W. 19 Simma. His appeal too must fail.

(42) Chauthi (Criminal Appeal No. 189 of 1952) was correctly identified by four persons but two of them failed to identify him in the Sessions Court. We are left with P. W. 7 Kishan & P. W. 19 Simma identification by whom has been good throughout. Thus the crime is brought home to him by sufficient evidence and his appeal must be dismissed.

(43) Manna has been tried separately for the same dacoity because he could not be caught earlier. After his arrest he was put up for identification in jail and out of the large number of witnesses sent up for the purpose of identifying the accused of this very dacoity, only six were chosen to be sent up to identify him. All of them identified him and not one of them made a mistake. This is rather a remarkable result when it is recollected that according to the witnesses they had last seen this man during the course of the commission of a dacoity at which firing was taking place and did not see him again till a year later. The whole identification becomes suspicious.

(44) It is said that he was absconding but although a warrant is said to have been obtained for the arrest of Manna it has not been produced and it is admitted that no proceedings were taken under Ss. 87 and 88. Further Manna's name is not shown in the first charge-sheet as an absconding accused although the investigating officer states that he had got to know his name before he filed

the charge-sheet. In these circumstances his conviction depending, as it does, only upon evidence of identification cannot be upheld.

(45) The result is that we dismiss Criminal Appeals Nos. 76 of 1952 (Chunnoo, Ram Dayal and Badlu), 77 of 1952 (Ram Dayal). They are on bail; they shall surrender to serve out the remainder of their sentence; 182 of 1952 (Ram Lal), 184 of 1952 (Puttoo), 185 of 1952 (Bindra), 186 of 1952 (Bhikhari), 187 of 1952 (Maiku), 188 of 1952 (Faqiray) and 189 of 1952 (Chauthi) are also dismissed. Criminal Appeal No. 98 of 1952 is allowed so far as it is on behalf of Tilak. His conviction and sentence are set aside. He is on bail. He need not surrender. His bail bonds are cancelled. In so far as this appeal relates to Jia Lal, it is dismissed and he should surrender to serve out the remainder of his sentence.

(46) Criminal Appeal Nos. 181, 183 and 427 of 1952 are allowed. The conviction and sentences of Sukha, Dularey and Manna are set aside. Sukha and Dularey shall be released forthwith, unless they are required in connection with some other offence. Manna is on bail. He need not surrender. His bail bonds are cancelled.

(47) The learned counsel for appellants in Appeals Nos. 77 and 98 of 1952 prayed for leave to appeal to the Supreme Court on the ground that an important question of law as to the validity of the trial arose. We have not differed from the earlier decisions of this Court and have only held that each case depends upon its own circumstances. We accordingly did not consider this to be fit case for the grant of leave and we reject the prayer.

D.H.Z. Order accordingly.

A.I.R. 1954 ALLAHABAD 801 (Vol. 41, C.N. 315)

AGARWALA AND GURTU JJ. (7-5-1954)

Mst. Reoti Devi, Defendant-Appellant v. Pt. Bhagwan Dayal, Plaintiff-Respondent.

First Appeal No. 486 of 1944, against Order of Civil Judge, Agra, D/- 27-4-1944.

(a) Hindu Law — Joint family — Some members, if can form corporate body within larger joint family — 25 Mad 149, Dissented from.

Per Gurtu J.: So long as the family remains an undivided unit two or more members thereof, whether they be members of different branches or of one and the same branch of the family, can have no legal existence as a separate independent unit, but if they comprise all the members of a branch or of a sub-branch, they can form a distinct and separate corporate unit within the larger corporate unit and hold property as such. 25 Mad 149, Foll. (Para 13)

Per Agarwala J. contra: There is no valid reason why two or more members of a larger joint family, whether belonging to one branch or not, may not form a separate joint family and acquire property by their joint labour and exertions as members of a smaller joint family — a corporate unit by itself. 25 Mad 149, Dissented from. (Para 55a)

The question whether in a particular case some of the members of a larger joint Hindu family, who have jointly acquired property separately from the other members of the larger family, have acquired it as joint family property of their separate independent unit or they have acquired it as tenants-in-common in their individual right, is a matter of intention and proof. One important test in ascertaining the intention of joint acquirers — whether they intended that the joint acquisition should be impressed with the character of joint family property or not — is to find out whether they intended that their interest in the property so acquired will be of the same nature as they would have in the joint property of an original joint family of which they are the survivors. If that was not their intention they could not be said to have acquired the property as members of a joint Hindu family. (Para 56)

(b) Hindu Law — Joint family — Re-union — What constitutes.

Per Gurtu J.: Once there has been a separation, there is a heavy onus on the party asserting a re-union. To constitute a "re-union", there must be an intention of the parties to re-unite in estate and interest. The mere fact that the parties who have separated live together or trade together after partition, by itself, would not amount to a "re-union." 'Re-union' implies an agreement between the parties to re-unite in estate with the intention to remit themselves to the former status as a member of a joint family. A re-union in estate also must take place between the very persons who are parties to the original partition. (Paras 16 and 17)

(c) Civil P. C. (1908), S. 11 — Decision of revenue Court under Agra Tenancy Act — Decision if operates as res judicata — (Tenancy Laws — Agra Tenancy Act (3 of 1926), Ss. 230, 271 and 272).

Per Gurtu J.: Since the revenue Court under the Agra Tenancy Act is a Court of exclusive jurisdiction, S. 11, Civil P. C., would not apply in terms, but the principles thereof would apply, and a decision of the revenue Court could operate as 'res judicata' in subsequent civil proceedings. (Paras 36, 37)

Per Agarwala J. (contra): The mere fact that the decision of the Civil Court is incorporated in the decree of the revenue Court does not mean that the decision on the issue of proprietary title is of the revenue Court and, further, it does not mean that the revenue Court had exclusive or even concurrent jurisdiction to try that issue. A reading of Ss. 230, 271 and 272, Agra Tenancy Act, shows that the revenue Courts are debarred from trying the issue of proprietary title. The judgment and decree of the revenue Court, therefore, could not be said to operate as 'res judicata' on the question of proprietary title on any general principles of law. (Paras 62, 63)

The decision of the civil Court on the issue of proprietary title, though given on an issue, will however, be binding as if it were given in a suit between the parties on the same principles as are laid down in S. 11, Civil P. C. The limitations imposed by S. 11 will govern the matter and the decision of the civil Court in the former suit will only be binding in the subsequent suit, if the former civil Court which decided the issue of proprietary title was competent to try the subsequent suit. (Para 64)

Anno: C. P. C., S. 11 N. 76.

(d) **Hindu Law — Joint tenancy.**

Per Gurtu J.: The Courts do not lean towards the creation of joint tenancies, and so far as Hindu Law is concerned, except in the case of co-parcenary between the members of an undivided family, the principle of joint tenancy is unknown to Hindu Law. (Para 43)

(e) **Hindu Law — Joint family — Presumption — Separation — Burden of proof — (Evidence Act (1872), Ss. 101 to 103).**

Per Agarwala J.: The ordinary presumption of Hindu Law is that a Hindu family is joint and continues to be joint and the burden of proving separation is on the party alleging it. In order to prove separation, it is not enough to show that different members of the family lived, i.e., resided and messed separately. It is necessary to establish that either there was a partition of the joint family property by metes and bounds or at least that the members of the family dealt with it as if they had separate defined shares therein. (Para 50)

Anno: Evidence Act, Ss. 101 to 103 N. 47.

(f) **Hindu Law — Joint family — Some members living together — Property acquired by them — Presumption.**

Per Agarwala J.: The mere fact that some members of a joint family lived together and messed together would not be enough to raise the presumption that the property acquired by them was their joint family property. (Para 60)

(g) **Tenancy Laws — Agra Tenancy Act (3 of 1926), S. 271 — Competent Civil Court.**

Per Agarwala J.: By the expression 'competent Civil Court' to which the issue of proprietary title has to be referred by the revenue Court, is meant the Civil Court which has jurisdiction to try a suit in respect of the title to the property in question. (Para 62)

(h) **Civil P. C. (1908), S. 11 — Limitations imposed upon application of doctrine of 'res judicata'.**

Per Agarwala J.: Under S. 11 certain limitations are imposed upon the application of the doctrine of 'res judicata'. These limitations apply only to suits and the wider principles of the doctrine of 'res judicata' do not admit of the application of these limitations. (Para 63)

Anno: C. P. C., S. 11 N. 3.

(i) **Civil P. C. (1908), S. 11 — Subsequent suit.**

Per Agarwala J.: S. 11 applies the bar of 'res judicata' only if the Court which tried the former suit or issue was competent to try the subsequent 'suit', i.e., the whole of the subsequent suit. (Para 65)

Anno: C. P. C., S. 11 N. 21.

(j) **Civil P. C. (1908), S. 11 — Competent Court — Subsequent suit based on cause of nature covering not only property in dispute in previous suit but also rest of properties.**

Per Agarwala J.: A party cannot be allowed to get round the bar created by S. 11 by the mere device of adding some more property to the property in dispute in the previous suit and by raising the valuation of the subject-matter of the subsequent suit thus making it non-cognizable by the Court which decided the former suit. But where the subsequent suit is based on one cause of nature, which covers not only the property in dispute in the previous suit but the rest of the properties, Section 11 can have no application. (Para 65)

Anno: Civil P. C., S. 11 N. 80 Pt. 1.

CASES REFERRED: Paras

(A) ('02) 25 Mad 149: 11 Mad LJ 353 13, 14, 52, 53
(B) ('08) 30 All 352: 5 All LJ 339 14, 52, 54
(C) (V40) AIR 1953 SC 487: 1953 SCJ 700 (SC) 14, 52, 54
(D) (V24) AIR 1937 All 481: ILR (1937) All 628 32, 62
(E) (V40) AIR 1953 SC 33: 1953 SCR 154 (SC) 33, 63
(F) ('35) 62 Cal 671: 39 Cal WN 1140 35
(G) ('11) 33 All 41: 7 Ind Cas 697 43
(H) (V9) AIR 1922 PC 201: 20 All LJ 839 (PC) 55
(I) (V18) AIR 1931 All 28 (2): 53 All 62 62
(J) (V3) AIR 1916 PC 78: 43 Ind App 91 (PC) 63

J. Swarup, for Appellant; Gopal Behari, for Respondent.

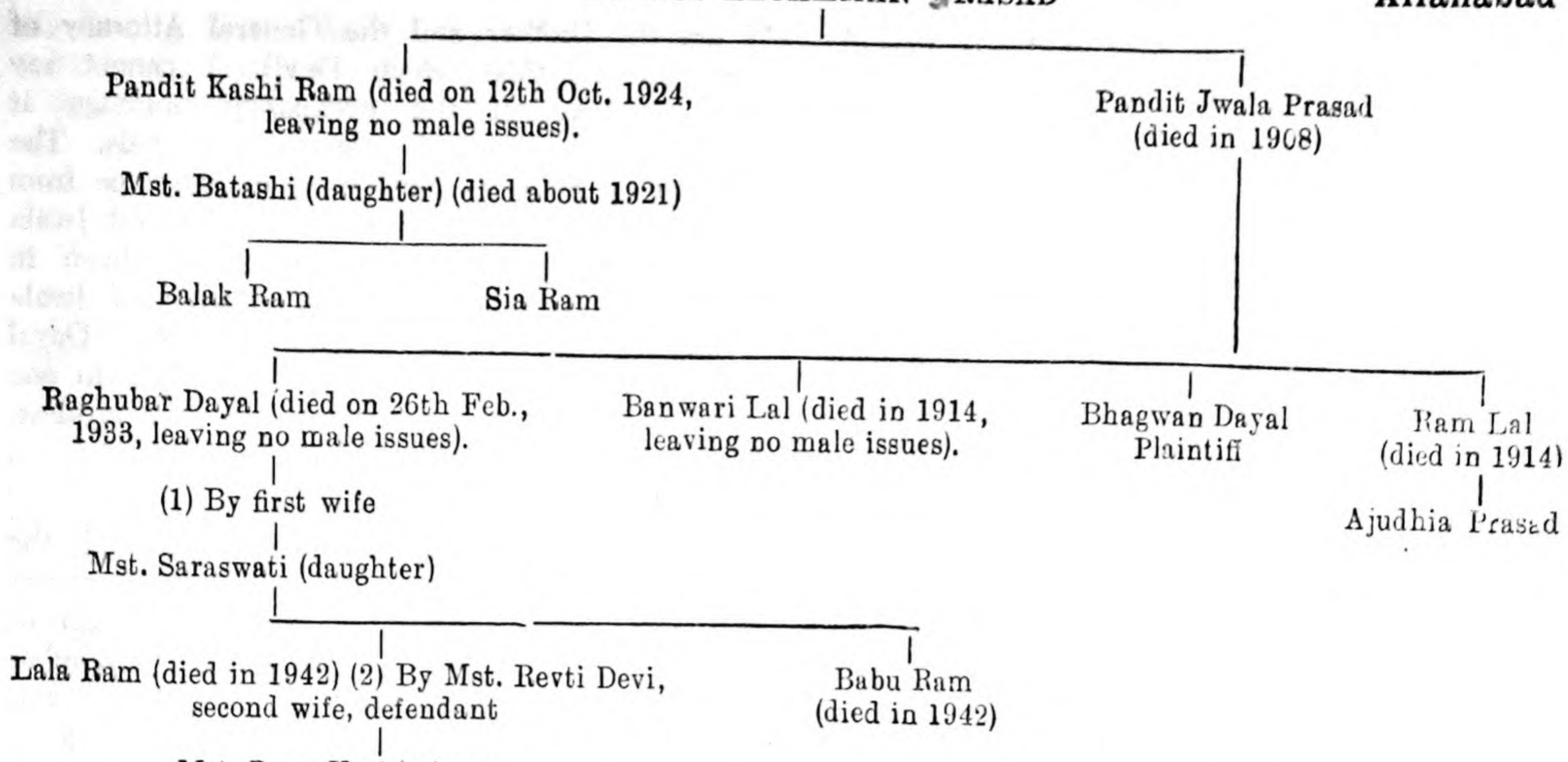
GURTU, J.:

This is a defendant's appeal. It is necessary to set out the pedigree printed at page 2 of the paperbook, as it will help in the appreciation of the case of the parties—

(See pedigree on page 803)

(2) The plaintiff's case has been stated as follows:

(3) Lachhman Prasad and his sons held properties detailed in Sch. "A" which are still in the joint undivided possession of the male descendants and are held by them in coparcenary as joint Hindu family properties, and there never was a separation between Lachhman Prasad's issues after his death. One of the wives of Kashi Ram, uncle of the plaintiff Bhagwan Dayal, used to reside in the ancestral house in village Naugaien, district Farrukhabad, where the other


PANDIT LACHHMAN PRASAD
Pandit Kashi Ram (died on 12th Oct. 1924, leaving no male issues).
Pandit Jwala Prasad (died in 1908)
Mst. Batashi (daughter) (died about 1921)
Balak Ram
Sia Ram
Raghubar Dayal (died on 26th Feb., 1933, leaving no male issues).
Banwari Lal (died in 1914, leaving no male issues).
Bhagwan Dayal Plaintiff
Ram Lal (died in 1914)
Ajudhia Prasad
(1) By first wife
Mst. Saraswati (daughter)
Lala Ram (died in 1942)
(2) By Mst. Revti Devi, second wife, defendant
Babu Ram (died in 1942)
Mst. Daya Vati (minor).

brother Jwala Prasad lived with his own wife. Kashi Ram was in service for about thirteen years at Lucknow and at Agra, but he gave up service about the year 1885 A. D. and then he, along with the plaintiff and the plaintiff's brother Raghubar Dayal, started a business in Agra which was carried on with the joint labour, skill and efforts of the three of them. The properties detailed in Sch. "B" were purchased out of the funds acquired in this way, and were never made part of the ancestral property belonging to the coparcenary.

(4) Kashi Ram, Raghubar Dayal and Bhagwan Dayal constituted a joint family of their own within the larger joint family. After the death of Kashi Ram, the plaintiff and Raghubar Dayal, as survivors of this smaller joint family, carried on as before, and properties entered in Sch. "C" were jointly acquired. After the death of Raghubar Dayal, the plaintiff became the sole survivor and owner of the entire assets of this smaller joint family entered in Schs. "B" and "C", and thereafter the plaintiff acquired by himself, the properties entered in Sch. "D" as the sole surviving coparcener. The ancestral assets and the assets of this smaller joint family were kept separate at all times.

(5) The plaintiff's alternative case is that if separation between Lachhman Prasad's issues be proved to have taken place after Lachhman Prasad's death, then Kashi Ram, Raghubar Dayal and the plaintiff constituted a re-united joint Hindu family. Further, the plaintiff's case is that in a suit (No. 15 of 1939) of the revenue Court, a decree had been passed which cast a cloud, and tended to affect the rights of the plaintiff adversely.

(6) The said decree was passed in a suit for profits brought by the defendant, Smt. Revti Devi, in respect of her share of the profits of village Chaoli entered in the present suit in Sch. "B". She claimed the profits in respect of a half share in the said village as the widow of a separated Hindu. In that suit, the issue sent down by the revenue Court under the provisions of S. 271, Agra Tenancy Act, 1926, "whether the defendant was proprietor of a half share in Chaoli" was answered in Smt. Revti's favour by the learned Munsif, a decree had been passed by the revenue Court on that basis in Smt. Revti's favour.

(7) The plaintiff claimed a declaration that the properties detailed in Schs. "B", "C" and "D" of the plaint are the sole and absolute properties of the plaintiff, and that the decree in revenue Court suit No. 15 of 1939 of the Court of the Sub-Divisional Officer, Agra, dated 3-2-1941, is null and void. An injunction was also prayed for against the defendant restraining her from executing the said decree.

(8) The defendant Revti Devi, wife of Raghubar Dayal, filed a written statement in which she stated that the sons of Lachhman Prasad lived separately and carried on cultivation separately. It was also stated that the descendants of Jwala Prasad also separated and carried on their cultivation separately. The existence of any joint property belonging to Lachhman Prasad's family or the accruing of any income therefrom was denied. It was pleaded that Kashi Ram was the sole owner of the business started by him and of the property purchased out of that business. It was pleaded that Raghubar Dayal and Bhagwan Dayal had no share in the business during the life-time of Kashi Ram.

It was further pleaded that after the death of Kashi Ram, Raghubar Dayal and Bhagwan Dayal became the owners of a moiety share each in the properties purchased and acquired by Kashi Ram, under his will dated 13-9-1919. It was pleaded that the entire property which was purchased after the death of Kashi Ram was owned half and half by Raghubar Dayal and Bhagwan Dayal plaintiff, and that after the death of Raghubar Dayal, the defendant was the owner of Raghubar Dayal's share and also had a half share in everything purchased subsequently because it was purchased out of the assets in which she had a half share. The case of re-union set out in paragraph 9 of the plaint was not admitted. There was also a plea that the judgment in revenue suit No. 15 of 1939 was final and binding on the parties.

(9) The learned Civil Judge was of the view that since Kashi Ram belonged to a separate

branch and out of the four sons of Jwala Prasad only two joined with Kashi Ram, a joint family within a joint family was not created, and that Kashi Ram, Raghubar Dayal and Bhagwan Dayal in themselves, could not form such a smaller joint family under the Hindu Law. The learned Civil Judge came to the conclusion that Raghubar Dayal and Bhagwan Dayal had separated from their brothers, Banwari Lal and Ramlal, that there had been a separation also, so far as Kashi Ram was concerned, in the family of Lachhman Prasad, but that Kashi Ram, Raghubar Dayal and Bhagwan Dayal plaintiff had reunited in fact, though the plaintiff could not be said to have legally re-united with Kashi Ram as it was not shown that the plaintiff was in existence when Kashi Ram separated.

The view of the learned Civil Judge seems to be that qua the share of Kashi Ram, the position was that it was Kashi Ram's self-acquired property, but since Kashi Ram had willed the property to both Raghubar Dayal and Bhagwan Dayal, and they had re-united amongst themselves also when they re-united with Kashi Ram, therefore, the property which came to them by will had, by the fact of their living jointly, messing jointly and managing jointly, been given the impress of joint family property.

The learned Civil Judge was clearly of the view that Kashi Ram could not be said to be joint with his nephews, Raghubar Dayal and Bhagwan Dayal, and that his share of the property must be deemed to have belonged to him in severalty. So far as the issue of 'res judicata' was concerned, the view of the learned Civil Judge was that so far as village Chauli was concerned, the question of title could not be gone into and the claim about half of Chauli village was barred by the rule of 'res judicata'.

(10) The controversy in this appeal has centred round several points and it is desirable to deal with each point under a separate sub-head.

A.—Was there a separation, or did Lachhman Prasad's male descendants continue to live jointly?

(11) The plaintiff's case, as set out in the plaint as regards this point, was perfectly clear that there never had been a separation. On the other hand, the defendant's case was that the sons of Lachhman Prasad lived separately and that the descendants of Jwala Prasad had also separated.

(12) Learned counsel for the plaintiff-respondent contended in arguments that there had, in fact, been no separation at all. He argued that if there was once a joint Hindu family and if it possessed some property, the presumption was that the entire family continued joint and that the burden of proving separation was on the person asserting it, namely, here on the defendant. Learned counsel invited attention to the following pieces of evidence and argued that the continued existence of a joint family and property is proved.

(i) Statement of Puttu Lal, page 391, at pages 392-393 which runs as follows—

> "I am the brother and the General Attorney of the plaintiff (Mst. Revti Devi). I cannot say the numbers of the occupancy holdings at Naugaien, nor can I state the Mahals. The occupancy holdings have been in existence from the time of the father of Kashi Ram and Jwala Prasad. The houses and groves had been in existence from the time of the father of Jwala Prasad..... Kashi Ram, Raghubar Dayal and Bhagwan Dayal used to live at Agra in one and the same house, and they were joint in mess. Kashi Ram was the head."

But this witness also said that—

> "Jwala Prasad and Kashi Ram partitioned the fields privately..... The houses and groves too were partitioned..... After the death of Kashi Ram, Bhagwan Dayal and Raghubar Dayal became separate, but the business remained joint. Both of them used to live separately in one Haveli..... In the life-time of Raghubar Dayal, the goods of Bhagwan Dayal and Raghubar Dayal used to be kept separate."

(ii) Revti Devi's evidence, page 397, at page 399 bottom, which runs as under—

> "Those fields were of the time of Kashi Ram's father."

But she also says that—

> "A partition in respect of these fields might have taken place beforehand."

In her examination-in-chief, she has clearly stated that Bhagwan Dayal, Banwari Lal, Raghubar Dayal and Ram Lal lived separately, and that Kashi Ram and Jwala Prasad also lived separately. Therefore, although the evidence suggests that there was once joint status and joint property, it also tends to show that there was subsequent separation, and at least an informal partition of joint property. The learned Civil Judge has relied upon the statement of Smt. Revti Devi which suggests partition, and has pointed out that even the plaintiff has asserted that the two other brothers of Raghubar Dayal and Bhagwan Dayal were separate.

This cannot be denied. The fact that Kashi Ram had separated also seems clearly evident from the evidence and the circumstances of the case. Once separation has been proved in the case of these individual members, there is no presumption left of jointness, and keeping in view the fact that the plaintiff himself has submitted an alternative case of re-union and denies that the two other brothers had any rights in the suit property, there can be little doubt that the finding arrived at by the learned Civil Judge in regard to the family having ceased to be joint is a correct one.

The evidence regarding joint living, messing and worship is substantially with reference to three persons Kashi Ram, Raghubar Dayal and Bhagwan Dayal, and its real bearing is on the question of re-union; there is little evidence of a satisfactory character with reference to family members as a whole. No accounts have been filed to show that the entire family funds and dealings were treated as joint amongst all the descendants of Lachhman Prasad. The evidence in the case does not satisfy

me that up to the date of the suit Lachhman Prasad's family continued joint in status and property.

B.—'Could Kashi Ram, Raghubar Dayal and Bhagwan Dayal be regarded in Hindu Law as forming, in themselves, an undivided family owning joint family property as a corporate body within a larger joint family'?

(13) It has been clearly laid down in — 'Sudarsanam Maistri v. Narsimhulu Maistri', 25 Mad 149 (A), that:

> "So long as the family remains an undivided unit, two or more members thereof, whether they be members of different branches or of one and the same branch of the family....., can have no legal existence as a separate independent unit; but if they comprise all the members of a branch or of a sub-branch, they can form a distinct and separate corporate unit within the larger corporate unit and hold property as such."

Two brothers out of four and an uncle do not satisfy this test.

(14) The view taken in this Madras case — '25 Mad 149 (A)' has been followed in the case of — 'Himmat Bahadur v. Bhawani Kunwar', 30 All 352 (B), and has quite recently been approved of by their Lordships of the Supreme Court in — 'Sidheshwar Mukherjee v. Bhubeneshwar Prasad', AIR 1953 SC 487 (C). At p. 491 it has been observed as follows:

> "It has been observed in a Madras case — 25 Mad 149 at p. 155 (A)', and we think rightly, that so long as the family remains joint, all the members of a branch or a sub-branch of the family can form a distinct and separate corporate unit within the larger unit. Of such a smaller unit consisting of the father and his sons, the father would undoubtedly be the head and legal representative, although he is not the head of the larger unit."

(15) The question formulated under sub-head B must, therefore, be answered in the negative. This discussion presupposes that there was no partition, which is contrary to the facts of the case.

C.—"Was there a re-union between Kashi Ram, Raghubar Dayal and Bhagwan Dayal?"

(16) Once there has been a separation, there is a heavy onus on the party asserting a re-union. To constitute a "re-union", there must be an intention of the parties to re-unite in estate and interest. The mere fact that the parties who have separated live together or trade together after partition, by itself, would not amount to a "re-union". 'Re-union' implies an agreement between the parties to re-unite in estate with the intention to remit themselves to the former status as a member of a joint family.

(17) A re-union in estate also must take place between the very persons who are parties to the original partition. (His Lordship discussed the evidence on the question of re-union and concluded:)

(18-29) In view of the entire circumstances I am of the view that it has not been established that there was any re-union between Kashi Ram, Raghubar Dayal or Bhagwan Dayal, or any two of them.

(30) I might add that the plaintiff's case is not that there was a re-union between Raghubar Dayal and the plaintiff for the first time after Kashi Ram's death. The re-union set up was re-union with each other during the life-time of Kashi Ram, which case I have found to be not made out.

D.—"What is the effect of the decision of the judgment and decree in suit No. 197 of 1933?"

(31) It has already been stated that this was a suit brought by Smt. Revti Devi for her share of the profits of village Chauli. The suit was under the Agra Tenancy Act (3 of 1926). Under S. 271 of the said Act, if a revenue court is of the view that a question of proprietary title has arisen in the case before it, it has to frame an issue in this regard and send the record for a finding by the particular civil Court which would have jurisdiction to decide the question of title were the suit originally filed in the civil Court.

The finding of the civil Court, when it is returned, has to be accepted by the revenue court, and the decree has to follow upon the finding so accepted and the other findings recorded by the revenue court itself. The provisions of Act 3 of 1926 differ in this respect from the provisions of the previous Act 2 of 1901. Under that Act, the revenue court itself could, if it so chose, decide the question of proprietary title, or it could stay the suit and relegate the parties to a suit in a competent civil Court on the question of proprietary rights.

(32) In cases where the revenue court itself had decided the question of proprietary rights, the decision on the issue of proprietary rights has been considered by our High Court to be 'res judicata' in subsequent proceedings in the civil Court. (See — 'Ubaid Ullah Khan v. Abdul Jalil Khan', AIR 1937 All 481 (D)). In that case the suit was filed in 1932 for mesne profits for years from 1916 to 1929 under the Agra Tenancy Act 3 of 1926.

In that case it was indicated that it was then too late, in view of the state of authorities of this Court, to contend that the decision of a revenue court upon a question of title could not operate as 'res judicata' in a suit in a civil Court between the parties, but, as in that case the revenue court had not, as it should have done, sent an issue on title to the appropriate civil Court for a finding, the decree of the revenue court was treated as a nullity.

(33) It has been contended that, in view of the changed position under the Agra Tenancy Act, the previous rulings are not applicable. The argument is that under the old Act, the revenue court was itself entitled to give a finding on the question of title, but now the revenue court, which even though it may be a court of exclusive jurisdiction is not entitled to give a finding of its own on the question of title. This finding has to be given by an appropriate civil Court.

Therefore, it is argued that so far as the question of title is concerned, it cannot be said that the revenue court, the court of exclusive jurisdiction, gives any finding on the question of title. In this way, it is suggested that in the case of a judg-

ment and decree of the revenue court under the Agra Tenancy Act, 1926, the principles enunciated by their Lordships of the Supreme Court in — 'Raj Lakshmi Dasi v. Banamali Sen', AIR 1953 SC 33 (E), will not be applicable.

(34) There can be no denying the fact that the revenue court is still a court of exclusive jurisdiction. Moreover, a civil Court, when it is dealing with an issue sent by the revenue court to it under S. 271, Agra Tenancy Act 3 of 1926, does not really function as a normal original civil Court. The issue is decided by it not as a result of any plaint being presented to it in the first instance. It also cannot give any sort of a decree embodying its finding on the issue of title. Further, at no point of time does a revenue court lose seisin of the case. The case at no time 'pends' in the civil Court and is not there registered as a fresh suit.

(35) In these circumstances a civil Court, when dealing with the issue of title, appears to me to be itself exercising a sort of special and exclusive jurisdiction. The position is possibly analogous to the case when the High Court is answering a reference under the Income-tax Act. It has been held that when the High Court does so, it really acts in a special jurisdiction. (See — 'Commr. of Income Tax, Bengal v. Hungerford Investment Trust Ltd.', 62 Cal 671 (F)).

(36) Moreover, it could not be said that the issue as to title is a separate matter distinct from the main revenue suit. I am inclined to agree with the contention of Mr. Pathak that the sending of an issue to the so-called civil Court is merely a procedural matter, and that when the revenue court accepts the finding, as it must, and acts upon the finding, it really adopts that finding and the finding in effect, becomes the revenue court finding. If an analogy may be brought to aid, the position is somewhat like the one when a decree is passed upon an award, or a civil court records a finding according to the statement given on special oath by a particular person in a pending case, parties having agreed to abide by that statement.

Therefore, in my view, there is really no substantial difference between the position under the 1926 Act, and the position under the previous Act of 1901 in this regard, and since the revenue court is undoubtedly a court of exclusive jurisdiction, S. 11, Civil P. C., would not apply in terms, but the principles thereof would apply, and should be applied in order to prevent inconsistent decisions.

(37) Having disposed of the question "whether a decision of the revenue court under the Agra Tenancy Act, 1926 could operate as 'res judicata' in subsequent civil proceedings" the next question which arises is—

E.—"Does the judgment and decree of the revenue court, based on the finding recorded by the Munsif in suit No. 15 of 1939, operate as res judicata in this case?"

(38) There have been two controversies under this sub-head. Firstly, it is said that the only question that was decided in suit No. 15 of 1939 was, whether Smt. Revti Devi was the proprietor of the specific property in suit, namely a half share in village Chauli, Khewat No. 1, and that the question whether she was proprietor of the entire estate of Raghubar Dayal, was not directly or substantially in issue. Secondly, it is contended that if the Court found that Raghubar Dayal was owner of a half share, and on his death his wife became owner of his share as life owner and Raghubar Dayal's share does not devolve on Bhagwan Dayal, then the Court was only giving its reason for coming to the conclusion that she was the proprietor of the property in suit. It was argued that only findings operate as 'res judicata' and not reasonings for the finding.

(39) No doubt, the issue on which the civil Court recorded the finding is framed as follows:

"Is defendant proprietor of the property in suit?"

There is, however, no doubt that the whole question of whether Raghubar Dayal and Bhagwan Dayal were joint tenants or tenants in common, was gone into with specific reference not only to village Chauli, Khewat No. 1, but generally with reference to the entire estate held by Raghubar Dayal and Bhagwan Dayal. No special features relating to village Chauli, Khewat No. 1, which would put it on a footing different from other items of property comprising the estate of Raghubar Dayal and Bhagwan Dayal, was brought out by the civil Court in the course of its finding on the issue sent to it. In my view one has got to look at the substance of the issue and not at the mere wording of it, and one has to consider the respective cases of the parties put before the Court, and the judgment and decree as a whole.

(40) The answer to the issue "is the defendant proprietor of the property in suit" necessarily involved a consideration of what was the nature of Raghubar Dayal's estate. This question has clearly been decided in the former suit. The conclusion regarding the ownership of the estate of Raghubar Dayal, to my mind, does not constitute the reason for finding on the issue "is the defendant proprietor of the property in suit". That conclusion itself disposes of the issue, for the estate of Raghubar Dayal admittedly also comprised the village Chauli, Khewat No. 1.

(41) In my view the main issue in this case is the same as the main issue in the revenue suit, namely, what was the nature of Raghubar Dayal's estate.

(42) It is significant that the plaintiff should have felt that the decree in the revenue suit affects his right in regard to the entire assets of Rahgubar Dayal, and that parties should have asked that the very evidence filed in the revenue court should be treated as evidence in this case. I, therefore, find in favour of the defendant's contention that the question of the right of Smt. Revti to the estate of Raghubar Dayal cannot be re-raised.

(43) The net position, therefore, is that the plaintiff has failed to prove that Lachhman Prasad's family continued to be joint up to the date of the suit, and also failed to prove re-union between Kashi Ram, Raghubar Dayal and the plaintiff. The plaintiff has also failed to establish that there could be a joint family within a joint family under Hindu Law comprising of himself,

Raghubar Dayal and Kashi Ram. The only other position possible is that Kashi Ram, Raghubar Dayal and the plaintiff have carried on their affairs together as co-partners, and that after the death of Kashi Ram the plaintiff and Raghubar Dayal have continued as co-partners.

There is no rule of survivorship to the estate of a co-partner. It is not proved in this case either that there was any term of partnership which provided for the application of the rule of survivorship. The Courts do not lean towards the creation of joint tenancies, and so far as Hindu Law is concerned, except in the case of coparcenary between the members of an undivided family, the principle of joint tenancy is unknown to Hindu Law (See — 'Gopi v. Mt. Jaldhara', 33 All 41 (G)). It is not really necessary to examine the case further from the angle of a partnership, because that was not the case which was really submitted to us in the course of argument.

(44) Therefore, despite the careful advocacy of Mr. Gopal Behari, the plaintiff's case, in my view, fails. He is not entitled to the relief sought by him.

(45) This appeal must, therefore, be allowed with costs, and the plaintiff's suit must be dismissed with costs. I order accordingly.

(46) The cross-objection is dismissed with costs.

AGARWALA J.:

(47) I agree in the conclusion arrived at by my learned brother that this appeal should be allowed but for different reasons.

(48) The facts of the case are narrated in the judgment of my learned brother and it is not necessary to repeat them.

(49) The following points arise for decision in this appeal:

(1) Was there a separation among the descendants of Lachman Prasad or did they continue to live jointly?

(2) If there was a separation, did Kashi Ram, Raghubar Dayal and Bhagwan Dayal reunite?

(3) If the descendants of Lachhman Prasad were joint could Kashi Ram, Bhagwan Dayal and Raghubar Dayal form a smaller joint family within the larger joint family for the purpose of starting a business and acquiring joint family property separate from the property of the larger joint family?

(4) What was the nature of the property acquired by Kashi Ram, Raghubar Dayal and Bhagwan Dayal? Was it joint family property of these three persons or, at any rate, of Raghubar Dayal and Bhagwan Dayal or did they have separate interests in the same?

(5) What is the effect of the decision of the judgment and decree in suit No. 197 of 1933?

(50) Point No. 1: Was there a separation among the descendants of Lachhman Prasad or did they continue to live jointly?

The ordinary presumption of Hindu law is that a Hindu family is joint and continues to be joint and the burden of proving separation is on the party alleging it. I do not think that the defendant-appellant, on whom the burden lay, has succeeded in establishing separation. In order to prove separation, it is not enough to show that different members of the family lived, i.e., resided and messed separately. It is necessary to establish that either there was a partition of the joint family property by metes and bounds or at least that the members of the family dealt with it as if they had separate defined shares therein. The joint family property in which all the descendants of Lachhman Prasad are interested is admittedly none other than the property mentioned in Sch. A of the plaint.

It is nobody's case that in the properties mentioned in the other schedules (with which we are really concerned in the present case and which are not ancestral properties), the descendants of Lachhman Prasad other than Kashi Ram, Raghubar Dayal and the plaintiff ever had any interest. The evidence on the record only establishes separate living and messing and cultivation of fields separately. All these acts could have been done for the sake of convenience only. The statements of Puttu Lal and Reoti Devi quoted in the judgment of my learned brother do not show anything beyond this.

There is no reliable evidence on the record to prove that there was even a notional partition of the property mentioned in Sch. A or that its profits were enjoyed in defined shares by the different members of the family. No account books have been produced and we do not know how the profits of the ancestral property mentioned in Sch. A were dealt with. The fact that Kashi Ram, Raghubar Dayal and the plaintiff lived separately from other members of the family and carried on a business out of the income of which valuable properties mentioned in Schs. B and C were acquired has no bearing upon the jointness of the family, qua the ancestral property in Sch. A.

(51) No. 2. 'If there was a separation, did Kashi Ram and Raghubar Dayal re-unite'?

Since a partition between Kashi Ram, Raghubar Dayal and Bhagwan Dayal has not been established there can be no question of a re-union between them.

(52) No. 3. If the descendants of Lachhman Prosad were joint, could Kashi Ram, Bhagwan Dayal and Raghubar Dayal form a smaller joint family within the larger joint family for the purpose of starting a business and acquiring joint family property separate from the property of the larger joint family?

On behalf of the defendant-appellant it was urged that, even if Kashi Ram, Raghubar Dayal and Bhagwan Dayal had not separated from the other descendants of Lachhman Prasad and still formed a joint Hindu family along with those descendants, it was not possible in Hindu law for these three persons to form a smaller joint family for the purpose of acquiring property separately from the bigger joint family. In support of this proposition reliance was placed upon the judgment of Sir Bhashyam Ayyangar J. in — '25 Mad 149 (A)', which it was contended has been followed by

this Court in — '30 All 352 (B)' and by the Supreme Court in — 'AIR 1953 SC 487 (C).

(53) In — '25 Mad 149 (A)', Sir V. Bhashyam Ayyangar J. pointed out that the Mitakshara doctrine of joint family property is founded upon the existence of an undivided family as a corporate body and the possession of property by such corporate body and that therefore the first requisite is the family unit and the possession by it of property is the second requisite. He observed that the ordinary conception of a Hindu family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition, viz., the undivided state — it forms a corporate body; and that such corporate body, with its heritage is purely a creature of law and cannot be created by act of parties. As corollaries to these principles the learned Judge laid down the following two propositions:

"(1) That there may be one or more families all with one common ancestor, with each of the branches of that family having a separate common ancestor. The unobstructed heritage devolving on such family, with its accretions, is owned by the family as a corporate body, and one or more branches of that family, each forming a corporate body within a larger corporate body may have separate unobstructed heritage which, with its accretions, may be exclusively owned by such branches as a corporate body, and the main family and its branches may possess joint property not only by operation of law but also by act of parties." and

"(2) But so long as a family remains an undivided unit, two or more members thereof, whether they be members of different branches or of one and the same branch of the family, can have no legal existence as a separate independent unit."

(54) The first proposition cannot be doubted but with all respect to the learned Judge I think the second proposition has been too widely stated. No case has been cited to us in which the second proposition was directly in issue and was approved. In — '30 All 352 (B)', the question was whether all members who formed a joint Hindu family at the time of the receipt of the price of the property sold to a stranger were liable to return the whole of the price when the sale was subsequently set aside or the liability was limited to the share in the joint family property which they would obtain in partition.

The Court affirmed that every one of the members of the joint family was liable to refund the whole of the price, and in support of this view relied on the principle that a joint family has unity of juristic existence in its dealings with third persons and has unity of the ownership of the joint property. It was in this connection that the remarks of Sir Bhashyam Ayyangar cited above were quoted by this Court. The point that we have now to determine did not specifically arise for decision in that case. The Supreme Court in — 'AIR 1953 SC 487 (C)', had occasion to refer to the first proposition enunciated by Sir Bhashyam Ayyangar and approved of it. The second proposition did not fall to be considered by their Lordships and they expressed no opinion about it.

(55) The conception of a larger joint family holding joint property as a corporate body and at the same time two or more members whether forming a branch thereof or not, forming a separate joint family and holding joint property as a smaller corporate unit is not foreign to Hindu law. In order to understand this clearly, we shall have to bear in mind certain elementary principles pertaining to Hindu joint families. A joint family originates when a son is born to a person. The father and a son form a joint family. The other descendants of one or both of them continually add to the number of members of the joint family. Thus, in its origin the constitution of the family consists of a common ancestor and his descendants.

Where the father inherited some property from his ancestor, his sons and other descendants up to three generations acquire, according to the doctrine of the Mitakshara, an interest in such property by birth. Their interest is called 'unobstructed heritage' because they acquire it by birth. Property acquired by inheritance upon the death of another is called 'obstructed heritage'. The former kind of property and not the latter is joint family property. Property subsequently acquired by the family or by individual members thereof with the aid of joint family property or if not so acquired, thrown in the common stock also becomes joint family property. A joint family owns the property as a corporate unit.

If in the family there are sons of the common ancestor, then the joint family is said to consist of branches each of which has a separate common ancestor. These branches may themselves acquire properties as separate corporate units. In course of time upon the death of the common ancestor, or upon the death of the common ancestor of a branch the constitution of a family changes. It now consists of collaterals instead of a common ancestor and his descendants. The above change may be brought about not only by deaths, but by partition in the family. Any member of a joint family whether he is the head of a branch or not may separate from the rest of the coparceners at his sweet will at any time he likes.

Likewise two or more members whether belonging to the same branch or not may separate from the rest of the members. In such an event, if the separating members intend that they should remain joint 'inter se', there is nothing to prevent them from remaining joint. Likewise the other members of the family from whom two or more members have separated, may, if they so intend, continue to remain joint at the time of the separation of the former. The law is settled that the criterion is one of their intention and there is no presumption either in favour of separation or of jointness 'inter se' between the remaining members of a joint family when one or more members separate from them.

"Just as there may be partial partition as to members of a joint family, so also there may be partial partition as to property. It is open to the members of a joint family to make a divi-

sion and severance of interest in respect of a part of the joint estate, while retaining their status as a joint family and holding the rest as the properties of a joint and undivided family." (Mulla's Hindu Law, 11th Edn., sec. 328, page 433).

No doubt in the case of a division of interests in respect of a part of the joint estate, the presumption is that the separation is complete and that the members of the family hold the rest of the property not as coparceners but as tenants-in-common unless an agreement to hold this property as joint family property is proved. — 'Ramalinga Annavi v. Narayana Annavi', AIR 1922 PC 201 (H). But the point is that by agreement, there can be separation in respect of one item of joint family property only, while the rest of the property is held as members of a joint family.

Suppose now that a joint family consists of A, B and C brothers and their sons D, E and F respectively. A and his son D demand a partition of a part of the joint property as against B and C and their sons E and F. They can by agreement between themselves separate A and D's share in the part of the joint estate from that of B, C, E & F. They may further agree that A and B will remain joint as to the share obtained by them while B, C, E and F will remain joint as to the share allotted to them.

In a case of this nature, the position is that there are now three joint families as separate corporate bodies instead of one. First, the larger joint family consisting of A, B, C, D, E and F and owning as a corporate body the undivided portion of the estate; second, a joint family consisting of A and D owning as a corporate unit their share out of the divided part of the estate and third, a joint family consisting of B, C, E and F owning as a corporate body their share of the divided part of the estate. Thus it is established that two or more members of a larger joint Hindu family may by agreement form a smaller joint family and own property as a corporate body separately from the property of the larger family.

(55a) In my judgment there is no valid reason why two or more members of a larger joint family, whether belonging to one branch or not, may not form a separate joint family and acquire property by their joint labour and exertions as members of a smaller joint family—a corporate unit by itself. It is often said that a joint family cannot be created by agreement. By this is, however, meant that two strangers cannot join to form a joint Hindu family. A joint Hindu family comes into existence in the natural course, as indicated already, but once having come into existence, two or more members of such family may by agreement constitute of themselves a smaller joint family if they acquire property by partition or joint labour or otherwise as a corporate unit.

(56) The question whether in a particular case some of the members of a larger joint Hindu family, who have jointly acquired property separately from the other members of the larger family, have acquired it as joint family property of their separate independent unit or they have acquired it as tenants-in-common in their individual right, is a matter of intention and proof. If the intention of the joint acquirers is that they should acquire the property in their capacity as members of a joint Hindu family in which their sons and descendants should also have shares, then the property will be impressed with the character of a joint family property of the joint acquirers and their descendants.

If, on the other hand, their intention be that they should be interested in the property in defined shares, they have acquired the property as tenants-in-common in their individual capacity. But one thing has to be noted in this connection. When the joint acquirers are brothers, they have an equal interest 'inter se' in the joint family property of the larger family, and when they combine for the purpose of acquiring separate property in their capacity as constituting a separate joint family unit, their interest in the newly acquired property will also be equal.

But when the members of the independent unit are not brothers but are related between themselves as uncle and nephews, their interests 'inter se' in the joint property of the larger family are not equal and so their interests in the newly acquired property if it is intended to be their joint family property cannot be equal, but must be of the same nature as their interest in the property of an original joint family of which they alone are the survivors.

One important test, therefore, in ascertaining the intention of joint acquirers—whether they intended that the joint acquisition should be impressed with the character of joint family property or not—is to find out whether they intended that their interest in the property so acquired will be of the same nature as they would have in the joint property of an original joint family of which they are the survivors. If that was not their intention they could not be said to have acquired the property as members of a joint Hindu family. So far as the point of law under discussion is concerned I would answer it in the affirmative.

(57) Point No. 4. What was the nature of the property acquired by Kashi Ram, Raghubar Dayal and Bhagwan Dayal? Was it joint family property of these three persons or, at any rate, of Raghubar Dayal and Bhagwan Dayal or did they have separate interests in the same?

Kashi Ram, plaintiff's uncle, took up service in the army in the first instance. He was there for four or six years after the mutiny of 1857. Then he joined the police which service he left some time between 1884 and 1885. Then he began money-lending business, out of the income of which all the properties were acquired. It was admitted by the plaintiff that Kashi Ram began money-lending business, that that business was carried on in the name of Kashi Ram Sarraf, that he and Raghubar Dayal were called by Kashi Ram to Agra where the business was carried on, that this happened after four years of starting the business and that the plaintiff was 10 or 11 years old, while Raghubar Dayal was 15 or 16 years old at that time.

From the plaintiff's own admission it is clear that the business was started by Kashi Ram alone and that the plaintiff's case that it was started by Kashi Ram, Raghubar Dayal and himself was not correct. No doubt, after the plaintiff and Raghubar Dayal had been called to Agra they used to sit at the shop but they were minors at that time and there could be no question of their having contributed any assets in the business.

The plaintiff and Raghubar Dayal were maintained by Kashi Ram and the mere fact that they used to sit at the shop which belonged to Kashi Ram exclusively would not make them partners or co-sharers or coparceners in the business. It was an act of generosity on the part of Kashi Ram to have called his nephews to Agra to maintain them and educate them and such an act could not, without other evidence, be construed as entitling them to a share in the business.

(58) It no doubt appears that Kashi Ram intended that Raghubar Dayal and the plaintiff should have a share in the properties acquired by him from out of the income of the business. For, we find that from November 1890 onwards Kashi Ram began to associate the name at first of Raghubar Dayal, the elder brother, and later both of Raghubar Dayal and the plaintiff along with him in all the transactions of loan, purchases, sales, hypothecation etc. Thus we find that in the bond dated 27-11-1890, executed by one Kammo, Kashi Ram and Raghubar Dayal are stated to be the co-creditors. In the mortgage deed dated 21-12-1892, Kashi Ram and Raghubar Dayal are the co-mortgagees.

In the hypothecation bond of 6-8-1893, Kashi Ram and Raghubar Dayal are again the co-mortgagees. In the sale-deed dated 15-3-1899, the property is acquired in the name of Kashi Ram alone but the hypothecation bond of 6-8-1893, which stood in the name of Kashi Ram and Raghubar Dayal is set off towards the sale price. From 1903 onwards the names of Kashi Ram, Raghubar Dayal and Bhagwan Dayal appear in all the documents executed by way of hypothecation bonds, sale-deeds, mortgage-deed, etc., in their favour. Suits are instituted by all the three persons together and decrees obtained by them in their joint names.

This state of affairs continued up to the death of Kashi Ram in 1924. Numerous documents were executed during this period. All of them were by, or in favour of, all the three. The most important document, however, to be considered in this connection is the will of Kashi Ram dated 13-9-1919.

In this will Kashi Ram declares that he has got moveable and immoveable property, cash, ornaments, utensils of every sort and documents under which money was due to him by debtors which properties are self-acquired, that he has also got zamindari in mauza Chawali, purchased from his own money that he has a share in occupancy holding in mauza Naugaon, that Raghubar Dayal and Bhagwan Dayal, sons of Pandit Jawala Prasad, his nephews, have been living with him for a very long time, that he has brought them up like his own sons, that he has performed all the rites relating to marriage and sacred thread and that both of them are partners in the money-lending business.

After stating all these facts he goes on to make a bequest of all the properties to both of them stating that Raghubar Dayal and Bhagwan Dayal shall be the owners in possession and appropriation in equal shares of his moveable and immoveable properties and assets. This document to my mind clearly negatives the theory that the properties were acquired by Kashi Ram and his two nephews as members of a joint Hindu family; for in the first place Kashi Ram considered that the properties were his own self-acquired estate and secondly, as such he makes a bequest of it to his two nephews in equal shares.

Having regard to the context, the mention of the nephews as partners in the money-lending business is a statement more of his desire than that of a legally binding relationship. Even if the nephews were 'partners', they were not coparceners so far as the business or the property were concerned. In the case of properties acquired by Raghubar Dayal and the plaintiff jointly with Kashi Ram, the presumption is that all the three had an equal share therein.

This is an additional proof of the fact that they were not acquired with the intention of being the properties of a joint family unit because as stated in connection with point No. 3, in order that the separate property acquired by two or more members of a joint family be impressed with the character of joint family property, the interest of the acquirers must be of the same nature as their interest in the joint family properties of an original joint family of which they alone are the survivors. If Raghubar Dayal and the plaintiff were co-tenants in the properties acquired by them along with Kashi Ram, their status with respect to the properties bequeathed to them by Kashi Ram could not be different specially when by the will a defined moiety share was given to each brother.

(59) The same observations will apply to the properties acquired after the death of Kashi Ram as there is no evidence of blending of the self-acquired property with the joint family property mentioned in Sch. A.

(60) The mere fact that the three persons lived together and messed together would not be enough to raise the presumption that the property acquired by them was their joint family property; for one member of a joint Hindu family may acquire separate property for himself even though he is living and messing jointly with the other members of the family. The admissions of the defendant-appellant to the effect that her husband was joint with the plaintiff are not very material because even if they were members of a joint Hindu family (which they were qua the properties in Sch. A) they need not necessarily have acquired the properties in Schs. B and C as such members.

Whenever she was asked whether she had a share in the properties in dispute mentioned in Schs. B and C she always said that she had such interest which could only be possible if her husband and the plaintiff had defined shares in those properties. Further, these admissions were made for the pur-

poses of suits as against third parties when the interests of both the plaintiff and the defendant-respondent required that the admissions be made in order to save the suits as they had been filed by the plaintiff alone. For these reasons, the admissions cannot be construed against the contention of the defendant-respondent.

(61) Any acquisition by Bhagwan Dayal after the death of Raghubar Dayal out of the income of the business which was owned by himself and the defendant would belong to both of them, even though it was acquired in the name of Bhagwan Dayal himself, as Bhagwan Dayal would be deemed to hold the property as trustee for the defendant.

(62) This leads us to the last point urged before us, namely, whether the suit as a whole or in part is barred by the principle of res judicata. The earlier suit (No. 197 of 1933) was one for profits of the share of the defendant-respondent in village Chawli. The value of the property then in dispute was admittedly less than Rs. 5,000/-. A suit for profits of a mahal was cognizable exclusively by a revenue court as provided by S. 230, Agra Tenancy Act, 1926, which was then in force. But S. 230 expressly made the exclusive jurisdiction of the revenue court to try such suits subject to the provisions of S. 271. Section 271 provided that

> "where the question of proprietary right is in dispute in a case, the revenue court shall submit an issue on that question and submit the record to the competent civil Court for the decision of that issue only. The civil Court, after reframing the issue, if necessary, shall decide that issue only and return the record together with its findings on that issue to the revenue court, which submitted it. The revenue court shall then proceed to decide the suit accepting the finding of the civil Court on the issue referred to it."

Section 271 further went on to provide that

> "every decree of a revenue court passed in a suit in which an issue involving a question of proprietary right has been decided by a civil Court shall if the question of proprietary right is in issue also in appeal, be appealable to the civil Court which has jurisdiction to hear appeals from the court to which the issue of proprietary right has been referred; and if the question of proprietary right is not in issue in appeal, be appealable to the revenue court."

Three things are clear; first, that the revenue court has no jurisdiction to try an issue of proprietary right and a civil Court alone has jurisdiction to try it; second, that the revenue court is bound to accept the decision of the civil Court and, thirdly, that an appeal against the decision of the revenue court lies to the civil Court and not to the revenue court if in the appeal also the question of proprietary title is in dispute. It has been consistently held that by the expression 'competent civil court' to which the issue of proprietary title has to be referred by the revenue court, is meant the civil Court which has jurisdiction to try a suit in respect of the title to the property in question.

Thus, if the value of the property is less than Rs. 5,000/- the issue of proprietary title is to be sent to the Munsif; if it is over Rs. 5,000/- the issue is to be sent to the Civil Judge. If an issue is sent to the Munsif when the property is of the value of over Rs. 5,000/-, his decision is without jurisdiction and is not binding — ('Mt. Dan Kuer v. Ewaj Singh', AIR 1931 All 28 (2) (I). The mere fact that the decision of the Civil Court is incorporated in the decree of the revenue court does not mean that the decision on the issue of proprietary title is of the revenue court, and further, it does not mean that the revenue court had exclusive or even concurrent jurisdiction to try that issue. Indeed if it attempted to decide the issue itself, its decision will be a nullity, AIR 1937 All 481 (D)).

(63) The principles of 'res judicata' so far as suits are concerned are embodied in S. 11, Civil P. C. Under that section certain limitations are imposed upon the application of the doctrine of 'res judicata'. One of these limitations is that the Court which decided the previous suit must be a Court competent to decide the subsequent suit. It is true that these limitations apply only to suits and that the wider principles of the doctrine of 'res judicata' do not admit of the application of these limitations (AIR 1953 SC 33 (E)). Mahajan J., as he then was, in delivering the judgment of the Supreme Court after quoting from Sir Lawrence Jankins' judgment in — 'Sheoparsan Singh v. Ramanandan Prasad', AIR 1916 PC 78 (J), observed that—

> "When a plea of 'res judicata' is founded on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit. A plea of 'res judicata' on general principles can be successfully taken in respect of judgments of courts of exclusive jurisdiction, like revenue courts, land acquisition courts, administration courts etc."

Reliance was placed upon the first sentence quoted above namely, "the court that heard and decided the former case was a court of competent jurisdiction" and it was urged that the revenue court which tried the former suit was competent to try that suit, and that therefore its decision is binding on the question of proprietary title. The sentence quoted above read in the context means that the court that heard and decided the former case must be a court of competent jurisdiction to try the issue which has been raised in the subsequent case.

The next sentence clearly points out that the decision of courts of exclusive jurisdiction could be held to be binding on general principles only when such courts had jurisdiction to decide the issue which is in dispute in the subsequent case and not otherwise. A reading of Ss. 230, 271 and 272 shows that the revenue courts are debarred from trying the issue of proprietary title which is now in dispute between the parties. The judgment and decree of the revenue court therefore, could not be said to operate as 'res judicata' on the question

of proprietary title on any general principles of law.

(64) The decision of the civil Court on the issue of proprietary title, though given on an issue, will however, be binding as if it were given in a suit between the parties on the same principles as are laid down in S. 11, Civil P. C. For the purposes of S. 11 the decision of the civil Court on the issue of proprietary title in the former revenue suit will be treated on the same footing as if it was given by the civil Court in a suit respecting the title to the property in dispute in that case, and upon that footing it will have to be seen whether that decision is binding between the parties in the subsequent civil suit.

The limitations imposed by S. 11 will govern the matter and the decision of the civil Court in the former suit will only be binding in the subsequent suit, if the former civil Court which decided the issue of proprietary title was competent to try the subsequent suit. It is admitted that the civil Court which tried the issue of proprietary title was not competent to try the present suit. No case has been cited before us in which a contrary view has been taken. The position under the U. P. Tenancy Act of 1939 is the same as it was under the Agra Tenancy Act of 1926. But the procedure provided in the Agra Tenancy Act of 1901 was somewhat different.

Section 199 of the latter Act authorised the revenue Court before which a question of proprietary title was raised, either to require the defendant to institute in the civil Court a suit for the determination of the question within three months, or to determine the question itself. It was provided that if the Revenue Court elected to decide the question itself, it was to follow the procedure laid down in the Code of Civil Procedure and its decision in that case would be binding as the decision of the civil Court itself. Perhaps in such a case the wider principles of the doctrine of 'res judicata' might be applied and it might be held that the revenue Court decision is binding on the parties in the subsequent civil Court. But the same cannot be maintained of a decision given under the Acts of 1926 and 1939. The present suit, therefore, could not be barred by the decision in the former revenue suit.

(65) Nor is it possible to hold that the present suit is barred qua the Chawali property which was the subject-matter of the dispute in the previous revenue suit. Section 11, Civil P. C., applies the bar of 'res judicata' only if the Court which tried the former suit or issue was competent to try the subsequent 'suit', i.e., the whole of the subsequent suit and on this principle even the relief as regards village Chawli cannot be said to be barred by 'res judicata'. But if the subsequent suit is based on two distinct causes of action, or if two separate suits could have lain for the relief regarding village Chawali and for the relief regarding the other property, then one could possibly say the relief regarding village Chawali is barred by 'res judicata'.

For, a party cannot be allowed to get round the bar created by S. 11, Civil P. C., by the mere device of adding some more property to the property in dispute in the previous suit and by raising the valuation of the subject-matter of the subsequent suit thus making it non-cognizable by the Court which decided the former suit. But where, as here, the subsequent suit is based on one cause of nature, which covers not only the property in dispute in the previous suit but the rest of the properties, S. 11 can have no application.

(66) Having regard to my finding on point No. 4 the appeal must succeed and the plaintiff's suit must be dismissed with costs in both the Courts. The cross objection must be dismissed with costs.

BY THE COURT:

(67) We allow the appeal, set aside the decree of the lower Court and dismiss the plaintiff's suit with costs throughout. The cross-objection is dismissed with costs.

V.R.B. Appeal allowed, cross-objection dismissed.

A.I.R. 1954 ALLAHABAD 812 (Vol. 41, C.N. 316)

(LUCKNOW BENCH) KIDWAI AND H. S. CHATURVEDI JJ. (22-7-1954)

Baij Nath Das, Appellant v. Sri Ram Charan Das, Respondent.

First Appeal No. 36 of 1953, against decree of Civil Judge, Hardoi, D/- 25-7-1953.

High Court Rules and Orders — Allahabad High Court Rules (1952), Chap. XIII, R. 13 — Court-fee on — (Court-fees Act (1870), S. 4).

It is only an application to the Court in a matter relating to the printing of the record that requires to be stamped and not applications for preparation of record made to the Registrar or the Deputy Registrar. Preparation of the record is a ministerial function and not a judicial function and hence an application for translation and printing is not required to be stamped. (Para 3)

Anno: Court-fees Act, S. 4 N. 1.

R. B. Lal and R. B. Chaudhri, for Appellant.

KIDWAI J.:

In anticipation of the expiry of the time allowed by the Rules of the Court for the making of an application for the translation and printing of the record and for making an initial deposit the appellant applied to the Deputy Registrar for extension of time. The Office has raised two objections to this application:

1. That the application has been made before the time allowed for an application for printing had expired; and
2. That it should be stamped.

(2) No doubt the application was premature but this does not justify its rejection and it can be considered when the necessity arises. The time has now expired and orders can be passed upon the application by the Deputy Registrar.

(3) Secondly, applications relating to the preparation of the record made to the Registrar (or, at Lucknow, to the Deputy Registrar) are not applications for the exercise of the judicial functions of that Officer. The preparation of the record is a ministerial function and not a judicial function. It

is for this reason that all the work is done by the office and the application for translation and printing is not stamped. Such matters have to be placed before the Court only when, owing to steps not being taken, the appeal might be dismissed, i.e. the judicial function of passing a decree has to be performed. They also come before the Court when an order of the Registrar is objected to and then they assume the form of an appeal to the Court against the order of the Registrar. It is only an application to the Court in a matter relating to the printing of the record that requires to be stamped and not applications to the Registrar (or the Deputy Registrar).

(4) The application is, therefore, entertainable and it will be laid before the Deputy Registrar for his orders.

D.R.R. Appeal allowed.

A.I.R. 1954 ALLAHABAD 813 (Vol. 41, C.N. 317)

MALIK C. J. AND CHATURVEDI J. (24-8-1954)

Banarsi Das and others, Applicants v. State of Uttar Pradesh and others, Opposite Parties.

Civil Misc. Writ No. 827 of 1953 and Civil Misc. Writ Nos. 194, 431, 433 of 1954.

(a) Government of India Act (1935), S. 266(3) — U. P. Regulations (1941), Reg. 3(1) — Regulations if law in force within Art. 372(3) of Constitution — Consultation with Public Service Commission — (Constitution of India, Art. 372(1) and (3), Explanation I).

The Regulations made by the Governor had the force of law, and the Explanation to Art. 372(3) includes within the expression 'law in force' not only laws made by a Legislature but also by 'other competent authority'. The term 'other competent authority' is wide enough to include the Governor or any other authority which has been empowered to make rules and regulations having the force of law. The Regulations, therefore, continued to remain in force till the new Regulations were made in 1954. (Para 9)

(b) Constitution of India, Art. 320(5) — Applicability — (Government of India Act (1935), S. 266 — U. P. Regulations made under).

Article 320(5) does not apply to Regulations made under S. 266, Government of India Act (1935), nor does it invalidate the said Regulations, as Art. 320(5) can only apply to Regulations made under Art. 320(3) of the Constitution. (Para 11)

(c) Constitution of India, Arts. 309, Proviso and 320(3) — U. P. Public Service Commission (Limitation of Functions) Regulations (1954) — Service of Lekhpals if new.

The service of Lekhpals was a new service that was constituted and since it was done under the orders of the Governor, the proviso to Art. 309 of the Constitution gave him that power. (Para 14)

(d) U. P. Land Revenue Act (3 of 1901), Ss. 23 and 234(b) — New service — Effect of non-amendment of S. 23 — Validity of Rules under S. 234(b), if affected.

Section 23 no doubt provides for appointment of Patwaris to each 'halka' and that section has not yet been amended, but it does not take away the right of the Governor to create a new service for each 'halka' or group of 'halkas' if he so desires. In the alternative, even if it be considered to be the same service the mere fact that it has been given a new name would not necessarily affect the question of the validity of the rules framed under S. 234(b). (Paras 16, 17)

CASE REFERRED: Para

(A) (V41) AIR 1954 All 629: (Civil Misc. Writ No. 7854 of 1951-All) 11

S. N. Misra, for Petitioners; Advocate-General, U. P., for Opposite Parties.

MALIK C. J.:

In these four writ petitions, besides the points that were raised in Writ Petition No. 45 of 1954, two other points were raised. As regards the points raised by Mr. Pathak in Writ Petition No. 45 of 1954 no further arguments were raised by learned counsel and our decision in that case would govern these writ petitions also.

(2) Writ Petition No. 827 of 1953 was filed on behalf of Raghubar Dayal and 4 others against the State of Uttar Pradesh, the District Magistrate, Jhansi, and 5 other persons who had been appointed Lekhpals. Writ Petition No. 431 of 1954 was filed on behalf of Chhotan Lal and 6,999 others against the State of Uttar Pradesh, Minister for Revenue and Agriculture, U. P., the Land Reforms Commissioner, U. P., 34 Collectors of various districts, and 105 Sub-Divisional Officers of various Tehsils. Writ Petition No. 194 of 1954 was filed on behalf of Ganga Sahai and 209 ex-Patwaris of District Bareilly, against the State of Uttar Pradesh through Minister for Revenue and Agriculture, the Land Reforms Commissioner, the Collector of Bareilly and 5 Sub-Divisional Officers of various Tehsils in the district of Bareilly. Writ Petition No. 433 of 1954 was filed on behalf of Prem Narain and 432 others against the State of Uttar Pradesh, Minister for Revenue and Agriculture, the Land Reforms Commissioner, Collectors of 7 districts and Sub-Divisional Officers of 15 Tehsils.

(3) The two new points raised in these petitions are:

(1) that under Art. 320 of the Constitution consultation with the Public Service Commission was necessary relating to methods of recruitment to civil services and for civil posts, and as there was no such consultation the appointment of Lekhpals was invalid; and

(2) that the new rules for the appointment of Lekhpals contravene the provisions of the Land Revenue Act and the Land Records Manual and are, therefore, invalid.

(4) In the counter-affidavit filed in Writ Petition No. 827 of 1953 a point has been taken that these petitioners were not entitled to challenge the appointment of Lakhpals as they had no 'locus standi' having no interest in the matter, they having already been disqualified by reason of their resignations having been accepted. It is not necessary for us to go into the objection as to the maintainability

of the writ petition, as on the merits also we are against the petitioners.

(5) Taking up the first point, the relevant portions of Art. 320(3) of the Constitution are as follows:

"……the State Public Service Commission,……
……shall be be consulted—

(a) on all matters relating to methods of recruitment to civil services and for civil posts;……

Provided……the Governor……as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted."

Relevant portions of cl. (5) of Art. 320 may also be quoted and they are as follows:

"All regulations made under the proviso to cl. (3) by……the Governor……shall be laid for not less than fourteen days before……the Legislature of the State……as soon as possible after they are made, and shall be subject to such modifications, whether by way of repeal or amendment, as……both Houses of Legislature of the State may make during the session in which they are so laid."

(6) In exercise of the powers conferred by the proviso to cl. (3) of Art. 320 of the Constitution, quoted above, the Governor of Uttar Pradesh has made the regulations known as "The Uttar Pradesh Public Service Commission (Limitation of Functions) Regulations, 1954" which have been published in the U. P. Gazette dated 6-2-1954, at page 397. Regulation 3(a) of these Regulations provides that it will not be necessary to consult the Public Service Commission

"When the appointing authority in respect of the service or post concerned is an authority other than Governor, unless in any particular case, Government have directed or may, after consultation with the Commission, direct that the service or post in question shall be within the purview of the Commission."

The Patwaris are not appointed under the authority of the Governor and these Regulations would, therefore, have applied if the appointments had been made after the Regulations were made on 29-1-1954. The appointments, in the cases before us, were, however, made in 1953 and these Regulations cannot, therefore, apply to those appointments.

(7) The learned Advocate General has relied on the Regulations issued in the year 1941 under S. 266(3), Government of India Act, 1935, which was analogous to Art. 320 of the Constitution. Section 266(3) of the Government of India Act, 1935, is as follows:

"The Secretary of State as respects services and posts to which appointments are made by him, the Governor-General in his discretion as respects other services and posts in connection with the affairs of the Federation, and the Governor in his discretion as respects other services and posts in connection with the affairs of a Province, may make regulations specifying the matters on which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted but, subject to regulations so made and to the provisions of the next succeeding sub-section, the Federal Commission or as the case may be, the Provincial Commission shall be consulted—

(a) on all matters relating to methods of recruitment to civil services and for civil posts;
……"

In exercise of the powers conferred by sub-section (3) of S. 266, Government of India Act, 1935, the Governor made the regulations which were published in the U. P. Gazette dated 18-10-1941, at page 309. Regulation 3(1) provides that:

"It shall not be necessary to consult the Commission in matters relating to methods of recruitment to civil services and posts, or the principles to be followed in making appointments to such services and posts, or the suitability of candidates for such appointments, in the following cases, namely:

(a) when an appointment is to be made by an authority other than the Governor except in regard to services and posts mentioned in the Schedule;……"

The post of Patwari or Lekhpal was not mentioned in the Schedule, nor were appointments made to those posts by the Governor.

(8) The learned Advocate General has urged that under Art. 372(1) of the Constitution these Regulations continued to remain in force till the new Regulations were made. Article 372(1) of the Constitution provides:

"Notwithstanding the repeal by this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

'Law in force' has been defined in the Explanation I as including a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed. The words 'law in force' have not been defined in Art. 366 of the Constitution but in Art. 366(10) 'existing law' is defined as meaning any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of the Constitution by any Legislature, authority or person having power to make such law, Ordinance, order, bye-law, rule or regulation.

(9) Learned counsel for the petitioners have urged that since the expression 'existing law' has been defined as meaning any law, Ordinance, order, bye-law, rule or regulation, while the expression 'law in force' means a law passed or made by a Legislature or other competent authority, the Regulations made by the Governor should not be included in the term 'law in force'. We do not see why that should be so. The Regulations made by the Governor were under S. 266, Government of India Act, 1935, and had the force of law, and the Explanation to Art. 372(3) includes within the ex-

pression 'law in force' not only laws made by a Legislature but also by 'other competent authority'. The term 'other competent authority' is wide enough to include the Governor or any other authority which has been empowered to make rules and regulations having the force of law.

(10) We, therefore, think that the Regulations made in the year 1941 under S. 266, Government of India Act, 1935, were in force at the time when the Lekhpals were appointed by the various Sub-Divisional Officers or Collectors, and the question of consultation with the Public Service Commission did not arise.

(11) Learned counsel then urged that the Regulations made in 1941 were not placed before the Legislature within fourteen days after they were made. So far as we can find, there was no section analogous to Art. 320(5) in the Government of India Act, 1935, and Art. 320(5) would not apply to Regulations not made under the proviso to cl. (3) of Art. 320 of the Constitution. It has already been held by a Bench of this Court—Mootham and Chaturvedi JJ.—in — 'Jagannath Prasad Sharma v. State of U. P.', AIR 1954 All 629 (A) that Art. 320(5) does not apply to Regulations made under S. 266, Government of India Act, nor does it invalidate the said Regulations, as Art. 320(5) can only apply to Regulations made under Art. 320(3) of the Constitution. We are bound by that decision.

(12) Taking up now the second point raised on behalf of the petitioners that the appointment of Lekhpals was invalid, the learned Standing Counsel for the State has relied on the proviso to Art. 309 of the Constitution as giving power to the Governor to make rules regulating the recruitment and condition of service of persons appointed to posts in connection with the affairs of the Union. Article 309 is as follows:

"Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor or Rajpramukh of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act."

(13) In the affidavits attached to several of these writ petitions extracts from a letter from the Secretary to Government, U. P., to the Land Reforms Commissioner, Uttar Pradesh, dated, 7-3-1953, have been made a part of the affidavit. They deal with the recruitment of Lekphals as a result of the reorganisation of the service of Patwaris. The first paragraph of the letter is as follows:

"Sir,

In continuation of my demi-official letter No. 2627/IB, dated 5-3-1953, I am directed to communicate the orders of the Governor regarding the reorganisation of the service of Patwaris in the context of their mass resignations."

The portion quoted above has been omitted from the extracts filed and the learned Standing Counsel had taken time to produce before us the original, copies of which have been placed today on the record which show that the reorganisation of the service was made under the orders of the Governor. This was followed by a letter dated 27-4-1953, which finally laid down the conditions of service of Lekhpals. This letter also starts with the words:

"Sir,

I am directed to communicate the following orders of the Governor regarding the recruitment of sevice of Lekhpals....."

No objection has been taken by counsel for the other side to our looking into these papers and we have, therefore, placed the two copies on the record of the Civil Miscellaneous Writ No. 827 of 1953. From these letters it is apparent that the service was constituted under the orders of the Governor and that should satisfy the requirements of the proviso to Art. 309 of the Constitution so long as an Act is not passed by an appropriate Legislature.

(14) Learned counsel for the petitioners have urged that Art. 309 of the Constitution may allow the Governor to constitute a fresh service but it cannot give him the power to change the conditions of an already existing service, and they have taken us through the rules framed under the orders of the Governor quoted in the letter dated 27-4-1953, and the rules for the appointment of Patwaris in the Land Records Manual. Learned counsel themselves pointed out the difference between the two. They first referred us to R. 2 and pointed out that the appointment is not to be now confined to the list prepared by the Collector under paragraph 1; the age also is not between 18 and 25 but 18 and 40; the qualifications also are now different.

The minimum educational qualification now is Hindustani Middle or Junior High School Examination. Paragraph 5 has also been amended and now the period of probation is two years. Paragraph 7 has been amended and the salaries have been increased. Paragraph 10 has been amended and a Patwari can now be transferred from one 'halka' to another even in another district. Paragraph 12 has been amended as regards the travelling allowance. Paragraph 17 has been amended and now there are no appeals. There have been certain additions to Chapter II due to the two important departments having been opened—the Planning and the Development Departments. There are thus certain substantial changes though most of the work that was being done by the Patwaris will now be done by the Lekhpals.

As a result of the abolition of zamindari the whole system of revenue administration has changed giving rise to new problems and new conditions. Moreover, the State Government has undertaken schemes of development in the rural areas for which

men specially trained and with new outlook might have been needed. If by reason of these considerations the State Government decided, when they found that a vast majority of Patwaris had resigned, to reconstitute the service on new lines by reducing the number, increasing the emoluments, changing the qualifications for appointment, providing for special training and assigning to them other work besides the work that was originally allotted to the Patwaris, so that they may be of real help in the progress of the rural areas, the mere fact that some of the duties were the same as were performed by the old Patwaris, or even if most of the duties were the same, it would not mean that it was not a new service that had been constituted.

It must in this connection be remembered that to this new service were freshly appointed the old Patwaris who had not resigned and the new rules provided that they were to get a pay in the new scale at the stage that they had reached in the old scale for the Patwaris. If it was not intended to be a new service, no question of re-appointment of old Patwaris, who had never resigned, could arise. The Patwaris who had resigned but had withdrawn their resignations before 4-3-1953, had also to be reappointed, but in their case there was an additional qualification that their service record should have been satisfactory and they should not have attained a certain age. Considering all these facts and circumstances we feel satisfied that it was a new service that was constituted and since it was done under the orders of the Governor, the proviso to Art. 309 of the Constitution gave him that power.

(15) Learned counsel have referred us to a number of letters from the Land Reforms Commissioner and to certain other schedules attached to the affidavits to show that several changes were made in the rules from time to time. That is hardly of any importance for the decision of these cases, but none of the letters etc., written by the Land Reforms Commissioner was after 27-4-1953, when the final rules were framed under the orders of the Governor. Mere frequent changes in the rules will not affect their validity and we need not, therefore, go into this matter in detail.

(16) As regards S. 23, Land Revenue Act, it no doubt provides for appointment of Patwaris to each 'halka' and that section has not yet been amended, but it does not take away the right of the Governor to create a new service for each 'halka' or group of 'halkas' if he so desires. The grievance in these writ petitions is not that the provisions of S. 23, Land Revenue Act, have not been given effect to and Patwaris have not been appointed. The challenge has been made to the appointment of the Lekhpals and to the fact that the petitioners have been excluded from being considered for appointment to that service.

(17) In the alternative, even if it be considered to be the same service the mere fact that it has been given a new name would not necessarily affect the question of the validity of the rules framed under S. 234(b), Land Revenue Act. Reference has been made to the fact that throughout in the Land Revenue Act (3 of 1901) and the Land Records Manual the word used is 'Patwari' and not 'Lekhpal'. Section 23, Land Revenue Act, provides for appointment of a Patwari to each 'halka'. Section 234 gives the State Government power to make rules consistent with the Act regulating the appointment and transfer of Kanungos and Patwaris, their salaries, qualifications, duties, removal, punishment, suspension and dismissal.

(18) Learned counsel for the petitioners took us through the first and the second Chapters of the Land Records Manual to show what were the rules for recruitment and the conditions of service of Patwaris and their duties, with the object of making it out that Lekhpals did not belong to a new service but it was the old service of Patwaris to which a new name was given. The argument in short is that the State Government was really making fresh appointments to the posts of Patwaris but gave the service a new name, which it was not entitled to do. It was suggested that there was something very sinister behind it, but what exactly could be the sinister motive was not at all clear to us.

Out of 28,000 Patwaris about 26,000 and odd had resigned. The Government could have appointed as many new men in their places as it liked and it could also have amended the rules framed under S. 234, Land Revenue Act (3 of 1901). It has been admitted that the conditions of service and the emoluments attached thereto, as also the number to be appointed and the duties to be assigned to them, could all be altered under S. 234, Land Revenue Act, by the State Government by rules framed under that section, but it is said that those appointments could be only to the posts of Patwaris and the service could not be given a new name of Lekhpals so long as S. 23, Land Revenue Act, was not amended.

There is no special mode prescribed for making rules under S. 234, Land Revenue Act. Under S. 21, U. P. General Clauses Act (1 of 1904), power to make rules includes power to add to, amend, vary, or rescind any notifications, orders, rules or bye-laws so issued; and S. 23 relates to a power to make rules or bye-laws which have to be made after previous publication. There was no such provision as regards previous publication in S. 234, Land Revenue Act, and so no question of publication of the new rules in the Official Gazette would arise. The mere fact that a new name was given, because the old name had certain unsavoury associations around it, would not invalidate the rules even if they were to be treated as amending the previous rules made under S. 234, Land Revenue Act.

(19) The result, therefore, is that there is no force in the two points raised in these writ petitions and for the reasons given in our judgment in Writ Petition No. 45 of 1954 and the reasons given above these writ petitions are also dismissed, but for the reasons already mentioned we make no order as to costs.

V.R.B. Petitions dismissed.

END

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ANDHRA HIGH COURT

1954

CHIEF JUSTICE :

The Hon'ble Mr. Justice K. Subba Rao (5.7.1954).

PUISNE JUDGES :

The Hon'ble Mr. Justice P. Chandra Reddy (5.7.1954)

" " " Umamaheswaram (5-7-1954).

" " " Bhimasankaram (1-11-1954).

" " " P. Satyanarayana Raju (1-11-1954).

ADVOCATE-GENERAL :

Shri D. Narasaraju.

GOVERNMENT PLEADERS :

Shri P. Satyanarayana Raju, (Appointed as Judge of the High Court from 1.11-1954).

" Seshachalapathi *(Addl.)*

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A.I.R. 1954 ANDHRA 1 (Vol. 41, C.N. 1)

UMAMAHESWARAN J. (12-8-1954)

Komanduri Srinivasa Raghavacharyulu, Plaintiff-Appellant v. Polavarapu Venkataswamy and another, Defendants-Respondents.

Second Appeal No. 661 of 1950, against decree, Sub-J., Bapatla, in Appeal Suit No. 238 of 1947.

(a) Limitation Act (1908), Art. 144 — Adverse possession — Assertion of adverse title against assignee of mortgagor.

Property was usufructuarily mortgaged on 8-6-1874 for a term of 68 years. On 28-12-1880, the mortgagor assigned the equity of redemption to the plaintiff. The daughter's son of the original mortgagor, in spite of the assignment of the equity of redemption, filed a suit in 1925 for redemption of the mortgage. This suit was compromised in 1927. As per the terms of the compromise, half the hypotheca was taken by the mortgagee in discharge of the mortgage and the other half was retained by the daughter's son of the original mortgagor. The plaintiff was aware of the compromise:

Held that the assertion of title by the daughter's son of the original mortgagor was hostile to the plaintiff. The possession of half the hypotheca by the said daughter's son and his permitting the mortgagee to be in possession of the other half to the knowledge of the plaintiff was a clear assertion of title adverse to him. AIR 1914 Mad 334 (2) (FB), Ref. to. (Para 3)

Anno: Lim. Act, Art. 144 N. 85.

(b) Limitation Act (1908), Art. 144 — Adverse possession, what is.

Possession to be adverse should be overt without any attempt at concealment, so that the person against whom time is running, ought, if he exercises due vigilance, to be aware of what is happening. It is not necessary that it should be brought to the notice of the real owner. AIR 1934 PC 23; AIR 1935 PC 36; AIR 1942 Mad 622, Foll. AIR 1914 Mad 334 (2) (FB), Held no longer good law. (Para 7)

Anno. Lim. Act, Arts. 142 and 144, N. 16.

CASES REFERRED: Paras

(A) (V1) AIR 1914 Mad 334 (2): 38 Mad 903 (FB) 3, 7

(B) (V21) AIR 1934 PC 23: 61 Cal 262 (PC) 5, 6

(C) (V22) AIR 1935 PC 36: 14 Pat 327 (PC) 6

(D) (V29) AIR 1942 Mad 622: ILR (1943) Mad 15 (FB) 6

C. V. Dikshitulu and N. Rajeswar Rao, for Appellant; K. Krishnamurti, for Respondents.

JUDGMENT: The plaintiff is the appellant. The simple question for consideration in the second appeal is as to whether the defendants have acquired title to the suit property by adverse possession. The trial Court held that the defendants did not make out their plea of adverse possession, and decreed the suit. On appeal the Subordinate Judge reversed the judgment and decree of the District Munsif. Hence the plaintiff has preferred the second appeal.

(2) For the purpose of appreciating the plea of adverse possession, it is necessary to set out a few relevant facts. The suit properties belonged to K. Venkatacharyulu who executed a usufructuary mortgage, Ex. P. 4, dated 8-6-1874 for Rs. 4,000/- in favour of V. Raghavalu and two others for a term of 68 years ending with 8-6-1942. The plaintiff is the adopted son of Srinivasacharyulu who obtained an assignment of the usufructuary mortgage under Ex. P. 5 dated 28-12-1880. In spite of the execution of the assignment deed Ex. P. 5, the mortgagor's daughter's son Nelaturu Narasimhacharyulu filed a suit O. S. No. 120 of 1925 on the file of the Subordinate Judge's Court of Bapatla, for redemption of the mortgage and for the recovery of possession of the hypotheca. The suit was compromised on 30-7-27 as per Ex. D. 2.

As the plaintiff did not pay the amount to the defendants as per the terms of the compromise half the property was taken by the plaintiff and half by the defendants therein. The property obtained by the plaintiff under the compromise was subsequently sold to the defendants and the defendants have been in open and continuous possession from the date of the compromise in regard to a half and from the date of the sale in regard to the other half. The short question, therefore, is whether the possession of the defendants from the date of the compromise and the sale is adverse to the plaintiff, the adopted son of the assignee of the equity of redemption under Ex. P. 5.

(3) It is in evidence that Narasimhacharyulu, who instituted O. S. No. 120 of 1925, is the husband of the plaintiff's son-in-law's sister. In the reply notice issued by the defendants, Ex. P. 6 (a), as also in the written statement, the defendants averred that the plaintiff was fully aware of the previous suit and the compromise entered into therein. The plaintiff who examined himself as P. W. 1, did not deny knowledge of the suit or the compromise. So, no question was put to him in the cross-examination as to whether he was not present at the time of the suit and at the time

of the compromise. The 1st defendant who examined himself as D. W. 1, stated that the plaintiff was aware of the suit and that he was also aware of the compromise, though he could not say whether he was present on the date of the compromise. Nothing was elicited in the cross-examination to lead to the conclusion that what the 1st defendant stated in the examination-in-chief was not true.

D. W. 2 stated that the plaintiff accompanied Narasimhacharyulu at the time of the compromise. The Subordinate Judge accepted the evidence of D. Ws. 1 and 2 and found that the plaintiff was fully aware of the suit and the compromise. He, however, held that the conduct of the plaintiff was not such as to estop him from claiming the suit properties. If the plaintiff knew fully that a suit was filed by Narasimhacharyulu for redeeming the mortgage and that it was compromised, under which half the property was given to the mortgagees and half taken by the mortgagor's representative, there can be no doubt he knew that the mortgagee & Narasimhacharyulu were in possession from the date of the compromise in their own right and adversely to him.

Subsequently, Narasimhacharyulu sold the property to the defendants and their possession as from the date of purchase is adverse to the plaintiff. Therefore it is clear according to the Full Bench decision of the Madras High Court in — 'Periya Aiya Ambalam v. Shanmugasundram', 38 Mad 903 (AIR 1914 Mad 334 (2)) (A) that the possession of Narasimhacharyulu and the defendants was adverse to the plaintiff and the defendants acquired title by prescription. The head-note in — '38 Mad 903 (A)' is in the following terms:

"Where a trespasser dispossesses a mortgagee in possession and continues in possession asserting a title adverse to the mortgagor also, such possession will be adverse to the mortgagor from the time the mortgagor has knowledge of the assertion (though he may not then be entitled according to the terms of the mortgage to recover possession from the mortgagee)."

(4) If the equity of redemption vested in the plaintiff and he alone was entitled to redeem the mortgage the assertion of title by Narasimhacharyulu was hostile to the plaintiff and his (i.e., Narasimhacharyulu's) obtaining possession of half the property and permitting the mortgagee to be in possession of the other half was a clear assertion of their adverse right to the knowledge of the plaintiff who was assisting and accompanying Narasimhacharyulu in the conduct of the mortgage suit.

(5) The learned Advocate for the respondents contended that it was not necessary for his clients to fix the plaintiff with the knowledge of the assertion of the adverse claim. He relied on the Privy Council decision in — 'Secretary of State v. Debendralal Khan', AIR 1934 PC 23 (B). Lord Macmillan in delivering the judgment of the Judicial Committee stated the law clearly and succinctly in the following terms:

"The classical requirement is that the possession should be 'nec vi nec clam nec precario'. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships opinion, there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercised due vigilance, to be aware of what is happening".

(6) The decision was followed by Lord Thankerton in — 'Sris Chandra Nandy v. Baijnath Jugal Koshore', AIR 1935 PC 36 (C). The Privy Council decision in — 'AIR 1934 PC 23 (B)' was referred to and applied in a recent Full Bench decision of the Madras High Court in — 'Palania Pillai v. Ibrahim Rowther', AIR 1942 Mad 622 (FB) (D). At page 624, Leach C. J., referred to the conflict of authority in the Madras High Court on the question whether it was necessary in order to support a plea of adverse possession that knowledge of adverse possession must be proved. He set out the question that was referred to the Full Bench, namely:

"Where some co-owners usufructuarily mortgage specific items of property held by the members of a Muhammadan family, and the mortgagee enters into possession of the mortgaged items under his mortgage-deed, is a suit to recover the share therein by other members of the same family barred by Art. 144, Limitation Act, at the end of 12 years of such possession or does adverse possession begin as against the other members only from the date of ouster to their knowledge."

He answered the question in the following terms:

"The weight of authority in this Court is in favour of an affirmative answer being given to the first part of the question. There are decisions of the Calcutta and Bombay High Courts to the same effect and support for the majority view is also to be obtained from the decision of the Privy Council in — 'AIR 1934 PC 23 (B)' ".

(7) Having regard to the recent Privy Council decisions and the latter Full Bench decision of the Madras High Court referred to 'supra', the decision in — 'AIR 1914 Mad 334 (2) (A)' may no longer be regarded as good case law. It is sufficient as pointed out by the Privy Council that possession should be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what was happening and it is not necessary that adverse possession should be brought to the notice of the real owner. But as I have already pointed out the plaintiff had knowledge of the rights asserted by Narasimhacharyulu and the defendants in regard to the property and therefore the case satisfies even the principles laid down in — 'AIR 1914 Mad 334 (2) (A)'.

(8) The learned Advocate for the appellant contended that on the recitals in Ex. P. 5, his right to obtain possession did not accrue till 1942. I have carefully gone through the document and I find that there is no substance in this contention. It was open to the assignee to redeem and obtain possession of the properties even prior to 1942 as his assignor could do.

(9) In the result the second appeal fails and is dismissed with costs. No leave.

V.S.B. Appeal dismissed.

A.I.R. 1954 ANDHRA 2 (Vol. 41, C.N. 2)

UMAMAHESWARAN J. (4-8-1954)

Kotta Pullayya, 1st Defendant-Appellant v. Grandhi Veeraraghavamma and another, Plaintiff & 2nd Defendant-Respondents.

Second Appeal No. 508 of 1950, against decree, Sub. Judge, (Prl), Rajamundry, in Appeal Suit No. 76 of 1949.

(a) Succession Act (1925), S. 105(1) — Applicability — (Will — Construction) — AIR 1936 Bom 459, Dissented from.

In construing a will, all the clauses have to be read together and the intention of the testator or testratrix should be ascertained.

Clauses of the will made it abundantly clear that if any of the nephews of the testatrix should predecease the testatrix their descendants should take the place of the deceased. In each of the clauses, it was stated that the descendants according to their father's branch should take the properties equally, or in other words, the testatrix was anxious that the nephews, or if they should die during her lifetime, their 'Santhathis' should take the property.

Held that the testatrix intended that the nephew or his 'Santhathi' should take the property on his death during the lifetime of the testatrix. There was no lapse whatsoever so as to attract the terms of the first part of S. 105(1). The second part of S. 105(1) directly applied to the facts of the case as the testatrix herself provided that in the event of the legatee dying during her lifetime, his 'Santhathi' should take the property. (Para 9)

Anno: Succession Act, S. 105 N. 1.

(b) Succession Act (1925), S. 97 — Applicability to Hindu wills — AIR 1936 Bom 459, dissented from.

Section 97 does not apply directly to wills by Hindus, but it lays down a general principle of interpretation of wills, which could equally be applied to a will by a Hindu, though if the clear intentions of the testator appeared otherwise, the Section could not be applied. AIR 1944 Mad 22, Rel. on. (Para 9)

Anno: Succession Act, S. 97 N. 1.

(c) Words and Phrases — Santhathi — Meaning of.

The etymological meaning of "Santhathi" is "issue of the body". The expression "Santhathis Paramparai" used as a word of limitation to define the estate taken by a person has, however, come to acquire the larger significance of "heirs". AIR 1915 Mad 664; AIR 1921 Mad 518, Rel. on. (Paras 11, 12)

CASES REFERRED: Paras

(A) (V31) AIR 1944 Mad 22: 1943-2 Mad LJ 332 9

(B) (V23) AIR 1936 Bom 459: ILR (1937) Bom 679 10

(C) (V2) AIR 1915 Mad 664: 27 Mad LJ 694 11

(D) (V8) AIR 1921 Mad 518: 13 Mad LW 513 11

G. Chandrasekara Sastri, for Appellant; G. Balaparameswara Rao (for No. 1) and M. V. Naganamiah (for No. 2), for Respondents.

JUDGMENT: The first defendant is the appellant. The only question that arises for consideration is as to the true construction of the will executed by Manikyam on 3-1-1913 and marked as Exhibit A-3. There is no doubt that the properties devised under the will belonged to Manikyam absolutely as found by both the Courts below.

(2) According to the case of the plaintiff, the properties were bequeathed absolutely in favour of Manikyam's sister's sons, i.e., the second defendant and the plaintiff's deceased husband, and that as her husband died in 1914, she became entitled to his interest in the suit property.

(3) The 1st defendant (appellant) mainly contested the suit. The District Munsif of Rajamundry held that Ss. 105 and 107, Succession Act, did not apply, as the will was executed by a Hindu and that the plaintiff acquired an interest under the terms of the will, Exhibit A-3. On appeal, the learned Subordinate Judge of Rajamundry differed from the District Munsif and held that Ss. 105 and 107, Succession Act, applied also to Hindu wills. But on a due and proper construction of the will he confirmed the judgment of the District Munsif and held that as the heir-at-law of Satyanarayana, the plaintiff was entitled to a half share under the terms of Exhibit A-3. The second appeal is brought by the 1st defendant as against the judgment and decree of the Subordinate Judge of Rajamundry.

(4) As already stated, the sole question that arises for consideration is as to whether by the death of Satyanarayana in 1914, that is, during the lifetime of the testatrix, his interest lapsed and the plaintiff acquired no interest whatsoever. I have carefully perused the terms of the will, and I agree with the Subordinate Judge that the testatrix clearly intended that her nephews, Krishnamurthy and Satyanarayana, or their 'Santhathi' should take the properties equally.

(5) As regards moveable property, the testatrix stated in clear terms in paragraph 3, that after her lifetime, her sister's sons, Krishnamurthy and Satyanarayana, and their descendants according to their father's branch, should take the said properties equally.

(6) In cl. (4) she directed that her nephews or their descendants should give a sum of Rs. 1000/- to the persons specified therein. In cl. (5) she provided that if the persons specified in cl. (4) did not survive her, the amount should be taken by her two nephews or their descendants according to their father's branch equally. Clause (6) relating to immoveable property runs in the following terms:

> "It has been provided that the said Grandhi Krishnamurthy Garu and Satyanarayana Garu and their descendants shall after my lifetime, take even the entire immoveable property that I may purchase from my money or acquire in any other manner, subsequent to this will along with immoveable property mentioned in the will in the aforesaid manner, with all powers of disposition by way of gift, sale, etc., and they shall enjoy the same happily from their sons to grandsons and so on in succession."

(7) The contention of the learned advocate for the appellant is that an absolute estate was given to the nephews Krishnamurthy and Satyanarayana, and that as Satyanarayana died during the lifetime of the testatrix, the bequest in his favour lapsed and that the first defendant as the husband's heir of Manikyam, was entitled to his share as on intestacy. It is well established that in construing a will, all the clauses have to be read together and the intention of the testator or testatrix should be ascertained. Clauses (3) to (5) make it abundantly clear that if any of the nephews should predecease, the testatrix, the descendants should take the place of the deceased. In each of the clauses, it is stated that the descendants according to their father's branch should take the properties equally, or in other words, the testatrix was anxious that the nephews, or if they should die during her lifetime, their 'Santhathis' should take the property.

(8) Reference was made to the terms of Ss. 97 and 105 which run in the following terms:

> "Sec. 97:—Where property is bequeathed to a person and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of

the testator therein, unless a contrary intention appears by the will;

"Sec. 105:—(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

(2) In order to entitle the representatives of the legatee to receive the legacy; it must be proved that he survived the testator."

(9) The argument of the learned Advocate for the appellant is that the use of the expression "their descendants" in cl. (6) merely defines the nature and character of the estate taken by Krishnamurthy and Satyanarayana and that applying the rule of construction laid down in S. 97 to the will, the 'Santhathi' acquired no interest whatsoever as the 'Santhathi' was not a direct object of a distinct and independent gift. So according to the learned Advocate, under the terms of S. 105 Satyanarayana having predeceased the testatrix, the plaintiff, his widow, acquired no right whatsoever in the suit properties. But, if I am right, in my construction of the will, that the testatrix intended that the nephew of his 'Santhathi' should take the property, there is no lapse whatsoever so as to attract the terms of S. 105(1), Succession Act.

The second part of S. 105 (1), "unless it appears by the will that the testator intended that it should go to some other person" directly applied to the facts of the case. The testatrix herself provided that in the event of the legatee Satyanarayana dying during her lifetime, his 'Santhathi' should take it. It is, therefore, unnecessary for me to consider whether the rule of construction laid down in S. 97, Succession Act, applies to "Hindu wills" or not as held by Horwill J. in — 'Damodhara Moothan v. Ammu Amma', AIR 1944 Mad 22 (A). I, however, agree with the observations of the learned Judge:

"This section does not apply directly to wills by Hindus, but it lays down a general principle of interpretation of wills, which could equally be applied to a will by a Hindu, though if the clear intentions of the testator appeared otherwise, the section could not be applied."

(10) The decision of the Bombay High Court in — 'Krishna Das Thulsidas v. Dwarkadas Kaliandass', AIR 1936 Bom 459 (B) does not in any way affect this question. Wadia J. rightly held that it is always the intention of the testator as expressed or implied in the language of the will, which must be given effect to, and that intention must be collected with reasonable certainty from the whole will. He construed the will in question as conferring interest in the sons and daughter of Thulsidas along with him. Or in other words, he held that the sons and daughter of Thulsidas were direct objects of a distinct and independent gift as contemplated under S. 97. I do not, however, agree with the observations of the learned Judge that S. 97 embodies an artificial rule of construction of wills taken from English law and that rule of construction ought not to be applied to wills made by Hindus. In the view taken by me I do not agree with the observations of the learned Judge as to the scope and effect of illustration (ii) to S. 105.

(11) The next argument of the learned Advocate for the appellant is that the expression "Santhathi" in cls. (3) to (6) of the will, will not and cannot by any stretch of language take in the plaintiff, the widow of Satyanarayana and that the suit is consequently not maintainable. I quite agree with the learned Advocate that the etymological meaning of "Santhathi" is "issue of the body". The expression "Santhathis Paramparai" used as a word of limitation to define the estate taken by a person has, however, come to acquire the larger significance of "heirs". In — 'Rajah of Ramnad v. Sundara Pandiaswami Thevar', AIR 1915 Mad 664 at p. 674 (C), Seshagiri Iyer J. held that the words "Santhathi Paramparai" convey a heritable estate from generation to generation and that

"no authority has been quoted for the proposition that the word 'Santhathi' is to be restricted to the lineal descendants."

Ramesam J. in delivering judgment of the Bench decision in — 'Guruvajammah v. Ramaswamy Mudaliar', AIR 1921 Mad 518 (D) observed as follows:

"Even assuming that the 'Santhathi' in the first instance was to be construed as limited to 'issue', it is not clear that that sentence is intended to describe the devolution of the trusteeship. It merely lays down the manner in which the trust was to be conducted and reference is made to some of the persons who are likely to conduct it. But even if it were otherwise, I do not think that 'Santhathi' should be construed in its narrow sense. It is true that its etymological meaning is "issue of the body". But it is also true that when used as a word of limitation to define the estate taken by a person, it has come to acquire the larger significance of "heirs....."."

(12) Adopting those observations, I hold that the expression "Santhathis" in the present case should not be construed in its narrow or etymological sense, but should be construed as meaning "heirs". In this view, the second appeal fails and is consequently dismissed with costs. No leave.

D.H.Z. Appeal dismissed.

A.I.R. 1954 ANDHRA 4 (Vol. 41, C.N. 3)

CHANDRA REDDI J. (15-7-1954)

Connabatula Satya Rao, Petitioner v. State.

Criminal Revn. Cases Nos. 1255 and 1366 of 1953 and Criminal Revn. Petn. No. 1185 of 1953 and taken up in No. 12 of 1953, to revise the order of Sub-Divisional Magistrate, Yellamanchilli in Criminal Appeal No. 55 of 1953.

Madras Prohibition Act (10 of 1937), S. 4A — Intoxication — Meaning of — Smelling of liquor is not intoxication.

Intoxication implies excessive drinking of liquor bringing about drunkenness. Merely smelling of alcohol does not amount to being in a state of intoxication within the meaning of S. 4A. Something more is necessary and that is the accused must be in a state of drunkenness. (Paras 4, 5)

E. Venkatesam and P. Kothandaramayya, for Accused; Public Prosecutor, for the State.

ORDER: This revision petition is directed against the conviction of the petitioner under S. 4-A, Madras Prohibition Act, and the sentence of a fine of Rs. 30/- in default imprisonment for 20 days.

(2) The charge against the petitioner, a Prohibition Guard, attached to the Prohibition Police Station, Yellamanchilli, is that he was found in a state of intoxication on 28-9-1952. The case for the prosecution is that the petitioner

was quarrelling with a rickshaw-puller on the relevant night and that on seeing P. Ws. 5 and 6 passing that way, he began to run. This roused the suspicion of these two witnesses and they gave chase to him, caught hold of him and found that he was smelling liquor. By then a number of people including P. Ws. 1 and 2, two of the local advocates, collected there. The plea of the accused was of denial. The prosecution evidence was accepted by the trial Court and a conviction followed.

(3) It looks to me that it is very doubtful whether the prosecution has brought home even the charge that the petitioner was smelling arrack. P. Ws. 5 and 6 are admittedly the enemies of the petitioner and even as regards P. Ws. 1 and 2 it is very doubtful whether they could be definite that the smell of arrack emanated from the petitioner. However, it is not necessary for me to get into this question as the revision petition can be disposed of on a shorter ground, viz., whether, assuming the prosecution case to be true, the petitioner can be said to have committed an offence under S. 4-A, Madras Prohibition Act, which enacts that

> "whoever is found in a state of intoxication in any public place and whoever, not having been permitted to consume any liquor or intoxicating drug in pursuance of this Act, is found in a state of intoxication in any private place, shall be punished with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

(4) The question for consideration is whether on the prosecution evidence, the petitioner can be brought within the terms of S. 4-A of the Act. As already pointed out, the only evidence for the prosecution is that the accused was smelling alcohol. In my opinion this does not amount to his being found in a state of intoxication within the meaning of S. 4-A. A person can consume alcohol without being intoxicated. The expression "intoxication" is synonymous with drunkennness. In the Concise Oxford Dictionary, the meaning of the word "intoxication" is given as "make drunk, excite, exhilerate, beyond self-control". In the 14th volume of the Encyclopedia of Britanica (11th edition) the meaning of the word "intoxication" is given as

> "poisoning or the action of poisoning, whether of drug, baectorial products or other toxic substances and hence the condition resulting from such poisoning, particularly the disorder of the nervous system produced by excessive drinking of alcohol."

It is thus seen that the intoxication implies excessive drinking bringing about drunkenness.

(5) To constitute an offence of being found in a state of intoxication it is not sufficient to show that a person smelt liquor. Something more is necessary and that is that he was in a state of drunkenness, as a result of excessive drinking. For this reason, I must hold that an offence under S. 4-A of the Prohibition Act has not been committed by the petitioner and he is therefore entitled to an acquittal.

(6) The petition is allowed and the conviction and sentence are set aside. The fine, if paid, will be refunded.

(7) Criminal Revision Case No. 1366 of 1953.— In view of my finding in Criminal Revision Case No. 1255 of 1953 that no case under S. 4-A of the Prohibition Act was made out, the question of enhancement of sentence does not arise. Petition is, therefore, dismissed.

V.S.B. Petitioner acquitted.

A.I.R. 1954 ANDHRA 5 (Vol. 41, C.N. 4)

SUBBA RAO C. J. (2-8-1954)

Pullata Lakshminarayan, Plaintiff-Appellant v. Bakkida Ramanna and others, Defendants-Respondents.

Second Appeal No. 1114 of 1950, against decree of Sub-J., Srikakulam, in A. S. No. 200 of 1949.

Civil P. C. (1908), S. 144 — Ex parte decree set aside — Effect on auction sale.

There is no provision in the Civil Procedure Code for setting aside an auction sale on the ground that the decree has been cancelled. There is no reason or justification for not applying the said principle to a case of an auction sale in favour of a third party held in execution of an ex parte decree. AIR 1931 PC 33, AIR 1933 Mad 598 and AIR 1941 Mad 399, Rel. on. (Para 5)

Anno: C. P. C., S. 144 N. 13.

CASES REFERRED:	Paras
(A) (V18) AIR 1931 PC 33: 60 Mad LJ 423 (PC)	3
(B) (V20) AIR 1933 Mad 598: 56 Mad 808	4
(C) (V28) AIR 1941 Mad 399: 1941-1 Mad LJ 193	4

C. V. Dikshitulu and N. Rajeswar Rao, for Appellant; C. Rama Rao, for Respondents (Nos. 1 and 2).

JUDGMENT: The second appeal is filed against the decree and judgment of the Court of the Subordinate Judge of Srikakulam confirming those of the District Munsif's Court Sompeta in O. S. No. 11 of 1949. The subject-matter of the suit is of the extent of 2 acres 10 cents of Government Zaroiti dry land described in the plaint schedule. It was originally owned by one Priya Chelamayya and others. They executed a mortgage deed in respect of the suit property in favour of Burla Yerrayya, the father of the 3rd defendant. Burla Yerrayya filed O. S. No. 52 of 1938 on the file of the Court of the Distrit Munsif, Sompeta and obtained a preliminary decree therein. A final decree followed.

In execution of the final decree, the plaint schedule items were brought to sale and they were purchased by the 1st defendant on 23-3-1942 for a sum of Rs. 325-0-0. The said sale was confirmed on 15-6-1942. On 10-11-1942 he took delivery of possession. The plaintiff who was the purchaser of the plaint schedule items from the mortgagors, and who was also impleaded as a defendant in O. S. No. 52 of 1938 filed an application on 21-4-1942 for setting aside the ex parte decree. The ex parte decree was set aside on 31-8-1944. Thereafter he filed O. S. No. 11 of 1949 on 14-12-1948 for possession of the said items on the ground that by reason of the setting aside of the ex parte decree and also by reason of the subsequent adjustment of the suit claims, the defendant did not acquire any valid title to the said items.

(2) The learned District Munsif and on appeal the learned Subordinate Judge rejected the claim and dismissed the suit. Hence the second appeal.

(3) The learned counsel for the appellant, Mr. Dikshitulu contends that there is no (sic) essential distinction between an ex parte decree and a decree on merits, and therefore the decisions holding that the title of a third party purchaser in execution of a decree is not affected by the reversal of the decree, will not apply to a case of a purchaser in execution of an ex parte decree. To appreciate this argument, it is necessary to consider the principles on which the said cases based their decisions. In — 'Nanhelal v. Umrao Singh', AIR 1931 PC 33 at pp. 35-36 (A), the Judicial Committee had to consider the case of

the effect of the adjustment of a decree under O. 21, R. 2, Civil P. C., on the sale held in execution of the decree in favour of a third party. Their Lordships held that the third party was protected and the sale could not be set aside.

The reasoning of their decision is found at pp. 35-36 of the Report. It runs thus:

"When once a sale has been effected, a third party interest intervenes and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in R. 89, viz., by depositing into Court the amount for the recovery of which the property was sold, together with 5 per cent. on the purchase money which goes to the purchaser as statutory compensation and this remedy can only be pursued within 30 days of the sale."

Their Lordships made no reference to the cases under R. 91 which has no application to the present case.

(4) This principle was followed by Madhavan Nair J. in — 'Sorimuthu Pilai v. Muthukrishna Pillai', AIR 1933 Mad 598 (B), where the learned Judge ruled that under O. 21, R. 92, Civil P. C., where no application is made under Rr. 89, 90 or 91 to set aside a valid sale, the Court is bound to confirm the sale and cannot refuse to do so on the ground that there was no subsisting decree at the time of the confirmation or on any other ground.

This judgment was accepted and followed by Wadsworth J. in — 'Ambujammal v. Thangavelu Chettiar', AIR 1941 Mad 399 (C). There, as in the earlier case, at the time the sale was sought to be confirmed, the decree in execution whereof the property was brought to sale was reversed by the appellate Court. Wadsworth J. points out at p. 401:

"There is no provision in the Code for the cancellation of a sale merely because of the cancellation of the decree and though it is in accordance with justice that a person who has succeeded in appeal should get from the opposite party such restitution as is possible, there is no principle of justice whereby an innocent 3rd party who has purchased in a valid auction held by the court should be deprived of his property merely because the decree under which the sale was held has been cancelled in appeal."

(5) It is true as contended by Mr. Dikshitulu that in all the aforesaid cases the decree was on merits and that it was reversed by the appellate Court. But the principle of the said three decisions is that there is no provision in the Civil Procedure Code for setting aside a sale on the ground that the decree has been cancelled. I cannot find any reason or justification for not applying the said principle to a case of sale in favour of a third party held in execution of an ex parte decree. Whether a decree is an ex parte decree or a decree on merits, it is a valid decree till it is set aside or modified in accordance with the procedure prescribed by law. It cannot be suggested and indeed it is not suggested that an ex parte decree is void and a nullity, and therefore it can be ignored.

Further for setting aside a sale, held in execution of an ex parte decree, just like in execution of a decree on merits, the Civil Procedure Code prescribes the same remedies. The judgment-debtor, if he seeks to set aside the sale, must proceed either under O. 21, R. 89 or under O. 21, R. 90, Civil P. C. The only distinction which the learned counsel was able to point out is that in the case of setting aside an ex parte decree, it may be that S. 144, Civil P. C., may not be applicable. But if S. 144 is not applicable and if a case for restitution is made out, the Court has got ample power under S. 151, Civil P. C., to order restitution against the decree-holder.

But so far as the third party is concerned, that circumstance cannot conceivably make any difference in the principle accepted by the decisions. I, therefore, hold, agreeing with the Courts below, that the first respondent who is a third party purchaser is protected and the sale in his favour cannot be avoided by the judgment-debtor. No other point arises in the appeal. The second appeal fails and is dismissed with costs. No leave.

D.H.Z. Appeal dismissed.

A.I.R. 1954 ANDHRA 6 (Vol. 41, C.N. 5)

CHANDRA REDDY J. (13-7-1954)

Mandapaka Sudarasana Rao and another, Appellants v. Challa Narasimham Naidu, Respondent.

A. A. O. No. 166 of 1952, against Order of Sub-J., Srikakulam, D/- 27-3-1951.

Court-fees Act (1870), S. 7 (x) (a) — Sale of property — Agreement to re-convey — Suit for specific performance — Court-fee payable.

The plaintiff sold the suit properties to the defendant for a stated consideration of Rs. 5,500/-. Alleging that the consideration actually paid was only Rs. 3,000/- and there was an agreement for reconveyance of those properties entered into on the same date for this sum of Rs. 3,000/-, the plaintiff filed a suit for specific performance of that agreement of sale:

Held, that the appropriate court-fee was payable on Rs. 3,000/- and not Rs. 5,500/-. (Paras 2 and 6)

Anno: C. F. Act, S. 7 (x) N. 2.

CASE REFERRED: Paras

(A) (V24) AIR 1937 Mad 81: ILR (1937) Mad 275 (FB) 5, 6

M. Narasayya, for Appellants; Kasturi Sivaprasada Rao, for Respondent; D. L. Narasimha Raju, for the Govt. Pleader, for the Govt.

JUDGMENT: This is an appeal against the judgment of the Subordinate Judge of Srikakulam remanding the suit to the trial Court. The material facts may be briefly stated:

(2) The plaintiff sold the suit properties to the defendant on 13-3-1947 for a stated consideration of Rs. 5,500/-. Alleging that the consideration actually paid was only Rs. 3,000/- and there was an agreement for reconveyance of those properties entered into on the same date for this sum of Rs. 3,000/-, the plaintiff filed the suit which gives rise to this appeal in the Court of the District Munsif of Srikakulam for specific performance of that agreement of sale. He valued the suit under S. 7, Cl. (x), Court-fees Act, at Rs. 639-1-9 and paid a court-fee of Rs. 71-15-0.

(3) One of the defences to the suit was that it was under-valued and court-fee should have been paid on the sum of Rs. 3,000/- said to be the consideration for the reconveyance of the properties. Agreeing with this, the trial Court called upon the plaintiff to pay the deficit court-fee and gave him time on 27-10-1950 till 6-11-1950. This was extended up to 15-11-1950. As further time was asked for again on 15-11-1950, the trial

Court refused to comply with it and dismissed the suit for non-payment of the deficit court-fees.

(4) The matter was taken in appeal and the main grounds urged in support of the appeal were that as time was granted till 15-11-1950 and since he had time till the evening to pay the court-fee, the suit could not be dismissed earlier in the day and the Court-fee as originally paid by him was correct. The appeal was opposed on the grounds that the correctness of the order of the trial Court on the question of court-fee could not be canvassed in appeal as it had become final and that under S. 12 of the Court-fees Act, the question of computation cannot be gone into by the appellate Court. Alternatively, it was contended that the proper court-fee payable is on Rs. 5,500/- and not on Rs. 3,000/-.

(5) The appellate Court accepted the contention of the plaintiff that the trial Court had no jurisdiction to dismiss the suit earlier in the day on 15-11-1950 when he had time to pay the deficit court-fee till the evening. It also held that the plaintiff could question the order dated 27-10-1950 in O. S. No. 165 of 1950 determining the court-fee, in the appellate Court. It further held that the court-fee payable is on Rs. 5.500/- being the amount of consideration recited in the sale-deed by the plaintiff to the defendant.

And for this view, reliance was placed by the Subordinate Judge on a Full Bench decision of the Madras High Court in — 'Madanamohana v. Krupasindhu', AIR 1937 Mad 81 (FB) (A). In the result, he set aside the order of the trial Court, but directed the plaintiff to pay court-fee on Rs. 5,500/-. In that view, he remanded the case to the trial Court for further disposal. There is also a direction to the trial Court to decide the question of pecuniary jurisdiction. The plaintiff who was called upon to pay the higher court-fee has preferred this appeal.

(6) It is contended by Mr. Narasayya in support of this appeal that under S. 7, Cl. (x), Court-fees Act, the court-fee payable is only on the amount of consideration agreed to be paid for the re-sale and not the original consideration stated to have been paid to him under the original sale by him to the defendants. In reply to this, Mr. Sivaprasada Rao argued that the decision referred to by the lower appellate Court supports its view and therefore the appellant has to pay court-fees on the consideration stated in the sale-deed.

I do not think I can agree with the proposition of the counsel for the respondent. The terms of S. 7, Cl. (x) are clear that the court-fee is to be paid according to the amount agreed to be secured under the suit contract. In this case, the amount agreed is Rs. 3,000/- and the sale consideration for the earlier sale has no bearing. We are not now concerned with the truth or otherwise of the averments of the plaint. It is the recitals in the plaint that should determine the question of court-fee.

The decision in — 'AIR 1937 Mad 81 (FB) (A)' has no application to the present case. In these circumstances, I must therefore give effect to the contention of the appellant and hold that the appropriate court-fee is payable on Rs. 3,000/- and not Rs. 5,500/-. The appeal is, therefore, allowed, but in the circumstances of the case, I direct the parties to bear their own costs both here and in the lower appellate Court.

V.R.B. Appeal allowed.

A.I.R. 1954 ANDHRA 7 (Vol. 41, C.N. 6)

SUBBA RAO C. J. (30-7-1954)

Hiranand Ramsook Firm, Appellants v. Province of Madras (Now Andhra) represented by the Collector, East Godavari, Respondent.

Second Appeal No. 938 of 1950, against decree of Dist. Court, East Godavari at Rajamundry in A. S. No. 255 of 1948.

(a) Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 2(b) — Commission agent may be "dealer" within meaning of S. 2(b).

Under certain circumstances a commission agent doing business may fall within the definition of "dealer". Neither the definition of "dealer" nor of "sale" contemplates as a necessary condition that the goods sold should belong to the person selling or buying. There can be a sale or purchase on behalf of another. (Para 5)

The plaintiffs carrying on business in silver and gold purchased the goods from the Bombay merchants at their own risk with the hope or with the confidence of passing them off to various customers. After the receipt of the goods, they gave them to their customers, taking for themselves only the commission as profits.

Held that plaintiffs were dealers within the meaning of S. 2(b). AIR 1952 Mad 718 (FB), Rel. on. (Para 5)

(b) Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 8 — Madras General Sales Tax Rules, R. 12 — Non-compliance with R. 12 — Exemption under S. 8 cannot be claimed.

Rule 12 of the Sales Tax Rules requires that the dealer should maintain separate accounts in respect of each class of articles specified in the Act. Rule 12 is a condition subject to which the licence is issued to a dealer. Hence if a dealer fails to maintain accounts as required by that rule, the non-compliance with the condition disentitles him to exemption under S. 8 of the Act. There is no justification for the contention that the condition being a non-material one can be ignored. (Para 6)

CASE REFERRED: Para

(A) (V39) AIR 1952 Mad 718: ILR (1952) Mad 571 (FB) 5

P. Somasundram and P. Suryanarayana, for Appellants; Government Pleader and D. L. Narasimha Raju, for Respondent.

JUDGMENT: The questions that arise in this second appeal are (i) whether the plaintiffs are "dealers" within the meaning of S. 2(b) of the Madras General Sales Tax Act and (ii) whether they are exempted from payment of tax under S. 8 of the said Act.

(2) The plaintiffs' case may be briefly stated: The plaintiffs are commission agents carrying on business in silver and gold. The customers would give an order for purchase of silver or gold at Bombay. The plaintiffs would send a telegram to Bombay customers and silver and gold would be received by the plaintiffs from the Bombay merchants. On the date of the receipt of the goods a bill would be prepared and the signature of the principal customer taken and a commission of 5 annas per Rs. 100/- in the case of gold, and 6 annas per Rs. 100/- in the case of silver would be given to the plaintiffs. To put it shortly, their case is that they purchased silver and gold from the Bombay merchants for and on behalf of their customers and that they received nothing more than the commission to which they were entitled.

(3) The defendant contended in the written statement that the plaintiffs were not commission agents for the purchase of gold and silver and that they carried on the said business in the year of assessment, not as agents of known principals, but as regular dealers on their own account. The defendant further pleaded that the plaintiffs did not comply with the conditions of the licence, and that, therefore, they forfeited their right to exemption under the provisions of the Madras General Sales Tax Act. The learned Subordinate Judge, and on appeal the learned District Judge, held that the plaintiffs were not commission agents, but carried on business on their own account, and that, therefore, they were liable to sales tax. They further held that the plaintiffs did not comply with the conditions of the licence, and that, therefore, they were not exempted from the payment of tax. The plaintiffs preferred the above appeal.

(4) The facts, either found by the Courts below, or in regard to which there is no dispute may be stated. The customers of the plaintiffs did not place any order with the plaintiffs. Exhibits A-1 to A-6 letters alleged to have been written to the plaintiffs by the customers Viswanadham and others, were held to be not genuine by both the Courts. Exhibit A-7 the order book alleged to have been maintained by the plaintiffs showing the various orders placed with them has been held not to be genuine by the Subordinate Judge. The learned District Judge did not give a definite finding on that question, but for the reasons mentioned by him in paragraph 13 of the judgment, I agree with him that the Ex. A-7 is highly suspicious and cannot be relied upon in support of the plaintiffs' case.

The expenditure incurred in connection with the telegrams alleged to have been sent by the plaintiffs to the Bombay merchants was not debited to the plaintiffs' accounts. Nor do the accounts maintained by the customers disclose that any amount was spent by them for sending the said telegrams. The accounts maintained by the Bombay merchants have not been produced. The correspondence that must have passed between the plaintiffs and the Bombay merchants has not been produced. But the accounts of the plaintiffs show that, in respect of the suit transactions, the plaintiffs had only taken commission. The bills establish that the plaintiffs passed on the goods received by them from the Bombay merchants to their customers and the price charged was only the amount for which the goods were sent by the Bombay merchants plus the commission to which the plaintiffs were entitled. It is not disputed that the accounts in Bombay were settled or adjusted on the basis that the plaintiffs were only responsible for the purchase.

On these facts, only one conclusion is possible. The plaintiffs placed orders with the Bombay principals or commission agents on their own account and on their own responsibility, though they expected to pass them off to their customers and though in fact they did so and were satisfied with the commission earned as profit. It is not possible to hold on the facts found that particular customers of the plaintiffs placed specific orders with the plaintiffs and that the plaintiffs purchased the goods from the Bombay merchants as the agents of their customers. On the other hand, the suppression of all the correspondence between the plaintiffs and the Bombay merchants and the bringing into existence of an order book to bolster up the plaintiffs' case leave no doubt in mind that the plaintiffs purchased the goods from the Bombay merchants at their own risk with the hope or with the confidence of passing them off to various customers and that after the receipt of the goods, they gave them to their customers, taking for themselves only the commission as profits.

(5) A Full Bench decision of the Madras High Court in — 'Radhakrishna v. Province of Madras', AIR 1952 Mad 718 (A) had to consider the scope of S. 2(b), Madras General Sales Tax Act. The learned Judges held that the definition of "dealer" in S. 2(b) would cover also cases of persons mentioned in S. 8, who would but for that section, be liable to taxation under S. 3. The learned Chief Justice laid down that under certain circumstances a commission agent doing business would fall within the definition of "dealer" and that neither the definition of "dealer" nor of "sale" contemplate as a necessary condition that the goods sold should belong to the person selling or buying and that there can be a sale or purchase on behalf of another. In this case, on the facts found, the plaintiffs were dealing on their own behalf. They did not purport to purchase the goods for the principals. It is, therefore, a clear case coming under the definition of "dealer". Assuming that the plaintiffs acted as commission agents, the next question that falls to be considered is whether they are entitled to exemption from payment of tax by reason of any of the provisions of the Madras General Sales Tax Act.

(6) The relevant section is S. 8 which reads:

> "The State Government may, on application and on payment of such fee as may be prescribed in that behalf, license any person under this section, who for an agreed commission or brokerage, buys or sells on behalf of known principals specified in his accounts in respect of each transaction and may exempt from the tax or taxes payable under S. 3, such of his transactions as are carried out in accordance with the terms and conditions of that licence."

Even if the plaintiffs are persons, who bought the goods for an agreed commission, on behalf of known principals, they would be exempted under the Act if they got a licence from the State Government. It is also not questioned that one of the conditions of that licence was that they should maintain separate accounts in respect of each class of articles specified in the Act (See R. 12 of the Madras General Sales Tax Rules). It is also not disputed that the plaintiffs did not maintain separate accounts in respect of each class of articles specified in the section.

But it is contended by Mr. Somasundaram that though his client had not complied with one of the conditions of the licence, the condition which was not complied with was not a very material condition, and, therefore, it could be ignored. I do not see any justification for that distinction between material and non-material conditions in the provisions of S. 8 of the Act. Once it is conceded that the condition laid in R. 12 is a condition subject to which the licence is issued, it follows that non-compliance with such condition disentitles to exemption under S. 8 of the Act. I would, therefore, hold that even if the plaintiffs are commission agents within the meaning of S. 8 of the Act, they not having complied with the condition of the licence are not exempted from payment of the tax. The judgment of the lower Court is, therefore, correct.

(7) The appeal fails and is dismissed with costs. No leave.

V.S.B. Appeal dismissed.

A.I.R. 1954 ANDHRA 9 (Vol. 41, C.N. 7)

SUBBA RAO C. J. (31-8-1954)

M. Gnanamani, Petitioner v. Governor of Andhra represented by the Chief Secy. to Govt. of Andhra and another, Respondents.

Writ Petn. No. 510 of 1954.

(a) Constitution of India, Arts. 154, 161 and 162 — Governor's powers under Constitution.

A combined reading of the three Articles indicates that the entire executive power of the State vests in the Governor in respect of all matters in regard to which the Legislature of the State has power to make laws. In regard to the same matters he has also got the limited judicial power given under Art. 161. These are all the powers conferred on the Governor under the Constitution. (Para 10)

(b) Constitution of India, Arts. 226 and 361 — Acts of Governor — Immunity from process of Court — Issue of writ under Art. 226.

In the case of official acts an absolute immunity from the process of Court is given to a Governor & this immunity extends not only to his official acts but also to acts purporting to be done by him in exercise of the powers conferred on him, so long as he is not guilty of dishonesty or bad faith. But this will not preclude the acts of the Governor from being questioned, if they can be done without a process on him. Indeed Art. 361 itself recognises that this immunity would not restrict the right of any person to bring appropriate proceedings against the Government. (Para 13)

Where an Assistant Engineer having been served with an order imposing the penalty of compulsory retirement preferred an appeal to the Governor who by order transferred it to the Secretary to the Government and thereupon the Engineer prayed for issue of a writ of certiorari against the Governor for quashing his order:

Held, that the Governor was not answerable for his act of sending the appeal to be disposed of by the Government. The Governor was also not responsible to the Court for the manner of his disposal, for no process could be served on him. The application against the Governor was therefore liable to be dismissed.

(Paras 14 and 15)

CASES REFERRED: Paras

(A) (V39) AIR 1952 Cal 799: 56 Cal WN 651 6

(B) (V39) AIR 1952 Nag 330: ILR (1952) Nag 409 7

(C) (V40) AIR 1953 Madh-B 54: ILR (1953) Madh-B 24 9

P. Babulu Reddi, for Petitioner; Advocate-General, for Respondents.

ORDER: This is an application for issuing a writ of certiorari to quash the orders passed by the Government of Andhra and the State of Andhra.

(2) The petitioner is a B.E. of the Madras University. He was working in the II Circle as an Assistant Engineer. On 15-1-1953, an order of Government dated 22-12-1952 was served on him imposing the penalty of compulsory retirement. Against that order, he preferred an appeal to the Governor of Madras. After the Andhra State was formed, the papers were transferred to the Governor of Andhra for disposal.

When he wrote to the Governor of Andhra for information, he received a reply from the Secretary that his petition was sent to the Secretary to Goverment, Public Works Department, Andhra, for disposal. Among other grounds, he claimed that the action of the Governor in asking the Government to dispose of the appeal was without jurisdiction and reduced the provisions for an appeal to a farce, as the very authority which passed the original orders was asked to dispose of the appeal. He asks for the issue of a writ of certiorari to quash the order of the Governor, as well as the Government.

(3) I gave notice to the Advocate General to argue the point, whether a writ would lie in the circumstances against the Governor of Andhra. I am grateful to him for the assistance he has given to the Court.

(4) The learned counsel for the petitioner contended that the immunity given to the Governor in Art. 361(1) of the Constitution is confined to the powers and duties conferred on him under the Constitution and not to powers and duties conferred on him otherwise. He would say that the Governor has the powers to entertain an appeal and a duty to hear it under R. 20(c) of the Madras Civil Services Rules and the immunity given under Art. 361(1) cannot be extended to the powers exercisable by him under those rules, whereas the learned Advocate-General broadly contended that Art. 361 makes a distinction between the powers and duties of the Governor's Office and his acts unconnected with that office, and that, in the former case, there is an absolute bar from any process of Court, whereas in the latter case, it is only protected to a limited extent.

(5) It will be convenient at this stage to notice the relevant provisions of the Constitution and the case-law throwing some light on those provisions.

"Article 361(1): The President, or the Governor, or the Rajpramukh of a State, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.

xx xx xx

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

2. No criminal proceedings whatsoever shall be instituted or continued against the President or the Governor or the Rajpramukh of a State in any Court during his term of office.

3. No process for the arrest or imprisonment of the President or the Governor or the Rajpramukh of a State shall issue from any Court during his term of office.

4. No civil proceedings in which relief is claimed against the President or the Governor or Rajapramukh of a State, shall be instituted during

his term of office in any Court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office, as President or the Governor or Rajpramukh of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor or Rajpramukh as the case may be or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and the place of residence of the party by whom such proceedings are to be instituted and the relief which he claims."

(6) The aforesaid provisions prescribe the limits of the Governor's immunity against civil and criminal proceedings. Bose J. in — 'Biman Chandra Bose v. Governor, West Bengal', AIR 1952 Cal 799 (A) had to consider the scope of Art. 361 in a writ, wherein the power of a Governor in nominating members to the State Legislature was questioned. At page 801 after citing the provisions of Art. 361, the learned Judge says:

"These words are wide enough to bar any interference by the Court in respect of the official acts or omissions of the Governor. But the framers of the Constitution have taken the precaution of using additional words in the Article with a view to extend the protection even in respect of acts or omissions which can be said to be incidental to the exercise of the power and performance of the duties of the office of the Governor. Consequently the Article affords immunity not only in respect of the exercise and performance of the powers and duties of the office, but also in respect of "any act done or purporting to be done by him" in the exercise and performance of those powers and duties.....

A comparison of Cl. (1) of Art. 361 with Cl. (4) thereof makes it clear that in respect of official acts, an absolute bar is created but, in respect of acts done in personal capacity, a partial bar in the shape of notice for a period of two months prior to institution of a civil proceeding is imposed."

(7) The Nagpur High Court in — 'G. D. Karkare v. T. L. Shevde', AIR 1952 Nag 330 (B) also expressed a similar view. There the appointment of the Advocate General by the Governor was sought to be questioned. It was argued that the appointment was in contravention of the Constitution, and therefore, Art. 361 could not afford any immunity to the Governor. Dealing with that argument, the learned Judges observed at page 332 as follows:

"The argument ignores that the immunity afforded by the clause is also in respect of any act purporting to be done by the Governor in the exercise & performance of the powers and duties of his office. The expressions "purporting to be done" postulates that any act, though not done in pursuance of the Constitution may nevertheless be accorded this protection if the act professes or purports to be done in pursuance of the Constitution."

(8) The learned Judges rejected the further argument that the validity of the appointment cannot be questioned in the absence of the Governor in the following words:

"We cannot accede to the contention that because His Excellency the Governor is not amenable to the process of Court, this Court cannot examine this action in appointing the non-applicant and pronounce upon its legality. The immunity afforded by Art. 361 is personal to the Governor. That Article does not place the actions of the Governor purporting to be done in pursuance of the Constitution beyond the scrutiny of the Courts. What the Constitution establishes is supremacy of law and not of men however high placed they might be."

(9) So too, the High Court of Madhya Bharat in — 'Lakshman Singh v. Raj Pramukh of Madhya Bharat', AIR 1953 Madh-B 54 (C) held on a construction of Art. 361 of the Constitution that it affords complete immunity to the Rajpramukh not only in respect of the exercise and performance of the powers and duties of the office, but also in respect of "any act done or purporting to be done by him in the exercise and performance of those powers and duties."

(10) Let me now analyse the relevant provisions of the Article in the light of the case-law cited. The crucial words are "Powers and duties of the Governor." The powers and duties of the Governor are prescribed by other Articles of the Constitution. Under Art. 154 the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

Article 161 provides for his judicial power and under that Article, the Governor of a State shall have the power to grant pardons, reprieves, respites, or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of a State extends.

Article 162 says that the executive power of a State shall extend to the matters with respect to which the legislature of the State has power to make laws. A combined reading of the three Articles, therefore, indicates that the entire executive power of the State vests in the Governor in respect of all matters in regard to which the Legislature of the State has power to make laws. In regard to the same matters he has also got the limited judicial power narrated above. These are all the powers conferred on the Governor under the Constitution.

(11) But the Constitution may also enable other bodies or authorities to confer the powers or impose the duties on the Governor subject to the provisions of the Constitution. Chapter I of Part XI of the Constitution confers powers on the Parliament and the State Legislatures, to make laws in respect of matters enumerated in the List given in Sch. VII to the Constitution. The said bodies may, therefore, make laws in respect of all matters mentioned therein and in so doing, confer certain powers on the Governor. So too, the Governor may

issue Ordinances under certain circumstances wherein powers may be conferred on the Governor.

The executive Government may also in exercise of the powers conferred on them by statutes make rules, conferring certain powers or imposing certain duties on the Governor. The Constitution also expressly enables the Governor under Art. 309 to make rules regulating the recruitment and conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature. Further certain Acts passed or rules made by competent bodies before the making of the Constitution of India may, by reason of the transitory provisions, continue to have constitutional validity and binding force.

Such Acts or rules may contain provisions conferring certain powers on the Governor. Therefore there are many ways by which a power may be conferred on the Governor qua Governor, which will enable him to exercise that power by virtue of his office as Governor. All the powers exercisable by a Governor by virtue of his office can be exercised only on the advice of the Ministers, except in so far as the Constitution expressly or perhaps by necessary implication says that he can exercise those powers in his individual discretion.

(12) There may be a second category of powers conferred on the Governor qua Governor, but in a different capacity though he occupies that capacity by virtue of his office as Governor. A statute may confer on a Governor the 'ex officio' Presidentship of a charitable institution. A third category of acts may be exercised by the Governor in his personal capacity. He may borrow money or execute promissory note. He may make a speech as President of a meeting or write an article defaming or slandering others. He may commit breaches of contract entered into with third parties.

(13) Under Art. 361 there is an absolute immunity for the first category of acts, but only a limited one in respect of the other two. In respect of the first he is not answerable to any Court of law. No Court can compel him to show cause or defend his action. In the case of official acts an absolute immunity from the process of Court is given and this immunity extends not only to his official acts but also to acts purporting to be done by him in exercise of the powers conferred on him, so long as he is not guilty of dishonesty or bad faith. But this will not preclude the acts of the Governor from being questioned if they can be done without issuing a process on him. Indeed Art. 361 itself recognises that this immunity would not restrict the right of any person to bring appropriate proceedings against the Government.

(14) In the instant case, appellate power is conferred on the Governor under valid statutory rules. He is authorised to exercise that power in his capacity as Governor. It is said that the said order of the Governor sending back the appeal against the Government to be decided by the Government is contrary to all principles of jurisprudence as the appellate authority has asked the subordinate authority to dispose of the appeal filed against its order. Whatever justification there may be for the comment the act complained of was one done by the Governor in exercise of the powers conferred on him or, at any rate, under a professed exercise of that power. The Governor is not answerable for his act of sending the appeal to be disposed of by the Government. The Governor is also not responsible to the Court for the manner of his disposal, for no process can be served on him. This will not preclude the petitioner from proceeding against the Government.

(15) The application against the Governor is dismissed. Rule nisi is issued against the Government returnable in four weeks.

V.R.B. Order accordingly.

A.I.R. 1954 ANDHRA 11 (Vol. 41, C.N. 8)

CHANDRA REDDI J. (7-7-1954)

Bettini Rangayya, Appellant v. Bettini Sesharathnam, Respondent.

A. A. O. No. 413 of 1952, against order of Sub-J., Tenali, D/- 25-3-1952.

Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949), S. 5(c) — Cruelty and desertion by husband — Maintenance decreed to wife — Subsequent application by husband under S. 5(c) — Maintainability.

Where a suit by wife for separate residence and maintenance against her husband on the ground of cruelty and desertion is decreed, a subsequent petition by husband for dissolution of marriage under S. 5(c), Madras (Bigamy Prevention and Divorce) Act, 1949, does not lie as it cannot be said that the wife, without just cause, deserted the husband for a continuous period of not less than three years immediately preceding the presentation of the petition within the meaning of that section. (Para 5)

Further, a Court cannot compel a wife to live with her husband under S. 5 of the Act. On the other hand, the object of the section is to grant a divorce and not to bring the wife and the husband together. (Para 5)

P. Suryanarayana, for Appellant; D. Narasaraju, P. Subba Rao and Y. Suryanarayana, for Respondent.

JUDGMENT: This is an appeal against the order of the learned Subordinate Judge of Tenali dismissing the petition under S. 5 of the Madras Act 6 of 1949, the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949. The appellant is the husband and the respondent is the wife and the petition is founded on cl. (c) of S. 5, namely, that the respondent deserted the appellant for a continuous period of not less than three years immediately preceding the presentation of the petition. This petition was opposed by the respondent on the ground that cl. (c) of S. 5 had no application to this case, because she had to live away from her husband owing to the cruel treatment meted out to her by him and that the right to live separately from her husband and get maintenance was declared in A. S. No. 59 of 1946 on the file of the Subordinate Judge's Court of Tenali.

(2) To appreciate the relative contentions of the parties, it is necessary to refer to the background of this litigation.

(3) The appellant filed O. S. No. 349 of 1944 on the file of the District Munsif's Court, Tenali, for restitution of conjugal rights. Shortly after, the respondent, i.e., the wife instituted O. S. No. 72 of 1945 on the file of the District Munsif's Court, Tenali, for maintenance against her husband alleging cruelty and desertion by the husband. The trial Court dismissed the wife's suit and decreed the husband's suit. But an appeal O. S. No. 72 of 1945 was decreed and the suit by the husband, namely O. S. No. 349/44, was dismissed. These decisions became final as the matters were not carried in appeals to the High Court.

(4) While matters stood thus, Act 6 of 1949 was passed and the appellant who was obviously anxious to get rid of the decree against him for payment of maintenance to his wife, sought the benefit of S. 5 of the Act and for that purpose filed the petition giving rise to this appeal.

(5) The learned Subordinate Judge dismissed the petition for the reason that it could not be said that the wife, without just cause, deserted the husband for a continuous period of not less than three years immediately preceding the presentation of the petition, as she was entitled to live away from her husband and claim maintenance by virtue of the decree in A. S. No. 59 of 1946. Mr. Suryanarayana in this appeal submitted that the parties being young couple should be brought together by directing the wife to live with her husband. But the course chosen by the appellant is not conducive to that course, nor a Court can compel a wife to live with her husband under S. 5 of Act 6 of 1949. On the other hand, the object of S. 5 is to grant a divorce and not to bring the wife and the husband together. No other point was argued, and rightly, as the appeal is unarguable. In the result, the appeal is dismissed with costs.

D.R.R. Appeal dismissed.

A.I.R. 1954 ANDHRA 12 (Vol. 41, C.N. 9)

SUBBA RAO C. J. AND CHANDRA REDDI J.

(29-7-1954)

Rajah of Vijianagaram, Appellant v. Revenue Divisional Officer, Vizagapatanam, Respondent.

Appeal No. 41 of 1950 against decree of Sub-J., Vishakapatnam in O. P. No. 4 of 1946.

Land Acquisition Act (1894), Ss. 23 and 24 — Assessment of compensation — Criterion — Land to be used as salt pan — Assessment.

The main criterion for the assessment of compensation is what a willing purchaser would pay to a willing vendor. But in valuing the land acquired, the possibilities of the land as distinguished from its realised possibilities must be taken into consideration for the vendor and the vendee necessarily would enter into a bargain with an eye on those potentialities. Though sentimental considerations and enhanced valuation by reason of the scheme itself have to be eschewed in assessing the value of the land, all its potentialities should be taken into consideration. (Para 4)

If there is a reasonable prospect of the acquired land being used as a salt pan, the income from a working salt pan may be taken and after taking into consideration the enormous expenditure incurred for converting a waste land into a salt pan some reasonable rate may be fixed. If sale deeds of salt pan in and around the locality are available, the value of the potentiality may be ascertained having regard to the expenditure incurred for conversion. Offers that may be made by persons intending to exploit the land as salt pans may also afford some basis. But all the aforesaid methods may not furnish precise data. There is always an element of guess and it is for the Court to come to a reasonable conclusion on the facts adduced in each case. (Para 4)

Anno: L. A. Act, S. 23 N. 2.

CASES REFERRED: Paras

(A) (V16) AIR 1929 PC 112: 115 Ind Cas 730 (PC) 3

(B) (V26) AIR 1939 PC 98: ILR (1939) Mad 532 (PC) 4

N. V. B. Sankara Rao, P. Rami Reddi and K. Subramania Reddy, for Appellant; P. Satyanarayana Raju, Govt. Pleader and D. L. Narasimharaju, for Respondent.

JUDGMENT.: This appeal raised a question of compensation under the Land Acquisition Act. At the instance of the Collector, Central Excise, Madras, parts O. S. Nos. 15 and 17 of Nellimukku a proprietary village in the Vizianagaram Estate, have been acquired by Government for the extension of the salt factory, at Balacheruvu. The total extent acquired was 229 acres 59 cents. The notification under S. 4 (1), Land Acquisition Act, was published on 29-8-1944 and that under S. 6 was issued on 6-3-1945.

The Land Acquisition Officer awarded compensation at the rate of Rs. 12-8-0 per acre totalling an amount of Rs. 2869-14-0. Adding a sum of Rs. 430-7-8 towards 15 per cent. solatium for compulsory acquisition, he awarded a sum of Rs. 3,300-5-8. On a reference made to the Subordinate Judge he increased the rate of compensation to Rs. 25/- an acre. On that basis, he has given additional compensation of Rs. 2,869-14-0 and also 15 per cent. solatium on the said amount. The claimant preferred the above appeal claiming Rs. 65,000/- including the statutory Solatium of 15 per cent.

(2) The simple question in this appeal is whether the compensation awarded by the Subordiate Judge is inadequate and, if so, whether the appellant is entitled to the whole or part of the amount claimed by him.

(3) Before we consider the evidence, it will be convenient at this stage to notice the law on the subject. The principles for fixing the compensation are governed by Ss. 23 and 24 of the L. A. Act. The general principles specified in the said section differ in no material respect from those laid down by English decisions. There are innumerable decisions of the English and Indian Courts

but it will suffice if two decisions of the Judicial Committee relevant to the present enquiry are cited.

In — 'Vallabhdas Naranji v. The Collector', AIR 1929 PC 112 (A), the land acquired was an irregularly shaped piece by sea and was covered by the tides at various times, and for ordinary purposes was practically useless. It was, however, capable of being used for salt works. There is nothing on record to show that there were any salt pans adjacent to the land acquired, or there was a demand for the said land for salt manufacture. The Assistant Judge of Thana awarded Rs. 200/- per acre. The High Court reduced it to Rs. 14/- per acre. Viscount Dunedin made the following observations in assessing the value of the said land as follows:

"What it really comes to is this: This land is absolutely worthless in itself, but it has no doubt a potentiality of being used for salt works and therefore, the owner is entitled to the market value of that potentiality".

(4) The only evidence adduced was, that in one case some people had spent Rs. 7 lakhs on salt works and had not made them pay at all, but hoped that at the end of ten years they possibly would pay. On that evidence, it was held by the High Court that it would not pay anybody to pay for land of that sort even if they were going to construct salt works upon it, more than the value as waste lands. This conclusion was accepted by the Privy Council. A more elaborate and, if I may say so, instructive discussion on the question is found in — 'Narayana Gajapathi Raju v. Revenue Divisional Officer, Vizagapatam', AIR 1939 PC 98 (B).

In that case a harbour was being constructed at Vizagapatam. The land acquired by the harbour authorities on the south of the harbour was allocated by them to oil companies and other industrial concerns. This land was malarious. The appellant's land, which was to the south of this land, contained a spring which yielded a constant and abundant supply of good drinking water, which could easily be made available for the oil companies and people engaged in the harbour works. The appellant's land was acquired for the purpose of the execution of anti-malarial works. The appellant claimed compensation on the basis that it was partly waste and partly cultivated.

Before the Subordinate Judge, the appellant made a further claim on the footing of potentialities as a source of water supply. The Subordinate Judge held that the only possible buyers were the oil companies and the harbour authorities and that compensation for potentialities could be awarded even where the only possible buyer was the acquiring authority. That award was questioned before the Judicial Committee. The Judicial Committee held that the owner is entitled to and the valuing officer must ascertain the value of the potentialities even where the only possible purchaser of the potentialities is the authority purchasing under powers enabling compulsory acquisition. The well established principle has been re-stated by their Lordships at page 54 as follows:

"It is plain that in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in S. 24(5) of the Act and is sometimes expressed by saying that the possibilities of the land and not its realised possibilities that must be taken into consideration."

Adverting to the main question raised in that case their Lordships observed:

"For these reasons, their Lordships have come to the conclusion that even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers and that he is no more confined to awarding the land's "poromboke" value in the former case than he is in the latter."

But they were careful to point out at page 552 that

"the existence of the scheme must not be allowed to enhance the price, if by "scheme" is meant by the fact that compulsory powers of acquisition have been obtained for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality. The valuation must always be made as though no such powers had been acquired, and the only use that can be made of the scheme is as evidence that the acquiring authority can properly be regarded as possible purchasers."

It will be seen from the aforesaid two judgments that the main criterion for the assessment of compensation is what a willing purchaser would pay to a willing vendor. But in valuing the land acquired, the possibilities of the land, as distinguished from its realised possibilities must be taken into consideration for the vendor and the vendee necessarily would enter into a bargain with an eye on those potentialities. Though sentimental considerations and enhanced valuation by reason of the scheme itself have to be eschewed in assessing the value of the land, all its potentialities should be taken into consideration.

Though the rule is easily stated, the difficulty lies in its application to the facts of each case. A land may have a particular value only to the owner of the site. It may have a particular value to a number of possible purchasers in the locality or even to the person acquiring the land. But how to value the said potentiality? Many methods are suggested and adopted in decided cases. If there is a reasonable prospect of the acquired land being used as a salt pan, the income from a working salt pan may be taken and after taking into consideration the enormous expenditure incurred for converting a waste land into a salt pan some reasonable rate may be fixed.

If sale deeds of salt pans in and around the locality are available, the value of the potentiality may be ascertained having regard to the expen-

diture incurred for conversion. Offers that may be made by persons intending to exploit the land as salt pans may also afford some basis. But all the aforesaid methods may not furnish precise data. There is always an element of guess and it is for the Court to come to a reasonable conclusion on the facts adduced in each case.

(5) What is the nature and character of the land acquired in this case? The total extent of 229 acres 59 cents is comprised in the following survey numbers:

S. No. 15/1A.	92 acres 72 cents.
S. No. 15/1C.	36 acres 67 cents.
S. No. 17-B.	100 acres 20 cents.

There are Zamindari unassessed porombokes. In the Commissioner's report P.19 the acquired lands are described as largely swampy, uneven and rugged, necessitating extensive reclamation work. C. W. 1, Sri C. A. Ramakrishnan I. C. S., who was the Estate Collector during the crucial period, but was the Joint Secretary, Board of Revenue, Madras, at the time he gave evidence, submits in cross-examination that the land acquired is saline and had not been assigned to anybody and was waste and that it yielded no income to the Estate.

R. W. 1 the village karnam of Nellimukku, says that, before acquisition the land was poromboke and there are still 5 or 6 hundred acres of poromboke land adjoining the acquired land, that the land acquired was unfit for cultivation and that even grass does not grow in it. R. W. 2 for whom these lands were acquired also says that the acquired lands were unfit for cultivation and the estate was not getting any income therefrom. But the real question is whether it has potentiality for manufacturing salt and whether that factor should be taken into consideration in fixing the valuation.

It may be recalled that this land was acquired for the extension of the Balacheruvu Salt Factory. It is adjacent to the factory. C. W. 1 who has no axe to grind and who was Joint Secretary to the Board of Revenue and who has personally inspected the locality, speaks in glowing terms of the possibilities of the land acquired. He says in emphatic terms that the Estate had lost for a trivial amount land with a potential lease value of two lakhs of rupees.

He would add that he estimated the value of the land at Rs. 25,000/- per acre on capitalising the lease value of Rs. 1,000/- per acre per annum at 25 times. He would say, considering the favourable location of the lands, that if the lands came back to the Estate, they would be leased out every year for the manufacture of salt. He had experience in land acquisition cases, being himself Sub-Collector for 12 years. It is not easy to ignore his evidence when he says that the lands have high potential value as salt pans.

(6) Still the question now remains how to assess its potential value. The valuation given by C. W. 1 cannot obviously be given to the lands acquired, for his valuation is of their realised possibilities of the land. He admits in his evidence that he has no idea as to what it will cost to convert a swamp into a salt pan fit to be worked. He did not ascertain what amount of salt those lands can yield per acre. He frankly admits that the rate of Rs. 25,000/- given by him as the market value of one acre, was only for purposes of putting forward the claim of the estate. From his evidence, therefore, it is not possible to fix the potential value of the lands.

(7) The potential value in this case can be fixed by adopting three methods. If there is data for the expenditure incurred in respect of a definite extent of land converted into a salt pan and the income derived therefrom thereafter, it may afford some basis for fixing the valuation. In this case, the only person who could have given that evidence has not placed before the Court definite material. R. W. 2, the person who is running the Balacheruvu Salt Factory, says in his evidence that he has spent about a lakh of rupees for converting the acquired lands into salt pans and that, in the first three years, they did not realise any amount.

In cross-examination he says that the acquired lands have been in his possession from October 1943 and that they did not get any profit till 1949. But he admits that he has not maintained separate accounts for the lands acquired. He did not file any account books. It is not possible, therefore, to accept his evidence at its face value and his evidence does not help the Court in ascertaining the value of the acquired lands.

R. W. 3 is a technical officer attached to the Balacheruvu Salt Factory. He would say that to bring 100 acres in cultivation, the cost was estimated at Rs. 1,31,000/-. He admits in cross-examination that in the first two years the yield will be 5 to 8 hundred maunds per acre, that from the third year the yield would be 1200 maunds per acre and that there is great demand for salt. His evidence also does not carry the matter further. But from the evidence of R. Ws. 2 and 3 it is apparent that large sums of money have to be invested before the acquired lands could yield profits. According to R. W. 1, he spent large sums of money going into lakhs. That should be borne in mind in valuing the potentialities of the acquired lands.

(8) We have then got sale deeds in respect of salt pans. Under Exhibit D-2 dated 11-11-1938 a salt pan of the extent of 1 acre 32 cents was sold for Rs. 100/- which works out at Rs. 75/- per acre. Exhibit D-3 is a sale deed dated 8-9-1941 under which 1 acre 37 cents of salt pan lands was sold for Rs. 100/-. The rate under this sale deed is Rs. 290/- per acre. Exhibit P. 8 dated 26-9-1945 is a sale deed conveying 33 acres 14 cents for a sum of Rs. 2,000/-. The rate under this sale deed is Rs. 635/- per acre. Exhibit P. 2 (a) dated 6-11-1945 is a list of sales conducted by the Estate Collector whereunder 4 acres were sold for Rs. 4,200/- at the rate of Rs. 1050/- per acre.

It will be seen that under the said sale deeds only the salt pans were sold and it is not, therefore, possible to give the same value to the acquired lands in their unprepared state. The evidence of R. W. 2, R. W. 3 and C. W. 2 shows that enormous amounts are required for conversion. These documents are, therefore, not of much evidentiary value. Exhibit P-13 is a letter from the Revenue Divisional

Officer, Vizagapatam, to the trustee of the Vizianagram Estate, forwarding the "C" form voucher for Rs. 262-7-7 on account of the cost of acquisition. The extent acquired was 3 acres 42 cents and the year of acquisition was 1915.

The extent is very small and the acquisition was made 33 years prior to the present acquisition. It does not, therefore, afford a correct basis for the present valuation. Exhibit D-11 is a certified copy of the compromise decree in O. P. No. 35 of 1926 on the file of the Court of the Subordinate Judge of Vizagapatam. The land acquired related to S. Nos. 16, 17/2 and 18/2 of Nellimukku village of an extent of 351 acres 87 cents. Under the compromise Rs. 20/- per acre were given. This is also a very old transaction and for the same reason it cannot be relied upon.

(9) There are some offers made by the villagers to the zamindar for leasing the lands acquired. Exhibit P-10 of the year 1942 and Exhibit P-9 of the year 1943 are applications filed to the Thana officer asking for lease of the suit lands. They do not show the rate, but they only indicate that there was demand for these lands even in 1942 and 1943. Exhibit D-1 dated 22-2-1943 is a notice given by the Estate Amin to Appana Ramachandra Rao.

Therein it is mentioned that the sale of survey No. 17 measuring 124 acres 32 cents of Nellimukku village will be conducted by the Estate Collector in public auction on 26-2-1942 for Nazarana at the rate of Rs. 1/4 per acre. This shows that the estate in 1943 was intending to auction these lands subject to the payment of Nazarana. Exhibit P. 12 dated 21-10-1943 is another application by two of the villagers to the Secretary to the Commissioner, Board of Revenue, requesting the Board for a lease of 250 acres of the suit lands undertaking to pay Rs. 1-8-0 per acre per annum.

Exhibit P-11 makes a reference to an application by the villagers to pay Rs. 1-4-0 cist per acre in addition to Nazarana of Rs. 1,000/-. Exhibit P-15 dated 26-8-1943 is an application by 10 persons to the Estate Collector, Vizianagaram, offering an annual assessment of Rs. 15/- per acre of the suit lands. The aforesaid documents show that offers were made to the estate agreeing to pay annual assessment of Rs. 1-4-0, Rs. 1-8-0 and Rs. 15/- per acre. The estate did not accept the offers, but instead they intended to auction the rights subject to payment of Nazarana.

(10) In this state of evidence, we have to fix the value per acre. At the time of acquisition, they were waste lands and were not yielding any income. There were some hundreds of acres of land belonging to the Zamindar similar to that acquired, but the lands acquired are adjacent to Balacheruvu Salt Factory, and Balacharuvu Salt Factory would certainly have purchased them by private negotiations if the Government had not stepped in. It was one of the possible purchasers.

Further, the offers showed there were people in the village, who intended to exploit the suit lands for salt purposes. The aforesaid documents show that even in 1915, similar lands were sold at the rate of Rs. 72/- per acre, though in 1927 under the compromise the Zamindar accepted Rs. 20/- per acre. There were also offers to pay annual assessments of Rs. 1-4-0 to Rs. 15/- per acre. It is manifest from the evidence that the lands in question have high potential value as salt pans.

Having regard to the aforesaid evidence and circumstances and having regard to the fact that large extent of land was acquired, we hold that the land, if leased out, would have fetched an income of Rs. 3/- per acre. Capitalizing it for 20 years purchase we arrive at the rate of Rs. 60/- per acre and award compensation on that basis. In addition, the appellant will get the usual solatium of 15 per cent. The applicants will also be entitled to interest at 6 per cent. from the date of taking of possession. The decree of the lower Court is accordingly modified. The parties will pay and receive proportionate costs.

V.R.B. Decree modified.

A.I.R. 1954 ANDHRA 15 (Vol. 41, C.N. 10)

UMAMAHESWARAM J. (27-8-1954)

Kattragadda Rathiah, Appellant v. Debineni Santhamma and another, Respondents.

Second Appeal No. 637 of 1950, against decree of Sub-J., Tenali in A. S. No. 54 of 1949.

(a) Succession Act (1925), S. 303 — Executor de son tort — Guardian of a lunatic borrowing amount after lunatic's death — Lunatic's estate if liable — (Lunacy Act (1912), S. 50).

Where in a suit against the guardian and the widow of a lunatic to recover money due under a promissory note executed by guardian, the plaintiff contended that the guardian was in the position of an executor de son tort so that the lunatic's estate was liable, but apart from the single act of borrowing under the suit promissory note, no other act of intermeddling was alleged or proved in the case, so as to attract the terms of S. 303:

Held, that the powers of the guardian ceased with the death of the lunatic and the estate vested in the lunatic's heir. The guardian was, therefore, not an executor de son tort and the properties of the lunatic in the hands of his widow could not be proceeded against. AIR 1943 Mad 265, Relied on. (Para 5)

Anno: Succession Act, S. 303 N. 1.

(b) Civil P. C. (1908), S. 100 — New plea — (Contract Act (1872), S. 69) — (T. P. Act (1882), S. 92).

The plaintiff's contention that defendant No. 1, had a right of subrogation as against the defendant No. 2 and that instead of passing a decree against the 1st defendant and driving him to a separate suit against defendant 2 all the equities might be worked out in the present suit, cannot be allowed to be raised for the first time in second appeal, when there was no pleading to that effect, no issue framed on it and when there was not even an application

for amendment of plaint in the second appeal. AIR 1932 Cal 182, Not followed. (Para 6)

Anno: Civil P. C., Ss. 100-101 N. 60; T. P. Act, S. 92 N. 2; Contract Act, S. 69 N. 1.

CASES REFERRED: Paras

(A) (V30) AIR 1943 Mad 265: 1943-1 Mad LJ 22 4, 5

(B) (V19) AIR 1932 Cal 182: 59 Cal 216 6

Nati Subramanian and J. V. Krishna Sarma, for Appellants; K. Kotayya & G. Mukatrama Sastri and A. Sambasiva Rao, for Respondents (Nos. 1 and 2 respectively).

JUDGMENT: The plaintiff is the appellant. He filed a suit for recovery of a sum of money due under a promissory note executed by the 1st defendant. His case was that the 1st defendant was appointed as the guardian of D. Chalapathirao under the Lunacy Act and that the 1st defendant borrowed the amount for performing his obsequies. The 2nd defendant was impleaded as the widow of Chalapathirao.

In the plaint, he stated that the debt was contracted and spent for the spiritual benefit of late Chalapathirao, the lunatic, and for meeting obsequial expenses and that the debt was consequently binding on his estate. He further stated in paragraph 1 that as the properties belonging to late Chalapathirao were at present in the possession of defendants 1 and 2, they were liable to discharge the suit debt. He prayed for a personal decree against the 1st defendant and as against the properties belonging to Chalapathirao in the hands of defendants 1 and 2.

(2) The 1st defendant filed a written statement stating that the amount was borrowed for the obsequies of Chalapati Rao, that the 2nd defendant requested her to execute the promissory note, that the 2nd defendant actually received the amount and utilised it for the obsequies. The 2nd defendant denied that the amount was borrowed for the obsequies, that the income got from Chalapati Rao's properties was large, that there was no necessity for the 1st defendant to borrow, that the 1st defendant was liable to render an account for the income realised by her during the management and that no decree should be passed against the estate in her hands.

(3) The plaintiff examined himself as P. W. 1. He deposed that the amount was borrowed for the obsequies of 2nd defendant's husband. He stated that he would be satisfied with a decree against the estate of Chalapatirao, if any, in the hands of defendants 1 and 2. In cross examination, he made it clear that he did not want a personal decree against the 1st defendant.

(4) An appeal was preferred by the 2nd defendant to the Subordinate Judge of Tenali. The Subordinate Judge rightly followed the decision in — 'Rama Kamath v. C. L. Lobo', AIR 1943 Mad 265 (A) and held that the 1st defendant ceased to be the guardian on the death of the lunatic and that the properties in the hands of the 2nd defendant could not be proceeded against. He, therefore, held that the decree that was passed as against the estate of Chalapathirao in the hands of the second defendant was wrong, and allowed the appeal.

(5) The plaintiff has preferred the second appeal. His contention is that the properties of the late Chalapathirao in the hands of the 2nd defendant are also liable. The learned Advocate for the appellant relied on S. 303, Indian Succession Act, and contended that the 1st defendant was in the position of an executor 'de son tort 'and that the properties of Chalapathirao might consequently be proceeded against. Section 303 runs in the following terms:

> "A person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.
>
> Exceptions (1) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for immediate necessities of his family or property, does not make an executor of his own wrong."

Section 304 defines the liability of the executor of his own wrong. Section 320 provides that the funeral expenses to a reasonable amount shall be paid before all debts. So, the question for consideration is whether the 1st defendant was an executor 'de son tort'. Apart from the single act of borrowing under the suit promissory note, no other act of intermeddling is alleged or proved in the case, so as to attract the terms of S. 303, Succession Act. The 1st defendant was only in the position of a guardian prior to the death of the lunatic. According to the decision in — 'Rama Kamath v. C. L. Lobo (A)', the powers of the guardian ceased with the death of the lunatic and the estate vested in the lunatic's heir, i.e., the 2nd defendant. Therefore the contention of the learned Advocate based on the provisions of the Succession Act has no substance.

(6) The next contention argued by the learned Advocate for the appellant was that the 1st defendant would have a right of subrogation as against the 2nd defendant in respect of monies borrowed for the benefit of Chalapathirao's estate and that instead of passing a decree against the 1st defendant and driving him to a separate suit all the equities might be worked out in the present suit.

Unfortunately there is no pleading to that effect. The plaintiff has not alleged in the plaint that the 1st defendant who executed the promissory note in his favour had a right of subrogation as against Chalapathirao's estate or that on taking accounts monies would be due to the 1st defendant from his estate and that the right might be worked in the suit itself. No issue was framed on this question. There is not even an application for amendment of the plaint in second appeal. Under those circumstances, I am not prepared to permit the appellant

to raise this question of subrogation at this stage inasmuch as several questions of fact will have to be determined and the case remanded for taking evidence.

The learned Advocate for the appellant relied upon the decision in — 'Manindra Chandra v. Sudir Krishna', AIR 1932 Cal 182 at p. 189 (B) for the proposition that even if it was not specifically pleaded in the plaint, he was entitled to be substituted to the indemnity which the 1st defendant had against the estate. I do not agree with that case. The plaintiff should have pleaded in his plaint that the 1st defendant was entitled to indemnity from the 2nd defendant and that on account taking, the 2nd defendant would be liable to pay the 1st defendant. It was brought to my notice during the course of the arguments that a suit was instituted by the 2nd defendant as against the 1st defendant and a decree was passed as against the 1st defendant, for the amounts collected by her during her management and that the 1st defendant was not entitled to recover any sums from the estate of Chalapathirao.

(7) The learned Advocate for the appellant wanted me to remand the case to the trial Court, so as to enable him to adduce evidence and work out his right of indemnity and to show that the 1st defendant was entitled to recover moneys from Chalapathirao's estate and that the 1st defendant intermeddled with the estate of Chalapathirao even after his death.

(8) I am not prepared to remand the second appeal at this stage in the absence of any pleading to that effect or an amendment application praying for such a relief.

(9) The second appeal therefore fails and is therefore dismissed. I direct each party to bear its own costs. No leave.

H.G.P. Appeal dismissed.

A.I.R. 1954 ANDHRA 17 (Vol. 41, C.N. 11)

CHANDRA REDDI J. (3-8-1954)

Dubaguntu Subramanyam, Plaintiff-Appellant v. Kannukollu Bhavanarayana Rao and others, Defendants-Respondents.

Second Appeal No. 497 of 1950, against decree of Dist. J., Krishna at Masulipatam in Suit No. 113 of 1947.

(a) Evidence Act (1872), Ss. 101 to 103 — Consideration — Burden of proof.

It is for the persons who plead want of consideration to prove it, notwithstanding the fact that they are not parties to the original document and that the persons claiming it do not claim under executant. (Para 10)

Anno: Evidence Act, Ss. 101 to 103 N. 24.

(b) Limitation Act (1908), Arts. 142 and 144 — Possession — Payment of tax affords evidence of possession — AIR 1924 Mad 571 and AIR 1926 PC 100, Distinguished. (Para 22)

Anno: Limitation Act, Arts. 142 and 144 N. 11.

(c) Limitation Act (1908), Arts. 142 and 144 — Possession of co-owners.

Even if the possession of a co-owners is not established, that is not sufficient to disallow his claim for possession unless there is any evidence of ouster. It is only when it is evident that the co-owner in possession intended to exclude others from possession amounting to ouster of others, that his possession will be exclusive. (Para 24)

Anno: Limitation Act, Arts. 142 and 144 N. 35 Pt. 4.

CASES REFERRED: Paras

(A) (V27) AIR 1940 PC 114: 1940-2 Mad LJ 452 (PC) 11
(B) (V11) AIR 1924 Mad 571: 46 Mad LJ 471 14-15
(C) (V13) AIR 1926 PC 100: 48 All 529 (PC) 17
(D) (V15) AIR 1928 Mad 299: 51 Mad 1 (FB) 21

Advocate-General, D. P. Narayana Rao and B. Srinivasamurthi, for Appellants; B. V. Ramanarasu, for Respondent (No. 1).

JUDGMENT: The plaintiff is the appellant. He instituted O. S. No. 76 of 1945 in the Subordinate Judge's Court of Bezwada for possession of 400 square yards of site in Vijiawada town. The material facts may be briefly stated.

(2) The father of defendants 1 and 2 and his brothers had 3400 square yards of site in Vijiawada, and in the family partition, their branch got 1800 sq. yards. On 3-1-1931 the father Chandrasekhara Rao conveyed 400 out of 1800 square yards to his daughter, 1st defendant, under Ex. P-3 in discharge of debts due to her. The plaintiff acquired title to these 400 square yards under Ex. P-1 dated 9-5-1945 having paid consideration of Rs. 3200/-. It is the case of the plaintiff that subsequent to the sale in his favour, he obtained possession of the property and when he was making arrangements to construct a house thereon, the 3rd defendant, alleging to be a tenant under the 2nd defendant, caused obstruction and necessitated him to file this suit, which has given rise to this appeal. The 1st defendant supported the case of the plaintiff.

(3) The suit was resisted by the 2nd defendant, his defence, inter alia, being that the property being an ancestral one, the father had no right to convey to his daughter, that the sale in the latter's favour was not supported by consideration, and lastly that, in any event, he prescribed title to the property by being in continuous and uninterrupted possession adverse to the 1st defendant.

(4) The trial Court found that the property was the self-acquisition of Chandrasekhara Rao and as such the conveyance in favour of the 1st defendant was valid and even otherwise the sale evidenced by Ex. P-3 was fully supported by consideration. He

also found against the 2nd defendant on the plea of limitation reaching the conclusion that the 2nd defendant was not in possession of this property, and that on the other hand, it was the plaintiff's vendor that was in enjoyment of the suit property. In the result, he dismissed (decreed?) the suit. On appeal, the District Judge came to the opposite conclusion on all the points and reversed the trial Court's decree, and dismissed the suit.

(5) In this appeal all the findings of the learned appellate Judge are canvassed. In support of the appeal, it is first contended by Mr. Narasaraju that the suit site was the self-acquisition of Chandrasekhara Rao, which is borne out by several of the documents which were overlooked by the lower appellate Court.

(6) The first point for consideration, therefore, is whether the suit site was the self-acquired property of Chandrasekhara Rao or not. Before I refer to the relevant documents, it is useful to refer to the acquisition of the vacant site in Bezwada, whereof the suit site forms a part and how the property in question passed on to the vendor of the plaintiff. Chandrasekhara Rao had four brothers, namely, Rajarathnam, Suryanarayana, Venkatachalam, and Buchiraju, the latter having died even prior to the acquisition of the site. It appears from the evidence that the purchase was only for the benefit of the three brothers, Chandrasekhara Rao, Rajarathnam and Suryanarayana. It may be also mentioned that neither Venkatachalam nor the children of Butchiraju put forward any claim to this property.

In the partition arrangement between the brothers, 1800 square yards seem to have been got by Chandrasekhara Rao. It may also be mentioned here that in or about the year 1915, the 2nd defendant, who was then a student in the Law College, wanted to know from his father how the site in Bezwada was acquired. His father replied that it was acquired by the eldest brother for the benefit of only three of them and the source of consideration for this acquisition was the earnings of the three brothers. On this, 2nd defendant gave his opinion, that it was the self-acquired property of the father. Subsequently, the father asserted in proceedings before the Tahsildar and the Municipal authorities that it was his self-acquisition.

(7) Chandrasekhara Rao utilised the moneys of his daughter, 1st defendant, for performing the marriage of his other daughters and his younger brother, and thus became indebted to his daughter, the 1st defendant. When the latter pressed for repayment of the same, he executed Ex. P-3 conveying the suit property to the 1st defendant. This narration shows that up to 1931 all parties proceeded on the footing that the site in question was treated as the self-acquisition of Chandrasekhara Rao. (His Lordship discussed the evidence and concluded:)

(8-9) In this state of evidence, the finding of the learned District Judge, contrary to that of the Subordinate Judge, is unsustainable.

(10) This leads me to the question, assuming that it was the joint family property in which the 2nd defendant had also interest, whether Ex. P-3 was supported by consideration or was a gift disguised as a sale deed. At the outset it must be mentioned that the evidence of the 2nd defendant is not that there was no consideration, for Ex. P-3. All that he stated was that he did not know whether there was any consideration for this document, while the 1st defendant as P. W. 4 asserted that there was consideration for Ex. P-3.

There is also a recital in Ex. P-3 that a sum of Rs. 400/- belonging to the vendee under Ex. P-3 was utilised by the vendor for the marriage of his 2nd son Rangasayi Sarma and for joint family expenses and this had accumulated with interest to Rs. 1500/- and by way of discharge of this debt, the suit site was sold. In the face of these recitals, it was for the 2nd defendant to have proved want of consideration for Ex. P-3. The fact that the son was not claiming under the executant of the document does not make any difference. It is for the persons who plead want of consideration to prove it, notwithstanding the fact that they are not parties to the original document and that the persons claiming it do not claim under him.

(11) In this connection, reference may be made to a ruling of the Judicial Committee of the Privy Council in — 'Bhagwan Singh v. Bishambar Nath', AIR 1940 PC 114 at p. 115 (A). The position is summed up succinctly by their Lordships in the following passage:

> "In the opinion of their Lordships the onus of proof on the question whether there was consideration or whether the full consideration stated in the mortgage had in fact passed, is wholly on the defendant and it is not for the plaintiff to prove this matter affirmatively. On the other hand when the question is whether there was legal necessity for the borrowing, the onus of proving that there was, is on the plaintiff."

(12) This was a case for enforcing a mortgage by a Hindu father against the father and his sons. While the High Court held the burden of proving the consideration had been discharged by the plaintiff and the defendants did not produce any satisfactory evidence to show that the money was returned to the mortgagee, the Judicial Committee expressed the opinion that the observations were the result of a misunderstanding of the position as to onus of proof in such cases. I need not multiply authorities on this question. Suffice it to say that the onus is always on the persons pleading want of consideration to prove it, although they do not claim it under the executant. The learned District Judge had not given effect to that well-established principle.

(13) Apart from the onus of proof, on the evidence on record there could be little doubt that Ex. P-3 was fully supported by consideration. (His Lordship discussed the evidence and proceeded:)

(14-15) The learned Judge thought that despite the payment of taxes by the 1st defendant, evi-

denced by Exs. P-8 and P-9 series in respect of the suit site, the 1st defendant could not be said to be in possession of the property. He remarked that separate payment of tax could not prove by itself separate possession and relied on — 'Meyyappan Servai v. Meyyappan Ambalam', AIR 1924 Mad 571 at p. 572 (B). I do not think that decision renders any assistance in this case. There the question was whether the production of the Union receipts by the sons was sufficient to show that they were in possession of the property to the exclusion of the father in whose name the title to the property stood.

How the question arose was this. A decree was obtained against one of the defendants for recovery of possession of an item of property, and on his death his sons were brought on record as his legal representatives. When the decree was being executed, the sons raised the plea that, as they were in exclusive possession of the property and were not made parties to the suit, the decree obtained against their father does not bind them, and substantiating their case that they were in exclusive possession of the property some union receipts were produced. It is in considering this point whether the production of the union receipts would conclusively establish that the father in whose name the property was purchased was excluded from possession by reason of these union receipts; the learned Judges observed:

> "Union receipts are not evidence of title and the payment of union tax does not show that the person who pays it must necessarily be in occupation."

(16) This case is not an authority for the proposition that payment of tax does not afford evidence of possession. Mr. Ramanarasu, the learned Counsel for the respondents, placed some reliance on the decision trying to support the judgment of the lower appellate Court. As I have already narrated, this does not really support the contention put forward on behalf of the respondents.

(17) The learned Counsel for the respondents next placed reliance on a ruling of the Privy Council in — 'Nirman Singh v. Rudra Pratab Narain Singh', AIR 1926 PC 100 (C). The decision also does not help respondents. What was stated by their Lordships in that case was that mutation proceedings are nothing more than fiscal enquiries instituted in the interests of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immoveable property may be put into occupation of it with greater confidence that the revenue for it will be paid. It is useful to extract the relevant passage from the judgment of their Lordships:

> "It is little less than a travesty of judicial proceedings to regard the two orders of the Extra Commissioner of Baharaich and Mr. M. L. Feerar, Deputy Commissioner, as judicial determinations expelling 'proprio vigore' any individual from any proprietary right or interest he claims in immoveable property."

(18) Earlier in the judgment, their Lordships remarked:

> "The perusal by their Lordships of the judgment of the Court of the Judicial Commissioner of Oudh, at page 482 of the record, leads their Lordships to think that its judgment is to a great degree based on the mischievous, but persistent error that the proceeding for the mutation of names is a judicial proceeding in which the title to and the proprietary rights in immoveable properties are determined."

(19) Their Lordships also laid down that they are not evidence that the successful applicant was in possession as sole legal owner in a proprietary sense, to the exclusion, for example, of all the claims of the other members of the family as co-owners.

(20) There are some observations in the judgment which far from supporting the contentions of the respondents establish that the mutation proceedings afford evidence of possession of the person in whose name the change was effected. The following passage is apposite:

> "It appears to us that these proceedings afford clear evidence that Lal Bahadur Singh took possession of the estate as property to which he was entitled to exclusive ownership, and not on behalf of the younger brothers. There can be no doubt he had held physical possession in the sense that he was able to deal with the proceeds and to exclude all others, and there can be no doubt that he showed a determination to exercise that physical power on his own behalf."

(21) The observations of a Bench of the Madras High Court in — 'Vannia Kone v. Vannichi Ammal', AIR 1928 Mad 299 (D) are also pertinent in this context. At page 305 of the judgment Kumaraswami Sastri J. remarks:

> "I may also state that no pattas or other documents are produced to show the enjoyment of property by agnates to the exclusion of widows. Though pattas may not be evidence of title, they are certainly evidence as to possession, as the Revenue authorities issue pattas to those in possession. There are also kist receipts which would show who paid the kist, but no such receipts have been produced in any instance."

(22) Thus, decided cases clearly show that payment of tax affords evidence of possession. Indisputably, 1st defendant was paying the tax in respect of the suit site and the evidence on record establishes beyond doubt that the 2nd defendant and his brothers paid taxes only in respect of the share allotted to each of them, viz., 466 2/3 square yards.

(23) There is also another circumstance which also points to the same conclusion. When the Co-operative department wanted to realise money due from the family of Chandrasekara Rao to the department, they attached the 1400 square yards as belonging to the family and excluded 400 square yards.

(24) No doubt, this is not a conclusive circumstance, but it gives an indication that it was thought

that the 2nd defendant's family had title to and possession of only 1400 Sq. Yds. of the site excluding 400 square yards. Even granting that the possession of the 1st defendant, the predecessor-in-title of the plaintiff, has not been established and that 2nd defendant and his brothers were in possession of the property, that is not sufficient to disallow the plaintiff's claim for possession, unless there is any evidence of ouster.

The plaintiff was in the position of a co-owner and it is only when it is evident that the co-owner in possession intended to exclude others from possession amounting to ouster of others, that his possession will be exclusive. In this case, in spite of Ex. D-4 it is clear from Exs. P-12 and P-13 that P. W. 3 did not pay any rent either to the 2nd defendant or his younger brother and it is only in 1934, as is seen from Ex. D-9, that he seems to have paid rent to the 2nd defendant and his brother. Even Ex. D-9 does not show that rent was paid to the two brothers in respect of the whole 1800 square yards.

Assuming this in favour of the 2nd defendant it was only on 17-2-1934 within 12 years of the suit, that rent was paid to the 2nd defendant and his brother in respect of the suit site. At the most, it could be said that there was ouster of the 1st defendant only on this date. For all these reasons, I must hold that the conclusion of the District Judge that neither the plaintiff nor his predecessor-in-interest was in possession within 12 years before suit is erroneous and contrary to the material on record.

It follows that his finding even on the question of possession cannot be accepted. In these circumstances, I hold that the plaintiff has proved his title to the property and was in possession thereof within the statutory period and is entitled to succeed. The result is the appeal is allowed and the decree of the trial Court restored with costs throughout. No leave.

V.R.B. Appeal allowed.

A.I.R. 1954 ANDHRA 20 (Vol. 41, C.N. 12)

CHANDRA REDDY J. (16-7-1954)

Mummidi Reddi Papannagari Yella Reddy, Appellant v. Salla Subbi Reddy and others, Respondents.

Second Appeal No. 1660 of 1951, against the decree of Dist. J., Cuddapah, in A. S. No. 198 of 1950.

(a) Specific Relief Act (1877), S. 27(b) — Notice — Includes constructive notice — Possession as notice — (Transfer of Property Act (1882), S. 3, Expln. II).

The notice contemplated by S. 27(b) cannot be confined to actual notice, but extends to constructive notice as well. It follows that where a subsequent transferee has the knowledge of actual possession of a certain person as a tenant over the property, he cannot be said to be a person purchasing the property without notice. Case law referred. (Para 11)

Anno: Specific Relief Act, S. 27 N. 3, 4; T. P. Act, S. 3 N. 39.

(b) Specific Relief Act (1877), S. 27 — Effect of S. 48, Registration Act — (Registration Act (1908), S. 48).

There is no conflict between S. 27(b), Specific Relief Act, and S. 48, Registration Act. Section 48, Registration Act, does not govern a case which is covered by S. 27(b), Specific Relief Act, the underlying principle of the former section being that a registered document should prevail over an oral transaction and it does not affect cases where a subsequent purchaser obtains a registered document in fraud of the right created in favour of a third party under the oral agreement. The result of reading of both the sections so as to reconcile them is that a case falling under the terms of S. 27(b) does not attract the provisions of S. 48, Registration Act. 4 Bom 126 (FB), Rel on. Case law referred. (Para 13)

Held that as the appellant could not be treated as a purchaser without notice of the prior agreement in favour of the plaintiff, the plaintiff's oral agreement prevailed over the appellant's registered instrument. (Paras 16, 17)

Anno: Specific Relief Act, S. 27 N. 3; Registration Act, S. 48 N. 7.

(c) Interpretation of statutes — Harmonious construction — (Civil P. C. (1908), Pre.).

It is a well-established canon of interpretation of statutes that, as far as possible, meaning should be given to every provision of an enactment and the language of any statute should be construed as far as possible in accordance with the terms of other enactments, which it does not repeal or modify expressly. (Para 16)

Anno: C. P. C., Pre. N. 7.

CASES REFERRED: Paras

(A) (V28) AIR 1941 Mad 707: 1941-1 Mad LJ 815 6
(B) (1809) 16 Ves Jun 249: 33 ER 978 8
(C) ('69) 6 Bom HCROC 59 9
(D) ('03) 27 Bom 408: 5 Bom LR 269 9
(E) (V8) AIR 1921 Bom 459: 45 Bom 910 9
(F) ('13) 40 Cal 565: 19 Ind Cas 9 10
(G) (V13) AIR 1926 Cal 204: 94 Ind Cas 538 10
(H) (V11) AIR 1924 Mad 67: 45 Mad LJ 175 11
(I) (V25) AIR 1938 Lah 39: 171 Ind Cas 265 11
(J) ('90) 13 Mad 324 12
(K) ('79-80) 4 Bom 126 (FB) 14
(L) 1 Sch & Lef 137 14
(M) ('07) 17 Mad LJ 319 15
(N) (V39) AIR 1952 Mad 265: 64 Mad LW 759 15

Advocate-General (D. Narasaraju) for V. Devarajan, for Appellant; P. Somasundaram and P. Suryanarayana, for Respondent (No. 1) and B. V. Subramaniam, for Respondents (Nos. 2 to 4).

JUDGMENT: The fourth defendant has filed this appeal against the decree and judgment of the District Court, Cuddappah confirming those of the District Munsif's Court of Proddatur.

(2) The suit, which has given rise to this second appeal was instituted for the specific performance of an oral agreement to sell a plot of land of an extent of 4 acres entered into between defendants 1 to 3, and the plaintiff on 29-11-1948, and also for an injunction restraining the fourth defendant from interfering with the plaintiff's possession. The case for the plaintiff is that the suit land originally belonged to his family, that, in or about the year 1935, it was sold to his family by defendants 1 to 3 and that despite this, he remained in possession of the land as a tenant till 29-11-1948 when the agreement for sale of the land was entered into between the parties, notwithstanding that the lease in his favour had expired two years prior thereto. On account of enmity between the plaintiff and the appellant, the latter obtained a sale-deed on 30-12-1948 offering a higher price and with the knowledge of the agreement in favour of the plaintiff. The suit was contested, inter alia, on grounds that the agreement pleaded was untrue, that, in any event, the fourth defendant could not be affected by the agreement as he was a bona fide purchaser for value without notice, and that lastly S. 48, Registration Act, saved the transaction in favour of the fourth defendant.

(3) The trial Court awarded the claim of the plaintiff holding that the oral agreement set up by the plaintiff was true, that the fourth defendant had notice of the agreement and that S. 48, Registration Act, had no application to the case. On appeal, the learned District Judge of Cuddappah agreed with the findings of the trial Court and confirmed the decree of the learned District Munsif. It is that decision, that is now under appeal.

(4) In this appeal, the learned Advocate-General contests the propriety of the decree mainly on two grounds, namely, the finding as regards notice is in conflict with the evidence on record, and secondly the learned District Judge has failed to advert to the contention of the appellant, based on S. 48, Registration Act. The learned Advocate-General did not canvass the finding regarding the truth of the oral agreement and rightly in my opinion, as there is ample material in support of that finding. No doubt the judgment of the District Judge is very unsatisfactory, but the matter has been exhaustively dealt with by the District Munsif and I have also gone through the record and satisfied myself that the finding is fully justified by the evidence on record.

(5) The learned Advocate-General further urged that there was no basis for the conclusion of the Courts below that the appellant was not a bona fide purchaser without notice of the suit agreement. It is true that there is no evidence to show that the appellant was aware of the oral agreement between the plaintiff and defendants 1 to 3, but the trial Court relied on several circumstances indicating that the appellant had notice of the suit agreement, apart from the burden which rests upon the appellant to prove that he had no notice thereof. The lower appellate Court expressed its agreement with this view, though the discussion even on this part of the case is not very helpful.

That apart, there is the admitted fact that the plaintiff was in possession of the land in question and that the appellant was aware of it and yet he did not institute an enquiry under what title the former was in possession of the land. The question for consideration is, whether these facts constitute notice within the meaning of S. 27(b), Specific Relief Act. It is urged by the Advocate-General that the notice contemplated by cl. (b) of S. 27, Specific Relief Act, is "actual notice", and not "constructive notice" and places reliance on S. 3, Transfer of Property Act, which says:

> "A person is said to have notice of a fact when he actually knows that fact or when but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it."

(6) On the basis of this, it is contended by him that unless either of the two elements exists, a person cannot be said to have notice and that, in this case, it has not been proved that the appellant actually knew the fact that there was an agreement or that the appellant wilfully abstained from an enquiry and he called in aid a Bench ruling of the Madras High Court in — 'Kausalai Ammal v. Sankara Muthiah Pillai', AIR 1941 Mad 707 (A) which laid down that an omission to enquire would not be sufficient to constitute constructive notice within the meaning of S. 3 and that abstention from enquiry should be actuated by a desire to avoid an enquiry which would disclose the true facts.

(7) This argument cannot be admitted for the reason that the present case is governed by Explanation II which enacts:

> "Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof."

(8) It may be mentioned here that an Explanation was introduced into the Transfer of Property Act by the Amending Act 21 of 1929. Even prior to this amendment, the law, as declared in decided cases, was that, when a person purchased property from the owner knowing that it is in the possession of another, he is under a duty to inquire into the nature of that possession, and, in the absence of such inquiry, knowledge of title under which possession is held, should be attributed to the purchaser. The leading case on the subject, relied on in a number of Indian decisions is — 'Daniels v. Davison', (1809) 16 Ves Jun 249 (B). The Lord Chancellor held that:

> "Where there is a tenant in possession under a lease, or an agreement, a person purchasing part of the estate must be bound to inquire on what

terms that person is in possession.....that a tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity repelling the claim of a subsequent purchaser who made no enquiry as to the nature of his possession."

(9) This decision was cited approvingly by Couch C. J. in — 'Mancharji Sorabji Chulla v. Kongseoo', 6 Bom HCROC 59 (C). The law as stated therein has been accepted by the Bombay High Court in — 'Kondiba v. Nana', 27 Bom 408 (D), wherein it was laid that possession, in certain cases, for the purpose of notice, had the same effect as registration. This principle was followed in — 'Faki Ibrahim v. Faki Gulam Mohidin', AIR 1921 Bom 459 (E), wherein it was held that the subsequent purchaser having had knowledge of the possession of the mortgagee with whom the vendor had entered into an agreement for sale of the property, and having made no enquiry as to how the latter came into possession, must be fixed with all the equities in favour of the latter.

(10) The rule stated by the Calcutta High Court in — 'Baburam Bag v. Madhab Chandra Pollay', 40 Cal 565 (F) is the same. It was held in that decision that possession of a property by a tenant normally affects subsequent purchaser with notice of the tenant's rights, and if the purchaser did not make any enquiry, into the nature of that possession, he could not claim to be a transferee without notice. The same view was taken by another Bench of the same Court in — 'Tiloke Chand v. J. B. Bettie & Co.', AIR 1926 Cal 204 (G). It was observed by Rankin J. (as he then was) at p. 211 that where there was a tenant upon the property his open possession was notice both of the immediate terms of his tenancy and of the collateral agreement in the absence of all enquiry by the transferee.

(11) That this principle has been accepted as correct by the Madras High Court is evident from the decision in — 'Parthasaradhi Iyer v. Subbaraya Gramani', AIR 1924 Mad 67 (H). The Lahore High Court also has shared this view vide — 'Ibrahim v. Yusuf', AIR 1938 Lah 39 (I). In my opinion, it is to give effect to this statement of law that the Amending Act 21 of 1929, introducing Explanation (2) referred to above was enacted. It is thus clear that the doctrine of notice cannot be confined to actual notice, but extends to constructive notice as well. In this case it is not disputed that the plaintiff was in actual possession of the property in suit on the relevant date and the appellant was aware of it. It follows that the 4th defendant having had knowledge of the actual possession of the plaintiff cannot be said to be a person who purchased the property without notice of the agreement in favour of the plaintiff.

(12) There remains the point argued by the learned Advocate-General that having regard to the provisions of S. 48, Registration Act, as amended in 1929, it is not open to a party to set up an oral agreement to sell as against a registered document. According to him the section overrides S. 27(b), Specific Relief Act, and, when once a case falls within the purview of S. 48, Registration Act, the registered document would have priority over an oral agreement to sell, even assuming that the purchaser could be imputed with the knowledge of the agreement. In support of this contention reliance is placed on the opinion of Handley J. in — 'Kannan v. Krishnan', 13 Mad 324 (J) that the provisions of S. 27, Specific Relief Act, do not override S. 48, Registration Act. In this case it was found that the person setting up an oral agreement was in possession of the property subsequently sold. So it was not necessary to consider whether there was any conflict between the two provisions of law and therefore these observations were merely obiter.

That apart Muthuswamy Ayyar J. who wrote the leading judgment, which is a very instructive one, took the opposite view. The position was summed up by the learned Judge in these words:

"The Specific Relief Act is a special enactment prescribing rules as to the party against whom the remedy is available and the conditions subject to which it may be enforced against third parties who may claim an interest in the same property. It is provided by S. 27, cl. (b) that specific performance may be granted against a third party claiming under a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. The words used are transferee for value and they signify a person to whom the property is transferred for value which can alone be under a registered instrument when the value exceeds Rs. 100/-. The intention is to adopt the equitable doctrine of notice in suits for specific performance, to protect bona fide purchasers for value and to treat at the same time purchasers with notice as persons purchasing subject to the vendor's pre-existing contractual obligation or with notice of a trust in favour of the party entitled to specific performance. Neither the Transfer of Property Act, nor the Registration Act overrides this provision of the Specific Relief Act.

* * *

Section 48 in protecting oral agreements accompanied with or followed by delivery of possession, against the rule of priority contemplates oral alienations referred to in para 3 of S. 54 of Act 4 of 1882 and has the effect of treating delivery of possession as equivalent to registration. But there is no trace in either enactment of an intention to override S. 27 of Act I of 1877, and contracts of sale are expressly excluded from both as creating no present interest in immoveable property."

With great respect, I express my accord with the opinion of Muthuswamy Ayyar J.

(13) I do not think that the Legislature intended by enacting S. 48, Registration Act, to nullify the provision of cl. (b) of S. 27, Specific Relief Act. In

my judgment, there is no conflict between S. 27(b), Specific Relief Act, and S. 48, Registration Act. I am of opinion that S. 48, Registration Act, does not govern a case which is covered by S. 27(b), Specific Relief Act, the underlying principle of the former section being that a registered document should prevail over an oral transaction and it does not affect cases where a subsequent purchaser obtains a registered document in fraud of the right created in favour of a third party under the oral agreement.

(14) This view of mine is supported by decided cases. In — 'Waman Ramachandra v. Dhondiba Krishnaji', 4 Bom 126 (FB) at pp. 148, 149 (K), it was ruled that a person holding a registered document which was obtained in fraud of the party with the notice of the prior equitable title could not defeat the rights of such a party. At page 148, Westropp C. J. extracts with approval a passage from — 'Latouche v. Lord Dunsany', 1 Sch & Lef 137 at p. 159 (L) which is as follows:

> "The intention was to make priority of registration the criterion of title to all intents and purposes whatever. But this does not exclude anything which affects the conscience of the party himself who claims under a registered deed; it never was the intention of the Legislature to give a priority or right to commit a fraud; but its meaning was that, parties dealing fairly, priority should be given to him who had the registered document, and that in equity as well as at law."

(15) The learned Judge then observed that the rule of equity in England and Ireland was that the person who purchased an estate with notice of a prior equitable right made himself a mala fide purchaser, and would not be enabled to defeat such prior equitable interest by getting in the legal estate, but would be regarded as a trustee for the benefit of the person whose right he sought to defeat. The principle is also found in a Bench decision of the Madras High Court in — 'Thimmajamma v. Abdulla Sahib', 17 Mad LJ 319 (M). To the same effect is the decision of a single Judge of the Madras High Court in — 'Parvathammal v. Sivasankara Bhattar', AIR 1952 Mad 265 (N). Mulla in his commentary on the Indian Registration Act at page 179 has accepted this view as the correct one.

(16) The result of a reading of both the sections so as to reconcile them and the decided cases is that a case falling under the terms of S. 27(b) does not attract the provisions of S. 48, Registration Act. It is a well established canon of interpretation of statutes that, as far as possible meaning should be given to every provision of an enactment and the language of any statute should be construed as far as possible in accordance with the terms of other enactments, which it does not repeal or modify expressly. I have, therefore, to repel the argument based upon S. 48, Specific Relief Act, and hold that as the appellant could not be treated as a purchaser without notice of the prior agreement in favour of the plaintiff, the plaintiff's oral agreement prevails over the appellant's registered instrument. It follows that the second appeal must be dismissed, but without costs. The respondents will have their costs in the Courts below.

(17) No leave.

D.R.R. Appeal dismissed.

A.I.R. 1954 ANDHRA 23 (Vol. 41, C.N. 13)

CHANDRA REDDY J. (8-7-1954)

Madhwapathi Venkatakrishna Rao, Appellant v. Panditha Narasubhai and another, Respondents.

A. A. O. No. 397 of 1952, against order of Dist. J., East Godavari, D/- 10-1-1952.

Succession Act (1925), Ss. 373 (3), 375 — Dismissal of application on ground that it involves complicated questions of law and fact — Legality.

Merely because complicated questions of fact and law arise in an application for the grant of a succession certificate that does not entitle the Judge to dismiss the application. A reference to cl. (3) of S. 373 makes it clear that the Court has nevertheless to grant the certificate to the person having prima facie the best title thereto under that provision. (Paras 5, 6)

Thus, where the applicant claims to be a legatee under the will which is a registered one and there is no other person who has got a better claim than the applicant, he has certainly a right to the grant of succession certificate. The estate can be safeguarded by calling upon him to furnish security as required by S. 375. It follows, therefore, that the order dismissing the application is unsustainable and has to be set aside. (Para 6)

Anno: Suc. Act, S. 373 N. 6; S. 375 N. 1.

G. Balaparameswari Rao, for Appellant; I. Vishnu Rao, P. Kothandaramayya and P. V. Ramanarasu, for Respondents.

JUDGMENT: This is an appeal against the order of the District Judge of East Godavari at Rajamundry dismissing a petition for the grant of a succession certificate.

(2) The appellant claiming to be a legatee under a registered will executed by one Achakkamma filed an application for the grant of a succession certificate for the sum of Rs. 6,000/-, the amount of legacy under the will. He also put forward the case that he was the adopted son of Achakkamma, but we were not concerned with that question in this enquiry.

(3) This was opposed by the first respondent, the maternal grandfather of the said Achakkamma, and the second respondent who claimed to be the nearest reversioner to the estate of Achakkamma's husband. The objection raised on behalf of these respondents was that the will was not executed by the said Achakkamma while in

a sound and disposing state of mind and that even otherwise she had no testamentary capacity in respect of this amount.

(4) The learned District Judge without going into any of the questions raised, dismissed the petition contenting himself with the observation that it raised very many complicated questions of law and fact. It is against this order that this appeal is filed.

(5) I am afraid that the order of the District Judge has to be set aside. Merely because complicated questions of fact and law arise in an application under S. 375 that does not entitle the Judge to dismiss the application.

(6) A reference to cl. (3) of S. 373 makes this position clear. The Court has nevertheless to grant the certificate to the person having prima facie the best title thereto under that provision. The decisions relied upon by the learned Judge do not support the proposition enunciated by him. Even these rulings lay down that it must be given to the person who prima facie has the best title. In the case the appellant claims to be a legatee under the will, which is a registered one. If there is no other person who had got a better claim than the applicant, he has certainly a right to the grant of the succession certificate. The District Judge has not considered whether a will has been executed by Achakkamma as contended by the appellant. If there is a registered will as put forward by the appellant and if there is no other person who has got a preferential claim to the estate of Achakkamma, he can be said to be a person who is prima facie best entitled to the succession certificate. The estate can be safeguarded by calling upon him to furnish security as required by S. 375, Succession Act. It follows that the order under appeal is unsustainable and has to be set aside.

(7) The District Judge will, therefore, go into the question whether a will was executed by Achakkamma as claimed by the appellant and whether he is prima facie entitled to the succession certificate. The scope of the enquiry is the one indicated in cl. (3) of S. 373, Succession Act.

(8) In the result, the order of the lower Court is set aside and the matter is remitted to it for disposal according to law. The appeal is allowed with costs. The costs of the enquiry in the lower Court will abide the result.

D.R.R. Appeal allowed.

A.I.R. 1954 ANDHRA 24 (Vol. 41, C.N. 14)

UMAMAHESWARAM J. (14-7-1954)

Sri Vatsavayi Venkata Sitarama Varma and others, Appellants v. Pedda Reddi Satyam and others, Respondents.

Second Appeal No. 575 of 1950, against decree of Sub-J., Kakinada, in Appeal Suit No. 181 of 1943.

Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 149(1) — Oral relinquishment — Validity.

The provision in S. 149(1) is merely for the benefit of the landholder. It is open to him to accept the oral relinquishment, and not to insist upon notice in writing as provided in S. 149(1). Such an oral release cannot be said to be invalid. (Para 2)

K. Bhimasankaram, for Appellants; P. Suryanarayana, for Respondents.

JUDGMENT: The short question that arises for consideration in the second appeal is whether item 2 was relinquished by defendants 1 to 4 or not. In para. 25 of the judgment, the Subordinate Judge held that the relinquishment has been proved, that defendants 1 to 4 were not in possession of item 2 from 1930 and that the plaintiff was in possession of that item. It is a pure question of fact and I accept the finding in regard to the factum of relinquishment.

(2) The next question that was raised by the learned Advocate for the appellant was that the oral release was not valid. He has not pointed out any authority for the proposition that the release should be in writing or should be registered. He relied upon S. 149, Madras Estates Land Act, which merely provides for the mode of relinquishment by a ryot. Section 149 (1) provides that every ryot may with effect from the end of any revenue year relinquish by notice in writing signed by him his holding or any part thereof. Clause (2) provides that if the ryot does not give notice of relinquishment as per cl. (1) he would still be liable to indemnify the land-holder against any loss of rents. So, it is merely a provision for the benefit of the land-holder. It is open to the land-holder to accept an oral relinquishment by the ryot.

No such point was raised in the Court below. Both the Courts have found that the oral relinquishment is true. It was open to the land-holder to accept the oral relinquishment, and not insist upon notice in writing as provided in S. 149 (1), and, in the circumstances, there is no substance in this contention.

(3) An objection was raised by the learned Advocate for the appellant, that this question of oral relinquishment was not raised in the pleadings. Both the Courts below have discussed the evidence and have arrived at the finding that the oral relinquishment is true. So, there is no substance in the contention that this point was not raised in the pleadings.

(4) In the result, the second appeal is dismissed with costs of the 6th respondent. No leave.

D.R.R. Appeal dismissed.

A.I.R. 1954 ANDHRA 25 (Vol. 41, C.N. 15)

SUBBA RAO C. J. AND CHANDRA REDDI J.

(30-7-1954)

Davuluri Venkata Hanumantha Rao and another, Appellants v. Kasinadhuni Chengalvarayudu and another, Respondents.

Appeal No. 145 of 1950, against decree of Sub. J., Tenali, D/- 27-1-1950.

(a) Inam — Succession — Unenfranchised service inam — No new mode of devolution laid down in the inam title deed — Hindu law, applicabilty — Religious Endowment Board's Standing Orders, 52 and 57 and Rr. III and V of Appendix I — Applicability of.

The holder of an unenfranchised Stanachari service Inam died leaving him surviving his widow, and divided brothers. The widow surrendered her interests in favour of her husband's divided brothers. It was contended that the rule of succession to unenfranchised service inams was different from that under the Hindu law, and that therefore the divided brothers would not be the nearest heirs to the deceased Stanachari:

Held that the inam title deed did not provide for any method of devolution different from the Hindu law; that the Hindu law, therefore, applied, and consequently widow took the property as widow's estate and she could surrender in favour of her husband's next heirs, the divided brothers. (Para 4)

Held further, that even if Board's Standing Order No. 57, which stated that lineal descendants of the last incumbent and failing them, the direct lineal heirs of the original grantee should succeed, applied, divided brothers in the case would be such lineal heirs. (Paras 6, 7)

(b) Inam — Grant of Melwaram and Kudiwaram — Presumption — Original sanad not produced — Inam title deed and inam proceedings, evidentiary value of — Inam register Col. 12 — Statement therein that Sarvadumbala is Rs. 13-14-4 and that alone is the profit — Statement does not mean that only melwaram was granted.

There is no presumption that grant of an inam is of both warams or of a single waram. Whenever such a question arises it has to be decided on the evidence adduced in the case. Where original grant is not produced, the inam proceedings and inam title deed are of high evidentiary value. Statement in Col. 12 in Inam Register that Sarvadumbala is Rs. 13-14-4 and that alone was the profit realised by the inamdars, does not mean that only melwaram was granted. Appeal No. 213 of 1942 (Mad), Held not followed in 1949-2 Mad LJ 609; App. No. 213 of 1942 (Mad), Not followed; 1949-2 Mad LJ 609, Relied on. (Paras 8, 9, 10)

(c) Madras Hindu Religious Endowments Act (2 of 1927), S. 44B — Suit by a service-inam holder to recover service inam — Section 44B is not applicable.

Section 44B provides a machinery for resumption of service inam lands on behalf of the Government on the ground that the purpose of the grant failed. Section 44B has no application to the grants of an inam burdened with service nor does it bar expressly or by implication, suit by a service holder, claiming to recover properties illegally alienated by his predecessors. No question of resumption is raised in such a suit. AIR 1954 Mad 795, Referred to. (Paras 12, 13, 14)

(d) Madras Hindu Religious Endowments Act (2 of 1927), S. 9(11) — Religious endowments — Grant of the land burdened with service is not covered.

The definition of Hindu religious endowment in S. 9(11) of the Act does not apply to a grant burdened with service. AIR 1946 Mad 81, Approved. (Para 15)

(e) Civil P. C. (1908), O. 6, R. 2 — New point not set up in pleading held was rightly disallowed to be raised at time of argument. (Para 3)

Anno: C. P. C., O. 6, R. 2 N. 9.

CASES REFERRED: Paras

(A) ('42) Appeal No. 213 of 1942 (Mad) 10

(B) ('49) 1949-2 Mad LJ 609 10

(C) (V41) AIR 1954 Mad 795: 1954 Mad WN 258 14

(D) (V33) AIR 1946 Mad 81: 1945-2 Mad LJ 220 15

Neti Subramaniam, C. Jagannadham and J. V. Krishna Sarma, for Appellants; N. S. Ragavan, for Respondents.

SUBBA RAO C. J.:

This is a defendants' appeal against the decree and judgment in Original Suit No. 82 of 1948, a suit filed by the respondents for recovery of two items of land in the village of Pedapulivarru and for recovery of profits.

The undisputed facts may be briefly narrated. The plaint schedule property was originally granted to an ancestor of the plaintiffs belonging to Kasinadhuni family for rendering Stanachari service in the temple of Sri Narendraswami Varu in the village of Peddapulivarru. In a partition effected by the plaintiffs, their brother Sadasivalingamurthi and their father, the suit lands fell to the share of Sadasivalingamurthi. Sadasivalingamurthi died on 4-9-1947. During his lifetime he leased out the property to defendants 1 and 2. Subsequently on 16-7-1946 Sadasivalingamurthi sold 1 acre 90 cents of item 1 and item 2 to the 1st defendant. Likewise he sold 1 acre 75 cents of item 1 to the 2nd defendant on 21-2-1946.

After the death of Sadasivalingamurthi, his widow Purnasundaramma surrendered her estate in favour of the plaintiffs by a deed dated 5-9-1948 on the ground that the leases and sales were not supported by consideration and they were also void as opposed to public policy. The plaintiffs filed the above suit for recovery of possession and profits.

(2) The defendants denied that the suit properties are service inam lands. They claimed that what was granted was only the melwaram in the suit lands. They averred that the leases and sales are valid and are fully supported by consideration. They finally pleaded that S. 44-B, Madras Hindu Religious En-

dowments Act, was a bar to the maintainability of the suit.

The learned Subordinate Judge held on the evidence that the suit lands were service inam lands and that the leases and sales were void. He ruled that S. 44-B, Madras Hindu Religious Endowments Act, was not a bar to the maintainability of the suit.

When a new point was sought to be raised for the first time, namely, that the mode of devolution of the property in regard to unenfranchised service inam lands was different from ordinary property and that according to the said devolution, the plaintiffs who were neither members of a joint Hindu family, nor the lineal descendants of Sadasivalingamurthi, were not entitled to inherit his property, the learned Judge refused to allow the appellants to raise that plea. In the result, he gave a decree to the plaintiffs. Hence this appeal.

(3) The first question raised is that the surrender of the suit lands by Purnachandramma, the widow of Sadasivalingamurthi, was invalid as the plaintiffs were not the next reversioners to the estate of her husband. This argument is based upon the contention, that in regard to unenfranchised inams, the rule of succession is different from that which obtains in the case of other property and that in regard to the said property, neither the widow nor the divided brothers of Sadasivalingamurthi were heirs to his estate. The learned Judge rightly pointed out that this case was not set up in the pleadings, and on that ground rejected the contention.

In our view, the learned Judge was right in not allowing the defendants to raise a plea at the time of arguments, which was not specifically raised in the pleadings.

Further we are also of the opinion that there are no merits in this contention. Exhibit A-1 is the title deed in respect of the suit properties. It reads:

"Title deeds granted to (1) Kasinadhuni Subramaniam and (2) Kasinadhuni Nagappa Ayyavarru.

(1) On behalf of the Governor in Council of Madras, I acknowledge your title to a Devadayam of Pagoda endowed inam situated in the village of Peddapulivarru in the Taluk of Repalle in the District of Guntur claimed title to be of 7 acres 70 cents of dry lands held for service of Stanacharis in the pagoda in the village.

(2) This item is confirmed to you and your successors tax free to be held without interference so long as the conditions of the grant are duly fulfilled."

(4) It will be seen from the aforesaid title deed that the title of the named individuals was acknowledged and the inam was confirmed to them and to their successors. This title deed does not prescribe any new mode of devolution or a devolution that is different from that prescribed under the Hindu law. In the absence of specific directions or imposition of conditions contrary to the ordinary devolution of property under Hindu law, we must hold that Government confirmed the grant to the named individuals and the successors-in-interest. If so, after the death of Sadasivalingamurthi, his widow Purnachandramma acquired a widow's estate and she was entitled in law to surrender her estate to the next heir, the divided brothers of her husband.

(5) Reliance is placed on Board's Standing Order No. 57 which reads:

"In the case of unenfranchised inam held for subsistence or personal inams as they are generally called, the Collector should be guided by the terms of the title deed granted by the Inam Commissioner.....where inams have been confirmed on hereditary tenure, it must be remembered that they are not transferable by alienation and that succession in cases is limited to the undivided brothers and to the direct lineal heirs of the last incumbent, and failing them to the direct lineal heirs of the original grantee."

Order 52 says:

"The rules under which inams have been settled by the Inam Commissioner are given in Appendix I, and Collectors should be guided by them in the disposal of any cases still remaining to be settled."

(6) Rule III of Appendix I which deals with service Inams says that they will be continued to the present holders and their successors and will not be subject to further interference, so long as the services continued to be performed according to the conditions of the grant. There is no rule or direction prescribing a new line of succession in the case of service inams.

But Rule V which deals with personal grants, says that succession is limited to direct lineal heirs and undivided brothers. In the note annexed to that clause, it is stated that succession, under this clause, is limited to direct lineal heirs and undivided brothers of the last incumbent, or failing them, to direct lineal heirs of the original grantee. Assuming that Board's Standing Order 57 and Rule V of Appendix I were intended to govern succession even in the case of grants burdened with service, that rule cannot obviously change the mode of devolution under Hindu law.

It may be that the grantor, i.e., the State, in issuing the title deed could have made the grant subject to specific conditions, but in this case, the Government, in issuing the title deed Ex. A-1, did not prescribe any such conditions. In the absence of any such condition, the general law of succession must apply.

(7) Further, even if the title deed must be read subject to Board's Standing Order 57, under that Order, in the absence of direct lineal heirs of the last incumbent, the property would devolve in the direct lineal heirs of the grantee. It is not suggested, nor is it in evidence, that Sadasivalingamurthy left behind him any lineal heirs such as sons, daughters' sons, etc. In the absence of such, any lineal heirs, his divided brothers would be the lineal heirs of the original grantee. Anyhow, if this plea was taken in the pleadings, the plaintiff could have established that fact. For all the aforesaid reasons, we hold that the plaintiffs are the next reversioners of Sadasivalingamurthi and the surrender in their favour is valid.

(8) It is then contended that the original grant in favour of the plaintiff's ancestors was only the melwaram interest in the plaint schedule property.

There is no presumption that either the grant is of both the warams or of a single waram. Whenever such a question is raised, it falls to be decided on the evidence adduced in the case. The original grant is not produced. In the absence of the original grant, the inam proceedings and the title issued by the Inam Commissioner, are of high evidentiary value.

Exhibit A-1 is the Inam title deed. Under that title deed, the Inam Commissioner acknowledged the title of the grantees to 7 acres 70 cents of dry land. The document does not say that the melwaram interest of the grantees only was confirmed. The Inam Register in Col. 5 gives the extent of the inams as 7 acres 70 cents and in Col. 9 under the heading "Whether free of tax i.e., Sarvadumbala, etc., or liable to quit rent, i.e., jodi, kattubadi, badiga etc." it is described as "free." The said extent is confirmed in Col. 22. There is absolutely no mention in any of the columns of the grant being of the melwaram alone in the said extent. Exhibit B-1 is the Inam statement filed by the predecessor-in-interest of the plaintiffs. In Col. 6 "Particulars as to how the inam was acquired and the conditions", the following entry is found:

> "In fasli 1196, Rajah Manikya Rao Tirupathi Rayanim Garu, the then Zamindar of Rachuru Taluk granted Arakutchalapolam manyam to Kasinadhuni Veeranna Ayyavarlu in the aforesaid Vantu. Therefore, Voleti Rayanna issued a Sannad known as Takid to the Karnams of Pallivarru Vantu on the 10th day of Bhadrapada Sudda of the year Plava directing that measurements should be taken and boundaries settled."

(9) If, as it is contended, the original grantee was in possession of the suit lands, and the Rajah only remitted the tax payable in regard to that extent, there was no necessity for issuing a takid for taking measurements and fixing boundaries. This recital clearly implies that what was granted was land not in the possession of the grantee and therefore it became necessary for the issue of a takid to measure and fix the boundaries to enable the grantee to take possession.

In Col. 11, under the heading "Particulars of the present enjoyment", the following recital is found:

> "The income is being enjoyed equally by these two individuals as per shares. The field is joint and we are doing Stanacharyatvam service in the temple of Sri Narendraswami Varu mentioned in the register of 1255."

This column clearly implies that the field, not the melwaram interest, was kept joint by the grantees and that they were enjoying the income from the field equally. This recital dispels any ambiguity that may be found in the other recitals in the document.

But strong reliance is placed upon the recital in Col. 12 under the heading "Profits realised on the inam, if Sarvadumbala or jodi, and if jodi how much?" The recital reads:

> "Sarvadumbala Rs. 13-14-4 being the seri rate of cist per one K equivalent to 7 acres 28 cents. This alone is the profit that is being realised by the Inamdars."

Relying upon this recital it is contended that what was granted was only the melwaram interest in the suit lands. To put it differently, it is said that Rs. 13-14-4, the assessment payable to the Government, was remitted to the grantees who were in actual possession at the time of grant. In our view, the recital does not support that contention. The lands were dry lands and in those days, the income must have been very insignificant. It may be that the amount they were getting from the Inamdars was only Rs. 13-14-4 per katti. The recital that that alone is the profit that is being realised by the Inamdars indicates that that was the income they were deriving from it.

(10) Reliance is placed on the unreported judgment of Wadsworth J. and Patanjali Sastri J. in — 'Appeal No. 213 of 1942 (Mad) (A)'. There, unlike in this case, the entire question fell to be decided on a recital in Col. 12. Under the column "Income realised from the Inam", the entry was Rs. 14/- Sarvadumbala; in the inam register the assessment of the inam was shown as Rs. 14/-. From a comparison of these two entries, the learned Judges held that the extent of the Inam was the amount of assessment. This view did not find favour with another Division Bench of the Madras High Court in — 'Bhagavathi Amman Temple v. Krishna Goundar', 1949-2 Mad LJ 609 (B), where it was held that such recitals did not warrant the inference that the grant was in the nature of a mere remittance of the rent payable to the Government.

The view expressed by the latter Bench was followed by another Division Bench of the same Court. In this case, the amount of assessment given in Ex. A-2, the inam register and the profits shown in Ex. B-1, the Inam Statement also do not tally, and therefore the basis for the said argument disappears. Apart from that, we hold from the other recitals in the inam statement, the Inam register and the title deed that the grant in the present case was of both the warams.

(11) Now we come to the last point advanced by the learned Counsel.

It is stated that S. 44-B, Madras Hindu Religious Endowments Act, is a bar to the maintainability of the suit. The relevant portion of S. 44-B reads:

> "(1) Any exchange, gift, sale or mortgage and any lease for a term exceeding five years of the whole or any portion of any inam granted for the support or maintenance of a math or temple or for the performance of a charity or service connected therewith, and made, confirmed or recognised by the British Government shall be null and void
>
> (2) (a) The Collector may on his own motion, or on the application of the trustees of the math or temple or of the Assistant Commissioner or of the Board, or any person having interest in the math or temple, who has obtained the consent of such trustee, Assistant Commissioner or Board, by order resume the whole or any part of any such Inam, on one or more of the following grounds, namely;
>
> x x x x

When passing an order under this clause, the Collector shall determine whether such inam, or the inam comprising such part as the case may be, is a grant of both the melwaram and the kudiwaram or only of the melwaram.

x x x x

(d) (i) any person aggrieved by the order of the Collector under Cl. (a) may appeal to the District Collector within such time as may be prescribed and on such appeal, the District Collector, after giving notice to the Board and such of the persons mentioned in Cl. (b) and after holding such an inquiry as may be prescribed, pass an order confirming, modifying or cancelling the order of the Collector.

(ii) The order of the District Collector on such appeal or the order of the Collector under Cl. (a) where no appeal is preferred under sub-cl. (i) to the District Collector within the prescribed period, shall be final.

Provided that where there has been an appeal under sub-cl. (1) and it has been decided by the District Collector or where there has been no appeal to the District Collector and the time for preferring an appeal has expired, any party aggrieved by the final order of the District Collector or the Collector as the case may be, may file a suit in a Civil Court for determining whether the Inam comprises both the melwaram and the kudiwaram or only the melwaram. Such a suit shall be instituted within six months, from the date of the order of the District Collector, on appeal, where there has been an appeal, under sub-clause (i) or from the date of the expiry of the period prescribed under sub-cl. (i) for an appeal to the District Collector in a case where there has been no appeal.

(e) except as otherwise provided in Cl. (d) an order of resumption passed under this section shall not be liable to be questioned in any Court by suit or otherwise."

(12) This section empowers the Collector to pass an order of resumption if an Inam described therein was alienated. Incidentally, he has to decide the extent of the inam, viz., whether it is of both the warams or of only the melwaram. The question whether the inam comprised both the melwaram and kudiwaram can be agitated by an aggrieved party by filing a suit in a Civil Court, but in other respects the order of resumption passed under this section shall not be questioned in any Court by suit or otherwise.

The scheme of the section, therefore, is that the Collector is empowered to resume an alienated inam and the order of the District Collector on the question of resumption has been made final. This section does not either expressly or by necessary implication bar a suit by a service holder claiming to recover properties illegally alienated by his predecessors. Such a suit does not involve any question of resumption. It is a suit by a service holder to recover property based on his title from a person in possession under an illegal alienation.

(13) Section 44-B provides a machinery for resumption of service inam lands on behalf of the Government on the ground that the purpose failed. The suit with which we are now concerned, is one by a service holder to recover a service inam, so that the service may be carried on. We cannot, therefore, hold that S. 44-B is a bar to the maintainability of the suit.

(14) Even otherwise, we hold that S. 44-B does not apply to a case of a grant of land to a person burdened with service. Section 44-B applies only to a religious endowment. It cannot apply to grants made to individuals burdened with service. It was so held by a Division Bench of the Madras High Court consisting of Rajamannar, Chief Justice, and Rajagopala Iyengar J., in — 'Bheemasena Rao v. Yella Reddi', AIR 1954 Mad 795 (C).

But it is contended that by reason of the explanation added to the definition of "Religious endowments" in S. 9(11) of the Act, such a grant burdened with service would also come within the scope of S. 44-B. As the learned Judges pointed out, the definition of religious endowment is not relevant to the consideration of the scope of S. 44-B. Further the explanation to the definition of "Religious Endowments" does not in any way enlarge the scope of the words for the performance of any service or charity, in the main part of that section. "Religious endowment" is defined in S. 9(11) as follows:

"Religious endowment or endowment means all property belonging to or given or endowed for the support of maths or temples or for the performance of any service or charity connected therewith and includes the premises of the maths or temples, but does not exclude gifts of property made as personal gifts or offerings to the heads of math or to the Archaka or other employee of a temple."

Explanation: All property which belonged to or which was given or endowed for the support of a temple or math or for the performance of any service or charity connected therewith, shall, for the purpose of this definition, be deemed to be a religious endowment or endowment notwithstanding that the temple or math has ceased to exist to be used as a place of religious worship, whether before or after the commencement of this Act."

(15) Somayya J. in — 'Venkata Narayana v. Hindu Religious Endowment Board, Madras', AIR 1946 Mad 81 (D) held that grants of land to persons burdened with service are not covered by the definition. We agree. The property endowed for the performance of any service connected with a temple in that section must be property given to the temple for the performance of service, or given as remuneration for performing service in a temple.

The words cannot conceivably take in grants made to individuals subject to the performance of service, for the Act is neither intended nor purports to confiscate private properties. The explanation is only intended to enlarge the scope of the definition to take in properties described in the main section, even though the math or temple ceased to exist or ceased to be used as a place of religious worship. It is not intended to enlarge the scope of the definition so as to take in properties given to the

individuals burdened with service. We, therefore, respectfully follow the aforesaid decision and hold that S. 44-B does not apply to grants burdened with service.

(16) In the result the appeal fails and is dismissed but as the learned counsel for the respondents reported no instructions, without costs.

R.G.D. Order accordingly.

A.I.R. 1954 ANDHRA 29 (Vol. 41, C.N. 16)

UMAMAHESWARAM J. (2-8-1954)

Manchineni Venkayya, Plaintiff, Appellant v. Manchineni Seshayya and another, Defendants 2 and 1, Respondents.

Second Appeal No. 635 of 1950, against decree of Sub-J., Guntur, D/- 29-7-1949.

(a) Civil P. C. (1908), O. 6, R. 2, Ss. 100 and 101 — New point.

It is well settled that parties ought not to be permitted to raise new points not covered by the pleadings or the issues.

Held, in the circumstances of this case that the appellate Court could not reverse the judgment of the trial Court on the question of repudiation of contract without the pleadings being amended and the necessary issues being raised. Case law referred. (Paras 5, 6)

Anno: Civil P. C., Ss. 100 and 101 N. 55; O. 6, R. 2 N. 9.

(b) Specific Relief Act (1877), S. 24 — Repudiation of contract — (Evidence Act (1872), S. 115).

A dispute arising subsequent to the contract of sale about a particular clause in the deed during the negotiations about the form the deed should take, cannot affect the completeness of the contract already made, nor can it amount to repudiation when it is not persisted in and the plaintiff later expresses his readiness and willingness to perform the contract agreed to. (Para 11)

Thus, where, in a suit for specific performance of a contract of sale the question was whether the plaintiff repudiated the contract by insisting upon the signature of the vendor's brother to the sale deed which the plaintiff was not entitled to according to the terms of the agreement:

Held, that out of abundant caution, the plaintiff might have requested the vendor to obtain the signature of his brother to the sale deed. But that did not lead to the conclusion that the plaintiff refused to obtain a sale deed as per the terms of the contract, or that by reason of such a request on the part of the plaintiff, the vendor repudiated the contract. 9 All 705 (PC) and AIR 1932 Lah 265, Disting and explained. AIR 1954 SC 75 and AIR 1949 FC 211, Followed. (Paras 7, 14)

Held, further that there was nothing on record to show that by reason of the conduct of the plaintiff in insisting upon the vendor's brother joining the sale deed, any equitable estoppel arose or the position of the defendant was in any way altered by such insistence. There was, therefore, nothing unreasonable in the conduct of the plaintiff so as to disentitle him to the relief of specific performance. (Para 15)

Anno: Speci. Rel. Act, S. 24 N. 2; Evi. Act, S. 115 N. 14.

(c) Specific Relief Act (1877), S. 22 — Discretion.

The discretion exercised by the lower appellate Court in granting or refusing specific performance is capable of correction by a Court of appeal in appropriate cases. AIR 1952 Mad 389, Rel. on. (Para 16)

Anno: Speci. Rel. Act, S. 22 N. 1.

(d) Civil P. C. (1908), O. 6, R. 2; O. 20, R. 4 —Plea not raised in pleading — Duty of Court.

No amount of evidence can be looked into upon a plea which was never put forward. AIR 1930 PC 57(1), Ref. (Para 16)

Anno: Civil P. C., O. 6, R. 2 N. 9; O. 20, R. 4 N. 9.

(e) Precedents — Decisions of Madras High Court — Binding effect on Andhra High Court — (Constitution of India, Art. 141).

So far as the Andhra High Court which was constituted on 5-7-1954 under Act 30 of 1953 is concerned, the only decisions which are of binding value are the decisions of the Supreme Court and a decision of a Division or Full Bench of Andhra High Court. The decisions of other High Courts including the Madras High Court, have only persuasive effect and will certainly be referred to with great respect in arriving at the correct principles, even though they are not binding upon the Andhra High Court. (Para 12)

Anno: Const. of India, Art. 141 N. 3.

(f) Civil P. C. (1908), S. 100 — Finding not based on evidence.

A finding which is not based on any evidence is unsustainable and liable to be set aside under S. 100. (Para 16)

Anno: Civil P. C., S. 100 N. 13.

CASES REFERRED: Paras

(A) ('66-67) 11 Moo Ind App 7: 6 Suth WR 57 (PC) 5

(B) (V37) AIR 1950 PC 68: 1950-1 Mad LJ 417 (PC) 5

(C) (V17) AIR 1930 PC 57(1): 58 Mad LJ 7 (PC) 5, 16

(D) (V29) AIR 1942 PC 64: 1943-1 Mad LJ 11 (PC) 5

(E) ('87) 9 All 705: 14 Ind App 173 (PC) 9, 11, 12

(F) (V41) AIR 1954 SC 75: 1954 SCR 360 (SC) 11

(G) (V19) AIR 1932 Lah 265: 136 Ind Cas 557 12

(H) (V15) AIR 1928 PC 208: 52 Bom 597 (PC) 12

(I) (V36) AIR 1949 FC 211: 1949 FCR 379 (FC) 13

(J) (1890) 44 Ch D 616: 59 LJ Ch 472 15

(K) (1890) 45 Ch D 481: 60 LJ Ch 166 15

(L) (1916) 1916-2 Ch 187: 85 LJ Ch 460 15

(M) (V39) AIR 1952 Mad 389: ILR (1952) Mad 508 16

Nati Subrahmanyam and J. V. Krishna Sarma, for Appellant; A. V. Krishna Rao, for Respondents.

JUDGMENT: This second appeal is brought by the plaintiff as against the judgment and decree of the Subordinate Judge of Guntur in Appeal Suit No. 417 of 1948 reversing the judgment and decree of the District Munsif of Guntur in Original Suit No. 207 of 1947. The appellant herein filed a suit for specific performance of a contract, dated 16-11-46, entered into by the 1st defendant agreeing to sell the plaint schedule property to him, for a declaration that the sale deed executed by the 1st defendant in favour of the 2nd defendant on 8-4-1947 was not binding upon him and for delivery of possession of the property.

In the plaint he alleged that he purchased the stamp papers and was always ready and willing to perform the contract, but that the 1st defendant put off the execution of the sale deed on some false pretext or other. Having learnt that a sale deed was executed in favour of the 2nd defendant by the 1st defendant with false recitals about the existence of an alleged earlier agreement dated 25-8-1946, the present suit was instituted for specific performance and other incidental reliefs.

(2) The 1st defendant was ex parte and did not file any written statement. The 2nd defendant contended that the suit agreement was not true, that the 1st defendant took an advance of Rs. 800/- from him and executed an agreement of sale dated 25-8-1946, that the sale deed dated 8-4-1947 was executed in his favour in pursuance of the agreement of sale and that the suit was consequently not maintainable. In paragraph 7 of the written statement, he badly denied the plaintiff's willingness to perform the contract. The two main issues that were raised in the trial Court were as follows:

"1. Whether the contract of sale dated 16-11-1946 in favour of the plaintiff is true, supported by consideration and binding on the 2nd defendant?

2. Whether the contract of sale dated 25-8-1946 in favour of the 2nd defendant is true, supported by consideration and binding on the plaintiff?"

The District Munsif in a careful and well considered judgment held that the contract of sale executed in favour of the plaintiff and marked as Ex. A-1 was true and that

"with a view to defeat this contract of sale, Ex. B-2 was brought into existence subsequently by the defendants in collusion by ante-dating it."

On those findings, he decreed the suit with costs directing mesne profits to be determined in separate proceedings under O. 20, R. 12, Civil P. C.

(3) The 2nd defendant preferred Appeal Suit No. 417 of 1948 in the Court of the Subordinate Judge of Guntur. The Subordinate Judge raised three points for decision in the appeal, which run as follows:

"1. Whether the contract in favour of the plaintiff is true?

2. Whether the contract in favour of the 2nd defendant is true as contended by 2nd defendant or ante-dated as contended by the plaintiff?

3. Whether the plaintiff is entitled to specific performance?"

On point 1, he held that the contract Ex. A-1 was true and that he saw no substance in the suggestion that the contract Ex. A-1 was ante-dated. He found on point 2 that Ex. B-2 was ante-dated. In paragraph 18 he held as follows:

"The 2nd defendant and the plaintiff are admittedly enemies. I see no improbability of 2nd defendant asking the 1st defendant to agree to ante-dating it, so that he may get an advantage over the plaintiff."

Having confirmed the findings of the District Munsif on issues 1 and 2, the learned Subordinate Judge ought to have dismissed the appeal. But point No. 3 was raised as arising for determination apparently by reason of the appellant raising ground No. 12 in the memorandum of appeal, namely, that the plaintiff had to show that he was always ready and willing to perform his part of the contract, and that he admittedly repudiated his own contract. The Subordinate Judge held on this new point in paragraphs 24 and 26 of his judgment, that as the plaintiff himself repudiated the contract, he was not entitled to specific performance under law and consequently, allowed the appeal with costs.

(4) As against the judgment and decree of the (Prl) Subordinate Judge, the plaintiff has preferred the above second appeal. The learned Advocate for the appellant contended that the Subordinate Judge erred in permitting the 2nd defendant to raise a new point for determination, which was not to be found in the pleadings or in the issues and also in holding that the plaintiff repudiated the contract. I agree that both the contentions are valid in law and that the second appeal should be allowed and the judgment of the trial Court restored.

(5) As stated supra, the 1st defendant who entered into a contract of sale dated 16-11-1946, Ex. A-1, with the plaintiff was ex parte and did not file any written statement. The 2nd defendant who denied the genuineness of Ex. A-1 and relied upon Ex. B-1, found to be ante-dated by both the Courts below, did not plead that even if Ex. A-1 was true, it was repudiated by the plaintiff and was no longer subsisting. The only allegation to be found in the written statement as having any bearing on this question was that the plaintiff was not willing to perform the contract. No issue was raised in the trial Court whether the plaintiff repudiated the contract dated 16-11-1946 on the ground that the 1st defendant refused to obtain his brother's (Rathayya's) signature to the sale deed. In the absence of any special pleading on the question of repudiation and an issue thereon, the lower appellate Court erred in raising point No. 3 for determination and dismissing the suit for specific performance on that new ground. It is well settled that parties ought not to be permitted to raise new points not covered by the pleadings or the issues. In — 'Eshan Chunder Singh v. Shama Churn

Bhutto', 11 Moo Ind App 7 at p. 20 (PC) (A), Lord Westbury described it as an absolute necessity that the determination of a cause shall be founded upon a case to be found in the pleadings, or involved in or consistent with the case thereby made. And this decision was followed by Sir Lionel Leach who delivered the judgment of the Judicial Committee in — 'Kanda v. Waghu', AIR 1950 PC 68 (B). In this connection, it may be pertinent to quote the observations of Viscount Dunedin in — 'Siddik Mahomed Shah v. Mt. Saran', AIR 1930 PC 57 (1) at p. 57 (1) (C):

> ".....but that claim was never made in the defence presented, and the learned Judicial Commissioners therefore very truly found that no amount of evidence can be looked into upon a plea which was never put forward."

In — 'Lala Hemchand v. Pearey Lal', AIR 1942 PC 64 at p. 66 (D), Sir Madhavan Nair in delivering the judgment of the Judicial Committee has condemned the practice of allowing parties to adduce evidence on points not raised in the pleadings in the following terms:

> "Their Lordships desire to observe that, though the case has been decided on all the points which arose on the evidence led by the parties, the procedure adopted by the trial Court of allowing the parties to adduce evidence on points not raised in the pleadings or issues was irregular and should not have been allowed without amending the pleadings and raising necessary issues."

(6) So in the present case, the lower appellate Court was wrong in reversing the judgment of the trial Court on the question of repudiation without the pleadings being amended and the necessary issues being raised.

(7) The next question that arises for consideration is, whether even assuming that it was open to the Subordiate Judge to permit a new point to be raised, the evidence on record is sufficient to sustain that finding. The whole reasoning of the Subordinate Judge on the question of repudiation rests upon certain admissions alleged to have been made by the plaintiff in the course of his deposition, and I shall, therefore, set out these passages in extenso. They are as follows:

> "As defendants are friends and as I asked defendant 1 and his brother Rathayya both to execute sale deed and as defendant 1 was not amenable to it, he joined with defendant 2 and brought into existence his sale deed. The property was purchased after defendant 1 and Rathayya divided. I asked defendant 1 in whose name it was and he said he alone purchased. I was advised that it was better to make Rathayya also to join in it. Ramakrishtayya divided 20 years ago and defendant 1 and Rathayya were together."

From the above passages the Subordinate Judge inferred that the plaintiff insisted upon Rathayya executing the sale deed along with the 1st defendant, which he was not entitled to, and that the 1st defendant was consequently justified in refusing to execute a sale deed and repudiating the contract altogether. A reading of paragraphs 24 to 26 of the judgment makes it abundantly clear that the Subordinate Judge was not clear in his mind as to who repudiated the contract of sale. In paragraph 24 he states:

> "I think that the demand by the plaintiff entitles the 1st defendant to repudiate the contract of sale Ex. A-1."

But in paragraph 26 he concluded by saying:

> "I find that, as the plaintiff repudiated the contract he is not entitled to specific performance under law."

So the simple question is whether, from the reading of the deposition of the plaintiff, it is clear that he repudiated the contract of sale Ex. A-1 as found by the learned Subordinate Judge.

I have no doubt that there is no evidence or admission that the plaintiff repudiated or put an end to contract of sale, as the 1st defendant had refused to obtain the signature of his brother Rathayya to the sale deed, or that the 1st defendant repudiated the contract of sale by reason of the plaintiff insisting upon the signature of Rathayya being obtained contrary to the terms of Ex. A-1. Out of abundant caution, the plaintiff might have requested the 1st defendant to obtain the signature of his brother to the sale deed. But that does not lead me to the conclusion that he refused to obtain a sale deed as per the terms of the contract Ex. A-1, or that by reason of such a request on the part of the plaintiff, the 1st defendant repudiated the contract. Exhibits A-2, A-5 and A-6 show that the plaintiff purchased the necessary stamp papers and was ready throughout to perform his part of the contract by paying the sale consideration. It was only the 1st defendant who colluded with the 2nd defendant and brought into existence Ex. B-2 and the sale deed, Ex. A-1. There is, therefore, no basis whatsoever for the conclusion that the plaintiff repudiated the contract, as Rathayya was not willing to execute the sale deed along with the 1st defendant.

There is also no evidence whatsoever that the 1st defendant repudiated the contract on account of the plaintiff unreasonably insisting upon Rathayya executing the document along with the 1st defendant. As already stated, the 1st defendant was ex parte. He did not file a written statement or enter the witness box and depose as to the circumstances under which he executed the sale deed in favour of the 2nd defendant. The 2nd defendant who was examined as D. W. 1 did not also depose that there was any repudiation by the plaintiff or the 1st defendant. I, therefore, hold that the 2nd defendant has not made out that the contract of sale dated 16-11-1946 was repudiated and that the plaintiff was not entitled to specific performance under law.

(8) The learned Advocate for the respondent sought to sustain the judgment of the Subordinate Judge on the following grounds:

(i) that the insistence of the plaintiff upon Rathayya joining in the execution of the sale deed amounted in law to repudiation of the contract;

(ii) that the discretion exercised by the appellate Court in refusing specific performance ought

not to be disturbed by the High Court in second appeal;

(iii) that the finding of the Subordinate Judge on the question of repudiation was a finding of fact, not liable to be interfered with under S. 100, Civil P. C., and

(iv) that even though the question of repudiation was not raised in the pleadings or in the issues, the Subordinate Judge was entitled to take into account the admission of the plaintiff in his evidence.

I shall discuss the contentions of the respondent in seriatim.

(9) The main decision relied upon by the learned Advocate for the respondent in support of his first contention is the decision of the Privy Council in — 'Bindeshri Prasad v. Jairam Gir', 9 All 705 (PC) (E). In that case the intending purchaser insisted on the vendor giving an absolute warranty of title. Even in the suit for specific performance of the contract, he insisted upon the vendor giving the warranty of title, but when it appeared that the appellate Court was not willing to decree specific performance as prayed for in the plaint, he was willing to rest content with specific performance of the contract as actually proved. It was held by Sir R. Couch that plaintiff was not entitled to specific performance. In delivering the judgment he made the following observations:

"Now there he distinctly claimed to have the contract performed by having this warranty of title and when he says that he was ready to have the contract completely performed, as far as he himself was concerned, it must be taken that he was ready to have it performed in that way."

(10) So, it is clear that as the plaintiff was insisting not upon the performance of the original contract, but upon a contract with an additional term as to the warranty of title, right up to the date of suit, he was not entitled to specific performance. In the last paragraph of the judgment, Sir B. Couch distinguished the cases where specific performance was decreed when the plaintiff was willing to submit to have the agreement which was actually proved, performed.

(11) The effect of Privy Council decision reported in — 'Bindeshri Prasad v. Jairam Gir (E)', was recently considered by the Supreme Court in the case reported in — 'Durge Prasad v. Deep Chand', AIR 1954 SC 75 at p. 80 (F). The legal position is very neatly and forcibly summed up and is in the following terms:

"As we have said, the question arose subsequent to the contract for sale and the plaintiff's insistence on the form of warranty at that stage could not affect the contract of 7-2-1942. It might in a given case disentitle him to specific performance as it did in — 'Bindeshri Prasad v. Jairam Gir (E)'. But that would depend upon whether the proposal regarding a form of warranty to which he was not entitled was a mere proposal regarding the form of the sale deed or was a refusal to perform without it.

No question of repudiation or refusal to perform was raised in the pleadings nor is that to be found in the evidence. On the contrary the plaintiff's letter dated 22-4-42 (Ex. 25) calls upon the Nawab to complete the conveyance 'as agreed to' and the plaint is to the same effect; it says nothing about a warranty. In the circumstances, a dispute arising subsequent to the contract of sale about a particular clause in the deed during the negotiations about the form the deed should take, cannot affect the completeness of the contract already made, nor can it amount to repudiation when it is not persisted in and the plaintiff later expresses his readiness and willingness to perform the contract 'agreed to'."

(12) These observations of the Supreme Court conclude the question arising for decision in this second appeal. The decision of the Supreme Court directly governs this case and is binding upon me. So far as the Court which was constituted on 5-7-1954 under Act 30 of 1953 is concerned, the only decisions which are of binding value are the decisions of the Supreme Court and a decision of a Division or Full Bench of this Court. No decision of this Court to the contrary has been referred to me. The decisions of other Courts including the Madras High Court, have only persuasive effect and will certainly be referred to with great respect in arriving at the correct legal principles, even though they are not binding upon this Court.

The learned Advocate for the respondent drew my attention to a case of the Lahore High Court in — 'Narinjan v. Md. Yunus', AIR 1932 Lah 265 (G). What was held in that case was that in order to obtain a relief by way of specific performance of a contract the plaintiff has first to allege and prove that he was ever ready and willing to perform his part of the contract from the date of the contract to the date of the suit as the contract really was and not in the way he thought the contract to be. The plaintiff in that case insisted upon the sale of the Khancha which was not included in the original contract. The Lahore High Court rightly held, following the decisions of the Privy Council in — 'Bindeshri Prasad v. Jairam Gir (E)' and — 'Ardeshir H. Mama v. Flora Sassoon', AIR 1928 PC 208 (H) that the plaintiff was not entitled to specific performance as he insisted upon the sale of the Khancha in addition to the house. That decision has really no bearing on the facts of the present case. As already pointed out there is no evidence that the plaintiff repudiated the contract of sale dated 16-11-1946 and insisted upon Rathayya joining the execution of the sale deed right up to the date of the suit.

(13) In this connection, it is necessary to refer to a decision relied on by the learned Advocate for the appellant in — 'Jainarain v. Surajmull', AIR 1949 FC 211 (I). At p. 216, Mukherjea J. observed as follows:

"If after a contract is concluded and its terms settled further negotiations are started with regard to new matters that would not prevent full effect being given to the contract already existing, unless it is established as a fact that the contract was rescinded or varied with the consent of both the parties or that both parties treated

it as incomplete and inconclusive. Once completed, the contract can be got rid of only with the concurrence of both the parties."

(14) Applying these observations to the facts of the present case it may be that out of abundant caution the plaintiff started further negotiations with Rathayya, the brother of the 1st defendant, that he should join in the execution of the sale deed. But that does not prevent full effect being given to the contract, Ex. A-1, dated 18-11-1946. The defendants upon whom the burden of proof lay have not established as a fact that the contract Ex. A-1 was rescinded or varied with the consent of both the parties or that both the parties treated Ex. A-1 as being incomplete or inconclusive.

(15) The learned Advocate for the respondent no doubt cited passages from "Fry" on Specific Performance and Halsbury, Vol. VI, that the conduct of the plaintiff may be taken into account for refusing specific performance. As already pointed out, there is nothing unreasonable in the conduct of the plaintiff so as to disentitle him to the relief of specific performance. Mukherjea J. negatived a similar contention raised by Sri Tekchand based on the English decision in — 'Bristol Cardiff and Swansea Aerated Bread Co. v. Maggs', (1890) 44 Ch D 616 (J), in the following terms:

"An attempt was made by Sri Tekchand to raise a contention on the authority of the English decision — 'Bristol Cardiff and Swansea Aerated Bread Co. v. Maggs (J)', where Kay J. went to the length of saying that if after a sale is concluded, one of the parties starts fresh negotiations with a view to introduce new terms, then, even if the subsequent negotiations fail, it will be inequitable to allow the party, who attempted to re-open the case, to enforce it specifically. This view seems manifestly unsound and has been expressly dissented from in later cases. Vide — 'Bellamy v. Debenham', (1890) 45 Ch D 481 (K) and — 'Perry v. Suffields Ltd.', 1916-2 Ch 187 (L). As a matter of fact, the decision is based not on the ground of the contract being incomplete and not final, but on the ground of some equitable estoppel which was deemed to arise by reason of the conduct of the plaintiff.....Here the new term sought to be introduced by the plaintiffs' Solicitor was only done under a mistake, but it had no effect whatever in altering the conduct or position of the defendants in any way."

Even in this case, there is nothing to show that by reason of the contract (conduct?) of the plaintiff in insisting upon Rathayya joining the sale deed, any equitable estoppel arises. The position of the defendant was in no way altered by such insistence.

(16) The second contention raised by the learned advocate for the respondent has really no force. Section 22, Specific Relief Act, clearly lays down that the discretion exercised by the lower appellate Court is capable of correction by a Court of appeal in appropriate cases. Section 22 runs in the following terms:

"The jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. But the discretion of the Court is not arbitrary, but sound and reasonably guided by judicial principles and capable of correction by a Court of appeal."

In — 'Sankaralinga Nadar v. Ratnaswami Nadar', AIR 1952 Mad 389 (M) a similar contention was negatived in the following terms:

"It was finally urged that as the relief is one by way of discretion, we should not interfere in appeal with the decree passed by the lower Court. Section 22 provides that the discretion is one to be exercised on 'judicial principles' and capable of correction by a Court of appeal. When once it is found that the contract sought to be enforced is a valid one it is for the defendant to establish legal grounds for refusing relief by way of specific performance."

So far as the 3rd contention is concerned, I have already held that the finding of the lower appellate Court is not based on any evidence and so the finding being unsustainable is liable to be set aside under S. 100, Civil P. C. The 4th contention has already been answered. The decision of the Privy Council reported in — 'Siddik Mahomed Shah v. Mt. Saran (C)' is a direct authority, for the proposition that no amount of evidence can be looked into upon a plea which was never put forward. The alleged admission of the plaintiff is also a piece of evidence, which according to the decisions already stated ought not to be looked into. Under the circumstances, I set aside the decision of the lower appellate Court and restore the judgment and decree of the trial Court. The respondent will pay the costs of the appellant throughout. No leave.

(17) After I delivered the above judgment, the matter was spoken to. It was agreed between the appellant's advocate and 1st respondent's advocate that there need not be any enquiry in regard to the mesne profits. The appellant shall deposit a sum of Rs. 2784/- due by him under Ex. A-1 in the Court within a month from to-day. The 1st defendant-respondent shall be entitled to draw out the amount. No interest is payable by the appellant on the sale consideration and the 1st respondent is not liable to account for mesne profits. Both the 1st and 2nd respondents (1st and 2nd defendants) shall execute a sale in favour of the appellant on payment of the consideration under Ex. A-1. If the sale deed is not so executed or possession not delivered the decree will be enforced in execution. After amount is deposited into Court by the appellant, the 1st defendant will not only execute the sale deed, but also deliver possession. The 1st respondent is entitled to draw amount so deposited into Court after executing the sale deed and delivering possession.

H.G.P. Order accordingly.

A.I.R. 1954 ANDHRA 34 (Vol. 41, C.N. 17)

SUBBA RAO C. J. AND UMAMAHESWARAM J.
(15-7-1954)

Kompella Ramamurthy and others, Appellants v. Kompella Venkatasubbarayudu and others, Respondents.

Appeal No. 443 of 1949, against decree of Sub. J., Kakinada, D/- 25-9-1948.

Hindu Law — Joint family — Partition — Division in status.

A definite and unambiguous indication of the intention of one member to separate himself from the family and to enjoy his share in severalty will amount to a division in status. Such an intention may be declared in a plaint or in a written statement or in any other document. In a partition suit, for certain purposes all the parties are in the position of plaintiffs. To that extent there cannot be a difference in principle between a member of a joint family, who happens to be a plaintiff and a member of a joint family who is arrayed as a defendant. In so far as he asks for relief of partition the defendant will be in the same position as a plaintiff. Another condition for effecting severance is that such a declaration will have to be communicated. Whether such a communication is made or not is really a question of fact in each case. (Paras 3, 4)

In a previous suit for partition one V presumably claimed in the plaint filed by him that he was the adopted son of the plaintiff's uncle and he asked for division of the joint family properties. To that suit, the present plaintiff filed a written statement admitting the claim of V. He admitted that V was the adopted son. He also admitted that he was entitled to a share in the joint family properties. After making those admissions in clear terms, he asked the Court for division and allotment of his share in the properties. After the written statements were filed, the suit was compromised, and one of the terms of the compromise was that the 11th defendant (the present plaintiff) "if he so desires shall later on get his share separately separated from the 2nd defendant's share and he shall not pray for any relief in this suit." To that compromise decree, the plaintiff, his father and V were parties:

Held that (1) when the plaintiff admitted that the property was divisible and claimed that the property falling to his share should be allotted to him the said prayer clearly implied an expression of his intention to divide from the other members of the family. (Para 3)

(2) when the relief claimed by the plaintiff was distinctly left over for consideration in a subsequent suit in a compromise decree to which his father was a party, it must be held that the contents of the written statement must have been communicated to the father. Observations of Satyanarayana Rao J. in AIR 1916 Mad 1170, Explained. (Para 5)

CASES REFERRED: Paras

(A) (V36) AIR 1949 Mad 173: ILR (1949) Mad 229 4

(B) (V3) AIR 1916 Mad 1170: 39 Mad 159 (FB) 4

K. Bhimasankaram for V. V. Sastri, for Appellants (Nos. 2 and 3); Advocate General (for Nos. 2 and 3); K. B. Krishnamurthi, K. Satyanarayana and T. Narayanachari (for No. 4), for Respondents.

SUBBA RAO C. J.:

This is a plaintiff's appeal against the decree and judgment of the Court of the Subordinate Judge of Kakinada in O. S. No. 43 of 1947, a suit filed by the appellant for partition of the plaint schedule properties into two shares and for delivery of one share to him. The plaintiff is the son of the 1st defendant, Venkatasubbarayudu. The 3rd defendant is alleged to be the son of the 1st defendant by the 2nd defendant Saradamba. The plaintiff filed the aforesaid suit for partition of the plaint schedule property into two equal shares on the allegation that the 3rd defendant was an orphan brought by defendants 1 and 2 from Vizagapatam hospital and that he was not born to them. The 4th defendant is a tenant in respect of item 2 of "A" schedule.

The defendants, 'inter alia', contended that the 3rd defendant was born to the 1st and 2nd defendants, and that, in any view, the plaintiff became divided in status from the 1st defendant on 26-1-1916. The learned Subordinate Judge accepted the case of the defendants that the plaintiff became divided in status and also found in their favour that the 3rd defendant was born to the 1st and 2nd defendants. In the result, he dismissed the suit with costs. The plaintiff has preferred the above appeal.

(2) Mr. Bhimasankaram, learned Counsel for the appellants, contended that the finding of the learned Judge that there was severance in status between the plaintiff and the 1st defendant was not supported by the evidence in the case. The only document on which the said finding of the learned Subordinate Judge was based is Ex. B-41, the written statement filed by the plaintiff in O. S. No. 61 of 1912. That suit was filed by Kompella Venkatarao, as the adopted son of a brother of the plaintiff's father, for partition of the family properties. To that suit, he made the plaintiff and also the 1st defendant parties. In that suit, the plaintiff filed the following written statement.

As the argument of the learned advocate merely turned upon the interpretation of Ex. B-41, it may be convenient at this stage to read that document, particularly as it happens to be a short one:

"1. The plaint allegations are all true and valid.

2. It is true that the plaintiff is the adopted son of late Thommannavadhanulu and that the late Thommannavadhanulu died divided.

3. It is true that late Thommannavadhanulu prior to his death delivered possession of the plaintiff's entire property to the 1st defendant for managing it during his (plaintiff's) minority.

4. This defendant has no objection at all to a

decree being passed according to the plaintiff's suit.

5. This defendant prays for division and allotment of even the share of the property to be got by this defendant in this suit. He will later on pay the court-fees required therefor."

The question is whether, by reason of the filing of the written statement by the plaintiff, a division in status was effected between the plaintiff and the 1st defendant.

(3) The law on the subject is fairly well-settled. A definite and unambiguous indication of the intention of one member to separate himself from the family and to enjoy his share in severalty will amount to a division in status. But the difficulty lies in the application of the said principle to the facts of each case. That such a declaration of intention could be indicated in any document also does not admit of any doubt. It follows that such an intention may be declared in a plaint, or in a written statement or in any other document. Another condition for effecting severance is that such a declaration will have to be communicated. Whether such a communication is made or not is really a question of fact in each case.

Applying the aforesaid principles to Ex. B-41, it appears to us that such a declaration is clearly discoverable in the document. Venkatarao presumably claimed in the plaint filed by him that he was the adopted son of the 1st defendant's brother and he asked for the division of the joint family properties. To that suit, the plaintiff filed a written statement Ex. B-41 admitting the claim of Venkatarao. He admitted that Venkatarao was the adopted son. He also admitted that he was entitled to a share in the joint family properties. After making those admissions in clear terms, he asked the court for division and allotment of his share in the properties. When the plaintiff admitted that the property was divisible and claimed that the property falling to his share should be allotted to him, we have no doubt that the said prayer clearly implies an expression of his intention to divide from the other members of the family.

(4) Mr. Bhimasankaram argued that the mere filing of a plaint does not amount to a declaration of an intention to divide and that, in any event, the filing of a written statement will not have that effect. In support of his argument, he relied upon the decision of a Division Bench of the Madras High Court consisting of Rajamannar C. J. and Satyanarayana Rao J. in — 'Radhakrishna v. Satyanarayana', AIR 1949 Mad 173 (A). There the learned Judges after considering the evidence in that case came to the conclusion that by filing a plaint a division in status was effected between the parties. But in the course of the judgment Satyanarayana Rao J. who delivered the judgment, made some observations on which the learned counsel for the appellant strongly relied.

At page 179, the learned Judge observed, after citing the observations of Sadasiva Iyer J. in — 'Soundararajan v. Arunachallam Chetty', AIR 1916 Mad 1170 (FB) (B), as follows:

"From this it follows that it is not every plaint or every suit for partition that brings about a division in status from the moment the suit was instituted and the summonses in the suit were served on the other coparceners. It must contain a clear and unambiguous intention on the part of the coparcener suing that he wishes to treat himself as a divided coparcener from the moment the plaint was filed."

At a later stage, the same learned Judge proceeded to state:

"The mere claim for a partition need not necessarily imply a fixed determination and communication of an intention to divide the title and hold the property in severalty. It is merely a piece of conduct from which an inference for or against the expression of such an intention may be deduced according to the facts and circumstances of each case."

Relying upon the aforesaid observations, learned counsel for the appellant contended that the mere filing of a plaint for partition does not 'ipso facto' amount to the declaration of an intention to divide. In our view, those observations only state the well-settled principle of law, viz., that to constitute a severance in status, there should be a clear declaration of an intention to divide. We may also mention that subsequent to the aforesaid decision, another Division Bench of the Madras High Court consisting of the Chief Justice and one of us (Umamaheswaram J.) explained the observations found in the judgment.

It is possible to visualise a plaint in a partition suit where the relief for division is conditional on the court refusing another main relief claimed by a party. Perhaps the learned Judge was contemplating the case of a plaint in such a suit where no unconditional declaration of an intention to divide is made. Ordinarily, in a suit for partition, we cannot conceive a plaint without containing allegations of an intention to divide, for the object of filing a suit for partition is to convert joint status into a separate one. That cannot be done without alleging that the parties are members of a joint family, that the plaintiff intends to divide himself from the other members of the family and therefore, he may be given that relief.

But it is said that though ordinarily the plaint in a partition suit may contain such allegations, a written statement filed therein may be different. In a partition suit, it is well established that for certain purposes all the parties are in the position of plaintiffs. To that extent there cannot be a difference in principle between a member of a joint family, who happens to be a plaintiff and a member of a joint family who is arrayed as a defendant. In so far as he asks for relief of partition the defendant will be in the same position as a plaintiff. If so when the defendant in Ex. B-41 admits that the property is joint family property and has no objection for a share being given to the plaintiff and asks for a share to be given to himself, there cannot be a possible doubt that he intended to sever himself from the other members of the family. We, therefore, hold on a construction of Ex. B-41 that there was a clear and unambiguous intention to divide on the part of the plaintiff.

(5) Mr. Bhimasankaram then contended that the second condition is not complied with in this case. He says that there is no evidence to prove that such an intention to divide was communicated to the 1st defendant. In O. S. No. 61 of 1912 after the written statements were filed, the suit was compromised, and one of the terms of the compromise was that the 11th defendant (plaintiff)

"if he so desires shall later on get his share separately separated from the 2nd defendant's share and he shall not pray for any relief in this suit."

To that compromise decree, the plaintiff, the 1st defendant and Venkatarao were parties. When the relief claimed by the plaintiff was distinctly left over for consideration in a subsequent suit in a compromise decree to which the 1st defendant was a party, it must be held that the contents of Ex. B-41 must have been communicated to him. Further this aspect of the case was not raised in the Court below nor has it been questioned in the grounds of appeal filed here.

(6) For the aforesaid reasons, we agree with the Court below that there was a division in status between the 1st defendant and the plaintiff in the year 1912. It is conceded that, on this finding, no other questions arise in the appeal.

(7) The appeal fails and is dismissed with costs—one set.

D.H.Z. Appeal dismissed.

A.I.R. 1954 ANDHRA 36 (Vol. 41, C.N. 18)

CHANDRA REDDI J. (17-8-1954)

Dirisala Tirapati Rayudu and another, Petitioners v. Yerra Venkateswarlu and others, Respondents.

C. M. P. Nos. 6683, 4002 and 6682 of 1954.

(a) Madras Village Panchayats Act (10 of 1950), S. 112 — Rules under — R. 9 — Revision against Election Commissioner's decision — Death of respondent — Abatement — (Constitution of India, Art. 227).

When once the election petition is disposed of and the petitioner before the Election Commissioner has succeeded and is impleaded as a respondent to the revision petition in the High Court under Art. 227 of the Constitution it is too much to argue that the petition before the Election Commissioner is still undisposed of and that the successful party before the Election Commissioner who is impleaded as a respondent in the revision petition in the High Court, is a petitioner and that his death has brought about the abatement of the petition before the Election Commissioner. (Para 6)

(b) Civil P. C. (1908), S. 151 and O. 1, R. 10 —Revision under Art. 227, Constitution of India — Applicability of O. 1, R. 10—(Constitution of India, Art. 227).

The provisions of O. 1, R. 10 can be called into play in suits or appeals and not in revision petitions. The addition of parties in a civil revision petiton can be ordered only in exercise of the inherent powers of a Court under S. 151. A revision petition against an order of the Election Commissioner is any the less a petition entertained in the revisional jurisdiction notwithstanding it is entertained under Art. 227 of the Constitution. So it is not by virtue of O. 1, R. 10 that an additional party can be impleaded in a revision petition. (Para 9)

Anno: C.P.C., S. 151 N. 2; O. 1, R. 10 N. 10.

(c) Madras Village Panchayats Act (10 of 1950), S. 112 — Rules under — R. 6(1) and (2) — Applicability of O. 1, R. 10, Civil P. C., to election disputes — (Civil P. C. (1908), O. 1, R. 10).

Obiter: Sub-rule (2) of R. 6 does not restrict the power of an Election Commissioner conferred under sub-r. (1) to adopt the procedure applicable to suits. Therefore the provisions of O. 1, R. 10 are attracted to enquiry in election disputes under the Madras Village Panchayats Act. (Paras 11 and 12)

Anno: C. P. C., O. 1, R. 10 N. 10.

(d) Madras Village Panchayats Act (10 of 1950), S. 112 — Rules under, R. 1 — Principle of Rule — Pending proceeding under Art. 227 of Constitution — Elector's locus standi to come on record — (Constitution of India, Art. 227) — (Civil P. C. (1908), S. 151).

Rule 1 seems to be based on the principle that it is not only the rival candidate that is interested in the election of a member or a President or Vice-President but the whole constituency is interested in the purity of the elections. A proceeding before an Election Commissioner challenging the election of a member or a President or a Vice-President is therefore a representative one and any member of the Constituency or any voter is interested in the result of the election petition and therefore an elector has 'locus standi' to come in a pending proceeding in the Court under Art. 227. There is nothing either in the rules framed under the Act or in the main provisions of the Act which precludes his being impleaded as a party, and under S. 151 the Court has got power to implead him as a party respondent. (Paras 13, 14, 16)

Anno: C. P. C., S. 151 N. 2.

(e) Madras Village Panchayats Act (10 of 1950), S. 112 — Rules under — R. 11 — Election of President found to be void — Successful party if can be allowed to continue as President pending revision — (Constitution of India, Art. 227).

When once the Election Commissioner has found the election to be void by reason of the successful party at the election being guilty of corrupt practices, there is no reason why he should be allowed to continue as President merely because the revision petition against the order of the Election Commissioner is pending. (Para 18)

CASES REFERRED: Paras

(A) (V36) AIR 1949 Mad 435: ILR (1949) Mad 566 9

(B) (V41) AIR 1954 SC 210: 1954-1 Mad LJ 480 (SC) 12

(C) (V4) AIR 1917 Mad 389: 40 Mad 110 16

P. Ramachandra Reddi, for Petitioners; Advocate-General and N. Subramaniam, for Respondents.

ORDER: C. M. P. No. 6683 of 1954: This is a petition by one of the voters in Ward No. III of Varagani Panchayat to come on record as a party respondent on the death of the 1st respondent in C. R. P. No. 692 of 1954. The facts leading upto this petition may be briefly stated:

(2) The petitioner in C. R. P. No. 692 of 1954 was elected President of the Varagani Panchayat in the recent election. The 1st respondent filed a petition before the Election Commissioner, Guntur, in O. P. No. 41 of 1953, for setting aside the election of the petitioner as President, 'inter alia', on the ground that votes of dead persons were polled at the instance of the petitioner and also that minors who were not entitled to vote exercised their franchise in favour of the petitioner. The Election Commissioner found these allegations to be true and declared the election of the petitioner void under R. 11 of the Rules framed under the Madras Village Panchayats Act. The petitioner has filed a revision petition in this Court under Art. 227 of the Constitution, challenging the validity of the order of Election Commissioner and obtained an interim suspension of the operation of the order of the Election Commissioner.

(3) The 1st respondent filed a petition to vacate the interim order but before this could be disposed of, i.e., on 18-6-1954, he died. The present petition is filed by one of the voters of the Panchayat to come on record and contest the petition.

(4) This is opposed by the petitioner in the civil revision petition, that is, the party who was unsuccessful before the Election Commissioner, mainly on the ground that he has no 'locus standi' to get himself impleaded in the proceedings.

(5) According to Mr. Subrahmanyam, counsel for the respondent in this petition (the petitioner in the civil revision petition) this case falls under R. 9 of the Rules framed under the Village Panchayats Act, and it is, therefore, not open to the petitioner to come on record. Rule 9 says:

> "An election petition shall abate on the death of a sole petitioner or the survivor of several petitioners and such abatement shall be communicated to the Executive Authority of the Panchayat concerned and the election authority by the Election Commissioner."

(6) The argument of Mr. Subrahmanyam is this: The election petition before the Election Commissioner shall be deemed to be still pending and that, therefore, the 1st respondent who was the petitioner before the Election Commissioner should still be regarded as a petitioner and when the 1st respondent died the petition which has still to be deemed pending, has abated by virtue of R. 9 and there is nothing more to be done by one of the electors coming on record. I find it very difficult to accept this argument. I do not see how after the disposal of the election petition declaring the election of Mr. Subramanyam's client to be void, it should be treated as pending.

In fact a finality has been given to that order under S. 19 and it is only by invoking the prerogative jurisdiction of the Court, that the defeated party is questioning the validity of the order of the Election Commissioner. When once the petition is disposed of and the petitioner before the Election Commissioner has succeeded and is impleaded as a respondent to the revision petition in the High Court, it is too much to argue that the petition before the Election Commissioner is still undisposed of and that the successful party before the Election Commissioner who is impleaded as a respondent in the revision petition in the High Court, is a petitioner and that his death has brought about the abatement of the petition before the Election Commissioner.

I do not know by what logic or fiction this result can be achieved. There is absolutely no force or substance in this contention. It is unnecessary for me for the disposal of this case to consider whether there is any conflict between the principles embodied in R. 7 and that in R. 9 in the view I have taken, namely, that the death of the respondent in the revision petition has not resulted in the abatement of the election petition.

(7) This leads me to the question whether the petitioner in the present civil miscellaneous petition has a 'locus standi' to come on record as a party respondent. Here again Mr. Subramanyam urged that the only remedy which was open to the elector concerned, was to have filed a petition under R. 1 of the Election Dispute Rules or to have got himself impleaded under R. 5 and having failed to do either of these two things, it is not open to him now to ask to be joined as a party in this revision petition.

(8) The learned counsel submitted further that the only provision under which parties can be added to pending proceedings is the one laid down in O. 1, R. 10, Civil P. C., and that cannot have any application to inquiries before the Election Commissioner, having regard to R. 6 of the Election Dispute Rules.

(9) It is not necessary for me to consider the second argument, namely, the applicability of O. 1, R. 10 for the reason that the proceedings, in which the party seeks to come on record, is a revision. The provisions of O. 1, R. 10 can be called into play in suits or appeals and not in revision petitions. The addition of parties in a civil revision petition can be ordered only in exercise of the inherent powers of a court under S. 151, Civil P. C. All the provisions of the Civil Procedure Code do not govern revision petitions.

In — 'Manickkam v. Ramanathan Chettiar', AIR 1949 Mad 435 (A), a Bench of the Madras High Court consisting of Rajamannar, Chief Justice, and Satyanarayana Rao J., held that the provisions of O. 22 that relate to the abatement on the death of one of the parties had no application to civil revision petitions and that the legal representatives of a dead party could be brought on record without any reference to the time in which the application for coming on record was filed.

It is unnecessary to multiply the authority for the position that only such of the procedural laws as is made specifically applicable to civil revision petitions by Rules framed in that behalf governs the civil revision petitions.

A revision petition against an order of the Election Commissioner is anytheless a petition enter-

tained in the revisional jurisdiction notwithstanding it is entertained under Art. 227 of the Constitution. So it is not by virtue of O. 1, R. 10 that an additional party can be impleaded in a revision petition. However, as the question has been argued at some length as to whether O. 1, R. 10 is applicable to enquiries before the Election Commissioner, I proceed to express my opinion on this also.

(10) According to Mr. Subrahmanyam, counsel for the respondents, only such of the provisions of the Civil Procedure Code that are enumerated in sub-r. (2) of R. 6 that are attracted to the proceedings before the Election Commissioner viz., discovery and inspection, enforcing the attendance of witnesses, compelling the production of documents, examining witnesses on oath, reception of evidence taken on affidavit and issuing commission for examination of witnesses, etc. This argument overlooks the rule enacted in sub-r. (1) which says:

> "Every election petition shall be enquired into by the Election Commissioner as nearly as may be in accordance with the procedure applicable under the provisions of the Civil Procedure Code, 1908, to the trial of suits....."

(11) This sub-rule makes it abundantly clear that the Election Commissioner should adopt the procedure governing the trial of suits as nearly as possible. In my opinion sub-r. (2) does not restrict the power of an Election Commissioner conferred under sub-r. (1) to adopt the procedure applicable to suits.

(12) An analogous provision of law contained in S. 90, Representation of the People Act, was interpreted by the Supreme Court in — 'Jagannath v. Jaswant Singh', AIR 1954 SC 210 (B). Sub-section (2) of S. 90 is in these terms:

> "Subject to the provisions of the Act and of any rules made thereunder every election petition shall be tried by the Tribunal as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908, to the trial of suits."

The language of this and of sub-r. (1) of R. 6 of the Rules referred to above is substantially the same. The Supreme Court decided that having regard to this section, an Election Tribunal was entitled to direct the addition of a respondent, who was omitted originally from the list of respondents under the provisions of O. 1, Rr. 9 and 10.

This case was sought to be distinguished on behalf of the respondents on the ground that the powers of an Election Tribunal are not circumscribed in the matter of adopting the provisions of the Civil Procedure Code as is done in the case of Election Commissioners by sub-r. (2) of R. 6. This distinction is devoid of force. There is a provision in S. 90(2) of the Representation of the People Act, similar to the one in sub-r. (2). In view of the provisions of sub-r. (1) of R. 6 and the pronouncement of the Supreme Court cited above, there can be little doubt that the provisions of O. 1, R. 10 are attracted to enquiry in election disputes, under the Madras Village Panchayats Act.

(13) Now coming to the contention based on Rr. 1 and 5 of the Election Dispute Rules, I must remark that this also lacks substance. Rule 1 prescribes the mode in which an election may be called in question and also provides a machinery to try the election disputes. Sub-rule (1) confers a right on any elector to challenge the validity of an election of a Member, President, or Vice-President. It does not take away the right of a voter to continue the proceedings in certain contingencies.

If the argument presented on behalf of the respondents were to be accepted, every voter should file an election petition to enable him to come on record at a later stage for any reason, which seems to be far from the intention of the Legislature. Rule 5 has not much bearing on the point for decision. The latter part of the rule only enables one of the candidates not impleaded as a respondent to come on record as a party respondent on his own application.

Rule 1 of the Rules framed under the Act, which enables any elector to challenge the validity of an election, seems to be based on the principle that it is not only the rival candidate that is interested in the election of a member or a President or Vice-President but the whole constituency is interested in the purity of the elections. This principle has been recognised in a number of rulings of the English, as well as Indian Courts. It is, therefore, clear that a proceeding before an Election Commissioner challenging the election of a member or a President or a Vice-President is a representative one.

(14) It follows that any member of the constituency or any voter is interested in the result of the election petition. In such a situation, it looks to me that an elector has 'locus standi' to come on record in a pending proceeding in the Court under Art. 227.

(15) If the proceeding is of a representative character any member who is interested in it can come on record is a proposition that has been acccepted in decided cases.

(16) It is sufficient to refer to a Bench ruling of the Madras High Court in — 'Parameswaram Munpu v. Narayanan Namboodri', AIR 1917 Mad 389 (C). There a suit was brought under S. 92, Civil P. C., by two of the worshippers with the previous sanction of the Advocate-General. On the death of one of the platiniffs some of the worshippers wanted to come on record and continue the suit. Objection was taken that the suit abated on the death of one of the two plaintiffs, and, therefore, it was not open to the other worshippers to continue the proceedings by coming on record.

This was overruled by a Bench of that Court on the ground that the Court had power to add other worshippers, not because they were the legal representatives of the persons who instituted the suit, but having regard to the representative character of the suit they had become parties to it, and therefore should be brought on record on behalf of all the worshippers.

I express my respectful accord with the principle enunciated in that case, and hold that the peti-

tioner is in the same position as the worshippers in a suit under S. 92 and can come on record on the death of the party respondent. There is nothing either in the rules framed under the Act or in the main provisions of the Act which precludes his being impleaded as a party, and under S. 151 the Court has got power to implead him as a party respondent. It follows that this petition should be allowed.

(17) C. M. P. Nos. 4002 of 1954 and 6682 of 1954: The question that arises in both the petitions is whether the interim suspension of the order of the Election Commissioner should be made absolute or should be vacated.

(18) Under R. 11 of the Rules framed under the Madras Village Panchayats Act, the order of the Election Commissioner is final. No doubt the aggrieved party can in certain circumstances, question the validity of it in this Court in appropriate proceedings. When once the Election Commissioner has found the election to be void by reason of the successful party at the election being guilty of corrupt practices, there is no reason why he should be allowed to continue as President merely because the revision petition against the order of the Election Commissioner is pending.

(19) The prayer, therefore, for the suspension of the operation of the order of the Election Commissioner so as to enable him to continue as the President should be disallowed. But there will be no fresh election pending the disposal of the civil revision petition. The civil revision petition is expedited and posted for final disposal as early as possible. There will be no order as to costs in either of the two petitions.

V.R.B. Order accordingly.

A.I.R. 1954 ANDHRA 39 (Vol. 41, C.N. 19)

SUBBA RAO C. J. (18-8-1954)

Guntaka Hussenaiah, Plaintiff-Appellant v. Busetti Yerraiah, Defendant-Respondent.

Second Appeal No. 1369 of 1950, against decree of Dist. J., Nellore in Appeal Suit No. 319 of 1948.

(a) Evidence Act (1872), S. 45 — Expert evidence — Value and appreciation of.

The expert's evidence is only a piece of evidence. A Judge of fact will have to consider that evidence along with the other pieces of evidence. Which is the main evidence and which is the corroborative one depends upon the facts of each case. It is the duty of the trial Court to come to a conclusion on a question of fact on a consideration of the entire evidence including that of the expert. (Paras 4, 6)

Anno: Evi. Act, S. 45 N. 1.

(b) Evidence Act (1872), Ss. 52, 138, 140, 145, 146, 148, 154, 155 — Scope — Character evidence.

Section 52 deals with the relevancy of character evidence in civil cases. The character of a party to a Civil suit cannot be relevant to the decision of an issue arising in that suit. But this section has no bearing on a case where the veracity of a witness is in question. This is governed by S. 146, under which a witness can be cross-examined to shake his credit by injuring his character. Character evidence may not be relevant to decide an issue in a case, but cross-examining counsel is given liberty under this section for the purpose of shaking the credit of a witness to put questions to him affecting his character. Sections 52 and 155 deal with different matters. Section 52 prohibits character evidence in regard to the subject matter of the suit whereas S. 155 prescribes the manner of impeaching the credit of a witness. Section 155 cannot, therefore, be construed as an exception to S. 52. Further, Ss. 155 and 146 are not in conflict with each other. Sections 138, 140, 145, 148 and 154 provide for impeaching the credit of a witness by cross-examination. (Para 7)

Anno: Evi. Act, S. 52, N. 1; S. 138 N. 3; S. 145 N. 1; S. 146 N. 1; S. 148 N. 1; S. 150 N. 1; S. 155 N. 2.

A. Kuppuswami and A. Subramaniam, for Appellant; M. S. Ramachandra Rao and M. Krishna Rao, for Respondent.

JUDGMENT: This is a plaintiff's second appeal against the decree and judgment of the Court of the District Judge of Nellore setting aside that of the District Munsif of Kanigiri in O. S. No. 128 of 1947, a suit filed by the appellant for the recovery of a sum of Rs. 604-12-0 from the defendants.

(2) The plaintiff's case is that the defendant took from the plaintiff Rs. 502-8-0 to pay to butchers and Rs. 10/- for his own expenses on 4-4-1944 and signed an entry in the plaintiff's account-book in token of the same. The defendant denied that he took any money from the plaintiff and charged the plaintiff with fabrication of accounts to support a false claim. The learned District Munsif, on a consideration of the entire evidence, held in favour of the plaintiff. The learned District Judge differed from him and dismissed the suit. Hence the appeal.

(3) The finding is one of fact. While conceding that, the learned counsel for the appellant argues that the said finding is vitiated by two circumstances: (1) The learned Judge has not correctly appreciated the scope of expert's evidence and (2) the Judge acted illegally in relying upon previous decisions, where the plaintiffs' suits on promissory notes were dismissed, in order to evaluate the character of the plaintiff. The learned Judge commented on the manner of approach of the learned District Munsif in regard to the expert's evidence. He pointed out that the learned District Munsif was wrong in substituting the expert's decision to his own and that he should have exercised his own mind in coming to the conclusion whether the expert's opinion was correct or not. He observed:

"The lower Court overlooked the fact that the opinion of the expert is only a piece of evidence, which has to be examined and appraised like any other evidence that might be adduced in the case and that it is the opinion

of the Judge that is after all the decision in the case. It is, therefore, incumbent upon the Court to use its own eyes in deciding whether certain handwritings placed before it are similar or not, utilising of course the opinion of the expert and the evidence, which he gave in support of it, as a guide but subjecting it to a close and searching scrutiny ...."

(4) The observations are to my mind, unexceptionable. The Judge does not lay down anything illegal when he points out that it is a duty of the Munsif to come to a conclusion on a question of a fact on a consideration of the entire evidence including that of the expert.

(5) Another passage of the learned Judge is also strongly commented upon. The passage is:

"Moreover, it is a wrong way of approaching the expert's evidence. It is the expert's evidence that has to be corroborated by the other evidence in the case and not vice versa."

(6) This statement may not be accurate. The expert's evidence is only a piece of evidence. A Judge of fact will have to consider that evidence along with the other pieces of evidence. Which is the main evidence and which is the corroborative one depends upon the facts of each case. But this general statement does not really affect the conclusion of the learned Judge, as he has considered the entire evidence along with the expert's evidence.

(7) Nor are there merits in the second point either. The learned Judge discredited the evidence of the plaintiff on the ground that he filed similar suits with false claims and that they were all dismissed and also on the ground that his name figures in the K. D. list maintained by the police. To put it differently, the learned Judge depended upon the bad antecedents of the plaintiff to discredit him. It is argued that the learned Judge contravened the provisions of S. 52, Evidence Act. Section 52 says:

"In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant except in so far as such character appears from facts otherwise relevant."

This section deals with the relevancy of character evidence in civil cases. The character of a party to a civil suit cannot be relevant to the decision of an issue arising in that suit. When a question arises whether a contract was entered into between the parties, or whether it is supported by consideration, the character of the plaintiff or defendant is certainly irrelevant to the issue whether, there was a contract or whether it was supported by consideration. But there may be cases in which the character of a person may be relevant for the disposal of a suit, such as actions for seduction, etc., but this section has no bearing on a case where the veracity of a witness is in question. This is governed by S. 146 which says that when a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend (1) to test his veracity, (2) to discover who he is and what is his position in life or (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Under this section a witness can be cross-examined to shake his credit by injuring his character. Character evidence may not be relevant to decide an issue in a case, but cross-examining counsel is given liberty under this section for the purpose of shaking the credit of a witness to put questions to him affecting his character. But the learned Counsel says that the provisions of S. 155 of the Act relate to the mode of impeaching the credit of a witness, that the provisions of that section are exceptions to S. 52 and that except in so far as those provisions permitted, character evidence is not admissible. The obvious answer is that Ss. 52 and 155 deal with different matters. Section 52 prohibits character evidence in regard to the subject matter of the suit whereas S. 155 prescribes the manner of impeaching the credit of a witness. Section 155 cannot, therefore, be construed as an exception to S. 52.

Further, Ss. 155 and 146 are not in conflict with each other. Sections 138, 140, 145, 148 and 154 provide for impeaching the credit of a witness by cross-examination. In particular S. 146 permits questions injuring the character of a witness to be put to him in cross-examination. Section 155 lays down a different method of discrediting a witness by allowing independent evidence to be adduced. I cannot, therefore, agree with the learned counsel that S. 155 is an exception to S. 52 and that, apart from S. 155, his character cannot be impeached. If so, it follows that the learned Subordinate Judge was certainly justified in discrediting the plaintiff by answers elicited in the cross-examination to the effect that his antecedents were bad. Further, in this case, apart from P. W. 1 who is obviously an interested witness, the plaintiff has examined two more witnesses. The learned Judge, for good reasons, disbelieved this evidence. I cannot, therefore, hold that the judgment of the learned Subordinate is vitiated by any error of law.

(8) The appeal fails and is dismissed with costs. No leave.

K.S.B. Appeal dismissed.

A.I.R. 1954 ANDHRA 40 (Vol. 41, C.N. 20)

CHANDRA REDDI J. (18-8-1954)

Bathini Syam Prasad, being minor by next friend B. Anandaramayya, Petitioner v. Bathini Mastanamma and another, Respondents.

C. M. P. No. 5478 of 1954.

(a) Civil P. C. (1908), O. 32, R. 6 — Scope of.

Order 32, R. 6 is designed to safeguard the interests of the minor and as a protection against the guardian frittering away the moneys got on behalf of the minor under a decree and it is not designed to protect the interests of the opposite side. (Para 6)

In pursuance of an order passed on agreement between the parties in appeal, a Commissioner was appointed for the ascertainment of mesne profits. After an elaborate enquiry, he found that a sum of Rs. 73,800/- was due to the minor plaintiff by way of mesne profits. Both sides filed objections to this report, the plaintiff claiming that he had to get at least another Rs. 50,000 and the defendants contending that the plaintiff would not be entitled to more than Rs. 40,000/-. This necessitated an enquiry into this matter by the lower Court. It was to pay the counsel for the plaintiff, in connection with this enquiry, that the present application had been filed.

Held, that it was not necessary that the minor's guardian should be called upon to furnish security for any amount that might be directed to be paid to him to pay to the counsel for the prosecution of the enquiry before the lower Court. (Para 6)

Anno: C. P. C., O. 32 R. 6 N. 3.

(b) Civil P. C. (1908), Ss. 11, 151, O. 41, R. 5 — Order under O. 41, R. 5 — Finality.

The order passed under O. 41, R. 5 staying the execution of the decree is not a final one, but a tentative one. It does not decide the rights of any parties, but is merely one giving some interim relief to parties. The High Court has ample power under S. 151, to vary the order in proper circumstances in order to grant relief and to do substantial justice between the parties. Case law discussed. (Paras 11, 13)

Anno: C. P. C., S. 11 N. 112; S. 151 N. 4; O. 41 R. 5 N. 22.

CASES REFERRED: Paras

(A) (V36) AIR 1949 FC 1: 1948-1 Mad LJ 103: 49 Cri LJ 625 (FC) 7

(B) (V37) AIR 1950 SC 77: 1949 FCR 842 (SC) 7

(C) (V40) AIR 1953 SC 198: 1953-1 Mad LJ 710 (SC) 7

(D) (V20) AIR 1933 PC 58: 60 Ind App 76 (PC) 7

(E) (V16) AIR 1929 Mad 121: 113 Ind Cas 646 8

(F) ('84) 11 Ind App 37: 6 All 269 (PC) 9

(G) (V17) AIR 1930 Bom 362: 55 Bom 372 10

(H) (V17) AIR 1930 Bom 294: 55 Bom 368 10

(I) (V9) AIR 1922 PC 112: 49 Ind App 144 (PC) 10, 11

(J) ('87) 9 All 36 11

Advocate General (D. Narasaraju) and P. P. Surya Rao, for Petitioner; A. Sithapathi Rao, M. S. Ramchandra Rao and A. V. Krishna Rao, for Respondents.

ORDER: This is a petition for directions to pay some amount to the petitioner herein in the following circumstances:

(2) The petitioner, who is a minor, represented by his natural father, filed a suit for possession of certain properties, as the adopted son of one Govindayya Chowdari. The suit was contested, 'inter alia', on the ground that the plaintiff was not validly adopted by the first wife of Govindayya. The trial Court accepting the case of the plaintiff gave a decree for possession of about acres 80-00 of land and mesne profits for the years 1949 and 1950 and also from the date of adoption up to the actual delivery of possession of the properties.

(3) The defeated defendants preferred an appeal to this Court against the decree and judgment of the trial Court. Pending appeal, they obtained an interim stay of execution of the decree. After notice, the parties agreed to certain terms and the following is the relevant portion of the order passed by the Court based on that agreement:

"The remuneration for the commissioner will be fixed by the lower Court. The plaintiff will draw the costs without security. Out of the amount deposited by the commissioner, each year (in accordance with the directions contained in paragraph 4) the respondent will be paid at the rate of Rs. 250/- a month on or before 15th April. As for the expenses of the appeal, a cheque for Rs. 3,000/- will be issued to the Advocate for the respondent after the first deposit is made and the balance will be ordered on application made to this Court. Expedite printing."

(4) The order was passed on 2-2-1953 and ever since the petitioner is being paid a sum of Rs. 250/- a month for his maintenance and the other amounts mentioned in paragraph 9 have also been received by him. In pursuance of this order, a commissioner was appointed for the ascertainment of mesne profits. It appears, after an elaborate enquiry, he found that a sum of Rs. 73,800/- was due to the plaintiff by way of mesne profits. Both sides have filed objections to this report, the plaintiff claiming that he has to get at least another Rs. 50,000/- and the defendants contending that the plaintiff will not be entitled to more than Rs. 40,000/-. This has necessitated an enquiry into this matter by the lower Court. It is to pay the counsel for the plaintiff, in connection with this enquiry, that the present application has been filed.

(5) The application is vehemently opposed by Mr. Ramachandra Rao on the grounds first that, without furnishing security for the amount to be paid to the petitioner no order could be passed, and for this position O. 32, R. 6, Civil P. C., is called in aid. This argument has to be repelled as a reference to that provision makes it manifest that it has no application to the present case. Order 32, R. 6, Civil P. C., is in the following terms:

"(1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor, either

(a) by way of compromise before the decree or order, or

(b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or having been so appointed or declared, is under any disability known to

the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application."

(6) It is seen that this provision of law is designed to safeguard the interests of the minor and as a protection against the guardian frittering away the moneys got on behalf of the minor under a decree and it is not designed to protect the interests of the opposite side. It follows that it is not necessary that the minor's guardian should be called upon to furnish security for any amount that may be directed to be paid to him, to pay to the counsel, for the prosecution of the enquiry before the District Judge.

(7) It was next urged by Mr. Ramachandra Rao that the order on the stay petition was passed by consent of parties and it could not be varied or modified without the consent of his client. I do not think that the order covers the present situation. Provision was made only for the payment of costs of appeal including the fee of the advocate and some amount for maintenance of the petitioner. It has no reference for payment of the fee to the counsel, conducting the enquiry, either before the commissioner or before the lower Court, into the quantum of mesne profits. It is true that if the consent order governs the application also, it may be necessary to allege and prove mistake or fraud or such other factors, as would invalidate an agreement between the parties. In one sense, the failure to provide for this contingency may be said to be due to a mistake; but the petition for the directions is not based on a mistake, and it is, therefore, unnecessary to consider, whether the consent order was vitiated by any such mistake. In the view I have taken, it is not necessary to consider under what circumstances the consent order could be varied or modified.

This leads me to the point, whether every order passed under O. 41, R. 5, Civil P. C., is final and conclusive, leaving no power in Court to vary, under any circumstances. The Advocate General placed before me a number of decisions of the Federal Court, of the Supreme Court, and the Privy Council — 'Kuppuswamy Rao v. The King', AIR 1949 FC 1 (A); — 'Mohamed Amin Brothers Ltd. v. Dominion of India', AIR 1950 SC 77 (B); — 'Asrumati Debi v. Rupendra Deb', AIR 1953 SC 198 (C) and — 'Abdul Rahman v. D. K. Kassim and Sons', AIR 1933 PC 58 (D). It is not necessary for me to refer to any of them, as they do not throw any light on the point for determination here. The question that was debated in those decisions was whether an order was a final order, either within the meaning of S. 205, Government of India Act, or under S. 109, Civil P. C., so as to enable the parties concerned to obtain a certificate for leave to file an appeal to the Supreme Court or to the Privy Council.

(8) The point for decision in this case is, whether an order passed in the interlocutory application has the incidence of finality and conclusiveness. Mr. Ramachandra Rao, counsel for the respondents, placed before me a Bench decision of the Madras High Court in — 'Parthasarathy Apparao v. Venkatadri Apparao', AIR 1929 Mad 121 (E). What was decided there. 'inter alia', was that a judgment recording the findings on some point, after hearing objections on both sides, is binding upon the successor, and could not be re-opened. What happened there was this. The High Court remanded a suit to the Subordinate Judge, Bezwada, with directions to restore it to take necessary accounts between the parties and to pass a final decree. In pursuance of this, the Subordinate Judge framed some points for determination, received statements of accounts, heard objections, took evidence and gave his findings on these points.

After he was transferred, an application was filed before his successor to reopen this matter and this was allowed. In a petition for revising the order of the succeeding Judge, the High Court ruled that this order under revision was without jurisdiction as the one passed by the previous Subordinate Judge was final and conclusive, as between the parties. The reason for the learned Judges coming to the conclusion was that an adjudication, once given by the Court on the earlier occasion, on the rights of parties, and in spite of the fact, that it was not a final judgment, must be regarded as a final and a conclusive one. This decision is, therefore, no authority for the contention put forward on behalf of the respondents.

(9) Nor does the pronouncement of the Privy Council in — 'Ram Kirpal v. Mt. Rup Kuari', 11 Ind App 37 (F) afford any assistance in deciding this case. All that was laid down by their Lordships was that an interlocutory judgment in a suit was as binding upon the parties in every proceeding in that suit, as a final judgment in a suit. One of the questions that arose for decision before the Judicial Committee was, whether an order passed in execution awarding mesne profits, was binding upon the parties or not, and this was answered by their Lordships in the affirmative. Thus none of these decisions touches the point for determination in this case.

(10) In this context, I may refer to a passage in Daniell's Chancery Practice (8th Edn.) Volume I, page 710, which was relied on by the learned Advocate General.

> "Even with the consent of the parties to a judgment it cannot be set aside except on the above grounds, and in no case will it be set aside when the rights of third parties have intervened or would be adversely affected. The above observations relate only to final orders, since interlocutory orders remain in the control of the Judge and can be varied by him as occasion requires."

This passage was relied on by Justice Rangnekar of the Bombay High Court in — Yusuf I. A. Lalji v. Abdullabhoy Lalji (No. 2)', AIR 1930 Bom 362 at p. 363 (G) cited by the Advocate General. The question that arose in that case was, whether an interlocutory order, made by the consent of the parties to a suit, could be set aside by an application in the same suit, on proper grounds, or whether a suit had to be filed to vacate that order. The learned Judge ex-

pressed the opinion that an application was sufficient for that purpose and that a suit was not necessary. Therefore the principle enunciated in that case cannot govern the present case.

But in the same volume, there is another ruling of the same learned Judge at page 294, in — 'Yusuf I. A. Lalji v. Abdullabhoy Lalji (No. 1)', AIR 1930 Bom 294 (H). The point for decision in that case was, whether an order made in chambers on the original side of the High Court, could be reviewed, if the ends of justice required it, although it did not fall within the terms of O. 47, Civil P. C. The learned Judge thought that, having regard to the interpretation placed by the Privy Council in — 'Chhajju Ram v. Neki', AIR 1922 PC 112 (I) the review could not be granted under O. 47, Civil P. C., but still he had jurisdiction, in order to secure the ends of justice, to reconsider the order under S. 151, Civil P. C. In my opinion, the principle enunciated in this case applies to the present case.

(11) It looks to me that the order passed under O. 41, R. 5, C. P. Code, staying the execution of the decree is not a final one, but a tentative one. It does not decide the rights of any parties, but is merely one giving some interim relief to parties. If finality should attach to such an order, there will be hardship to the parties concerned in several cases. My opinion gains support from a passage in Mulla's Civil Procedure Code (12th Edn.) at page 1191 :

> "The Court making an order under this rule may cancel or vary it at any time."

The basis of this statement is — 'Amir Hasan v. Ahmed Ali', 9 All 36 (J). It is no doubt true the last mentioned case related to the interpretation of O. 47 and the learned Judges expressed the opinion that an order obtained ex parte could be reviewed under O. 47, Civil P. C., though it did not come under the first three categories, but would fall within the expression "or for any other sufficient reason". This decision cannot be regarded as authoritative, so far as the interpretation placed by that Court on the expression "or for any other sufficient reason", having regard to AIR 1922 PC 112 (I). In spite of this Mulla has relied upon this for his statement at page 1191 (Civil Procedure Code, 12th Edn).

To the same effect is the passage in Sarkar's Law of Civil Procedure, (3rd Edn.) at page 871. The learned commentator has relied on 9 All 36 (J). It looks to me that this statement could be supported, on the basis of S. 151, C. P. Code. That section gives recognition to the well established principle that every Court has inherent power to act 'ex debito justitiae' to do that real and substantial justice for the administration of which alone it exists or to prevent abuse of the process of the Court, so long as it does not come into conflict with the other provisions of the Code.

(12) Failure to pass an appropriate order in certain cases causes a great hardship to the parties. For instance in this case, as a result of the order of stay the petitioner cannot get a decree for mesne profits which, according to the commissioner, would come to more than Rs. 70,000/- and realise the same by executing the decree; nor can he draw out any part of the sum of more than Rs. 20,000/- to his credit in court deposit which he could utilise for the purpose of this litigation. Any order which refuses relief to the petitioner will result in his inability to proceed further with the enquiry in Court. The suit was admittedly filed in 'forma pauperis' and the petitioner would be deprived of the only available means to conduct the inquiry in the lower Court, if this Court does not pass an order putting him in possession of some funds.

(13) For all these reasons I do not think that the order of Somasundaram J. should be regarded as a final one that could not be varied in any respect that would operate as an obstacle, in the way of directing the lower Court to permit the petitioner to draw out any portion of the sum in Court deposit. That order itself directed the inquiry into mesne profits and what was stayed was only the passing of the final decree and the petitioner certainly requires some money to proceed with this enquiry. In my considered opinion, this Court has ample power under S. 151, C. P. C., to grant a relief of the nature asked for in this petition and to do substantial justice between the parties. I, therefore, hold that I could entertain this petition and direct the lower Court to permit the guardian of the petitioner to draw out some portion of the amount. I think it is sufficient if I direct payment of Rs. 750/- to counsel for the petitioner in connection with this enquiry. This amount will be paid direct to the advocate instead of the amount being paid to the guardian of the petitioner, and he, in turn, handing it over to the advocate. There will be no order as to costs.

D.H.Z. Petition allowed.

A.I.R. 1954 ANDHRA 43 (Vol. 41, C.N. 21)

SUBBA RAO C. J. (25-8-1954)

Anne Viraraghavayya, Appellant v. Alapati Gopala Rao, Respondent.

Second Appeal No. 558 of 1950, against order of Sub. J., Guntur in A. S. No. 272 of 1949.

Transfer of Property Act (1882), S. 108(1) — Eviction by paramount title.

Eviction by title paramount destroys the effect of the grant and the corresponding liability for payment of rent. But eviction by a decree-holder of a tenant pending an appeal which is ultimately allowed during the period when execution of the decree was stayed cannot be described as eviction by paramount title. (Para 5)

Anno: T. P. Act, S. 108(1) N. 14 Pt. 33.

Advocate General (D. Narasa Raju) and Y Suryanarayana, for Appellant; P. V. Chalapathi Rao, for Respondent.

JUDGMENT: This Second Appeal arises out of O. S. No. 262 of 1948, a suit filed by the respondent for recovery of makta from the appellant.

(2) The facts admitted or found are briefly narrated. The plaint schedule property was ori-

ginally owned by the 2nd defendant. The plaintiff's father purchased the same in execution of a decree obtained against the 2nd defendant. After the purchase, he leased out the suit land to the 1st defendant for five years under Exhibit A-1 dated 7-5-1941. Subsequently, the 2nd defendant filed O. S. No. 134 of 1942 against the plaintiff's father and the 1st defendant for setting aside the decree and the Court sale and for possession. The suit was decreed on 31-7-1943.

The plaintiff preferred an appeal against that decree, being A. S. No. 328 of 1943. The appeal was allowed on 7-9-1945, and the title of the plaintiff's father was affirmed. Pending the appeal on 6-12-1943, the plaintiff filed an application for stay of execution of the decree and for a temporary injunction restraining the 2nd defendant from cutting and carrying away the crops. The 1st defendant also filed an application for temporary injunction. On 14-12-1943, the Court made an interim order directing the crops not to be cut and posted the application for final enquiry to 16-12-1943.

On 16-12-1943, final orders were made staying execution and directing the 2nd defendant not to remove the crops. Notwithstanding the said orders, the 2nd defendant cut and carried away the crops. In 1944, the 2nd defendant entered the land. The 1st defendant filed O. S. No. 276 of 1944 against the 2nd defendant and obtained a decree for the value of the crops removed by her. The plaintiff filed the aforesaid suit for recovery of the rent due for three years 1943 to 1946.

(3) The 1st defendant raised the plea that he had been evicted by a person with title paramount, and therefore, he was not liable to pay the rent due to the plaintiff.

(4) The learned District Munsif held that the 1st defendant was evicted by title paramount and, therefore, the suit for rent was not maintainable. On appeal, the learned Subordinate Judge took a contrary view and decreed the suit. Hence the appeal.

(5) The principle of law is well settled, and indeed there is no dispute about it. Eviction by title paramount destroys the effect of the grant and the corresponding liability for payment of rent. But the difficulty lies in the application of the principle to the facts of each case. Can it be said that, in the instant case, the 1st defendant had been evicted by title paramount? From the aforesaid narration of facts, it is obvious that, at the time the 2nd defendant took possession, the appeal filed by the plaintiff was pending and the title of the 2nd defendant was not finally upheld. Any decree that was obtained by the 2nd defendant was only tentative and subject to the result of the appeal.

An appeal is only a continuation of the suit and the moment an appeal is filed, the finality of the decision of the first Court is suspended. But, it is said that, though an appeal was pending, the 2nd defendant took possession under a decree and so her possession could not be equated to that of a trespasser or a person taking forcible possession. This argument ignores the admitted fact that possession was not taken in execution of a decree but the crop was forcibly cut despite a stay order against the 2nd defendant. The 2nd defendant trespassed upon the land ignoring the order of the Court staying her hands.

I am, therefore, of the opinion that the removal of the crops, or the taking of subsequent possession were illegal acts committed by the 2nd defendant. The 1st defendant was not evicted by title paramount, but by the illegal action of a person in defiance of Court's order. Eviction by a decree-holder of a tenant pending an appeal which is ultimately allowed during the period when execution of the decree was stayed cannot in any sense of the term be described as eviction by paramount title. I, therefore, agree with the conclusion arrived at by the lower Court and dismiss the appeal with costs. No leave.

V.R.B. Appeal dismissed.

A.I.R. 1954 ANDHRA 44 (Vol. 41, C.N. 22)

UMAMAHESWARAM J. (4-8-1954)

Maddu Venkata Subbaiah and others, Petitioners v. Alane Adinarayana and others, Respondents.

Civil Revn. Petn. No. 1701 of 1952, to revise the decree of Sub. J., Narasaraopet, D/- 21-3-1952.

(a) Civil P. C. (1908), S. 73 — Assets — Meaning.

The expression "assets" in S. 73 must be understood as referring only to money. (Para 4)

Anno: C. P. C., S. 73 N. 4 Pt. 6.

(b) Civil P. C. (1908), S. 73 and O. 21, R. 52 — R. 52 cannot override terms of S. 73. (Para 6)

Anno: C. P. C., S. 73 N. 4; O. 21 R. 52 N. 1.

CASES REFERRED : Paras

(A) (V26) AIR 1939 Cal 530: ILR (1939) 2 Cal 143 3

(B) ('41) 45 Cal WN 674 3, 4

G. Venkatarama Sastry, for Petitioners; Kaduri Seshagiri Rao and Kasturi Siva Prasad Rao, for Respondents.

ORDER : This civil revision petition raises an interesting question of law as to the interpretation of S. 73, C. P. C. The petitioner herein filed Small Cause Suit No. 312 of 1952 and obtained a decree on 31-7-1952. He filed I. A. No. 878 of 1950 and obtained attachment before judgment of two National Savings Certificates standing in the name of the defendant and given as security before the Collector of Guntur in respect of a licence issued in his name. The attachment before judgment was made absolute on 20-9-1950 after the suit was decreed.

The respondents herein filed Small Cause Suit No. 1 of 1949 on the file of the Subordinate Judge's Court of Narasaraopet and attached the National Savings Certificates before judgment on 14-12-1950. Before they were so attached, the petitioner herein filed E. A. No. 672 of 1950 to cash the National Savings Certificates on

4-12-1950, but, as the order of attachment before judgment was passed by the Subordinate Judge's Court, Narasaraopet, on 14-12-1950, the application was dismissed on 12-3-1951. The District Munsif of Bapatla, having cashed the National Savings Certificates, sent the amount to the Subordinate Judge's Court of Narasaraopet, on 10-8-1951.

As per the directions of the District Munsif, the petitioner herein filed E. A. No. 115 of 1951 before the Subordinate Judge, Narasaraopet, claiming that he was entitled to the full value of the National Savings Certificates. His contention was that the application by the respondents was made long after the receipt of the assets and that, therefore, the respondents were not entitled to an order for rateable distribution. The simple question for consideration is what exactly is the meaning of "assets" in S. 73.

(2) The meaning of the expression "assets" given in the Concise Oxford Dictionary (4th Edn.) is

> "enough goods to enable heir to discharge debts and legacies of testator; property liable to be so applied; effects of insolvent debtor; property of person or company that may be made liable for debts."

In Webster's Dictionary, the meaning given is

> "the entire property of all sorts belonging to a person, Corporation or an Estate."

The learned Advocate for the petitioner contended that the expression "assets" must be construed as including National Savings Certificates and that, as the National Savings Certificates were received in the Court of the District Munsif of Bapatla on 18-9-1950 long before the order of attachment before judgment was made by the Subordinate Judge's Court, Narasaraopet, no rateable distribution should be ordered. Though no doubt "assets" may ordinarily mean every form of property, still I am not prepared to adopt the Dictionary meaning in construing the provisions of S. 73, C. P. C. The latter part of S. 73 furnishes a valuable clue as to the meaning of the expression "assets" and it runs in the following terms:

> "the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons."

If the expression "assets" is to be understood as meaning every form of property, the costs of realisation cannot be deducted out of the assets but only out of the moneys realised from and by the sale of the assets. So, I agree with the contention of the Advocate for the respondents that the expression "assets" in S. 73 means only money.

(3) The only two decisions that are directly in point and brought to my notice in regard to the interpretation of the expression "assets" are those reported in — 'Deva Dutta Serogi and Son v. P. G. Mitter and Son', AIR 1939 Cal 530 (A) and — 'Jogesh Prasad v. Saligram Lachmi Narayan', 45 Cal WN 674 (B). In AIR 1939 Cal 530 (A) at page 535, MacNair J. states as follows:

> "But this argument appears to me to beg the question, namely, what is the meaning of the word 'assets'?, and I can find no reported cases in which the term has ever been applied otherwise than to money. That this is the true meaning is substantiated by the provision that 'the assets after deducting the costs of realisation shall be rateably distributed'. I have no doubt that the word "assets held by court" must mean 'money held by a court', for it is only money and not goods which can be the subject of rateable distribution".

In 45 Cal WN 674 (B) the same construction was adopted by a Bench of the Calcutta High Court. The observations which are apt and apply to the facts of this case are as follows:

> "The expression 'assets held by the court' obviously implies the idea of assets realised or converted into cash, for unless the property has been converted into some form which renders it available for immediate distribution, the court cannot be said to have received or held such assets. I am not aware of any reported cases either under the present S. 73, Civil P. C., or under S. 295 of the old Code where it has been suggested that the expression 'assets' could refer to anything else than money and the reason I think is that S. 73 is applicable only when the decrees are for money and the assets on which the court can operate under that section, must necessarily be money also."

(4) The further question that was raised in 45 Cal WN 674 (B) was whether the cheque that was issued by the District Court could be regarded as "assets" and the learned Judges held that as the cheque was issued by the District Judge it might be regarded as equivalent to cash or money. I agree with those two decisions and hold that the expression "assets" in S. 73 must be understood as referring only to money.

(5) The learned Advocate for the petitioner sought to rely upon the difference between the language of S. 73 in the present Code and S. 295 (corresponding to S. 73) under the Code of 1882 as supporting his contention. Section 295 was in the following terms:

> "Whenever assets are realised by sale or otherwise in execution of a decree ...."

For those words, under the Code of 1908, the words "where assets are held by a court" have been substituted. The object of the amendment, in my opinion, is only to make available all assets which are held by a court and not necessarily those only which were realised by sale or otherwise in execution of a decree. It does not appear that it was intended to enlarge the meaning of the expression "assets" so as to include every form of property. There is, therefore, no force in this contention.

(6) The next contention was based on the terms of O. 21, R. 52, C. P. C. I agree with the learned Advocate for the petitioner, that a distinction is sought to be drawn in the second proviso to O. 21, R. 52 between "the receipt of an asset" and "the realisation of an asset". If an asset means only money then, there can be no question of realisation of money, as distinguish-

ed from the receipt of money. So, even assuming that "asset" is used in a different sense in O. 21, R. 52, I am not prepared to import the same meaning to the expression "assets" in S. 73 in the same way. Order 21, R. 52 cannot also override the terms of S. 73. Moreover, the Collector had already sent the National Savings Certificates to the District Munsif's Court, Bapatla, and the terms of O. 21, R. 52 have really no application to the facts of this case.

(7) As the application for attachment before judgment was made by the respondents before the National Savings Certificates were encashed, and the money was received by the Court, the respondents were rightly held to be entitled to rateable distribution.

(8) In the result, the civil revision petition fails and is dismissed, but in the circumstances, I do not propose to award any costs to the respondents.

V.R.B. Revision dismissed.

A.I.R. 1954 ANDHRA 46 (Vol. 41, C.N. 23)

SUBBA RAO C. J. AND CHANDRA REDDI J.
(17-8-1954)

In re, Boya Burranna and others, Accused.

Referred Trial No. 64 and Criminal Appeals Nos. 338 and 339 of 1954, against the judgment of S. J., Kurnool Division in Sessions Case No. 22 of 1954, D/- 12-4-1954.

(a) Criminal P. C. (1898), Ss. 208, 252 and 286 — Non-examination of prosecution witness — Inference — (Evidence Act (1872), S. 114).

A duty lies on the prosecution to examine all the witnesses necessary to unfold the narration of the events that led to the incident. But where the witness is not a very important witness and if examined would have only advanced the prosecution story to the extent of proving an unessential detail, and for whose examination the prosecution had taken steps to summon but the Court refused to grant an adjournment for the purpose, no adverse inference against the prosecution can be drawn from the non-examination of such a witness, though it would have been better, if he were examined. (Para 7)

Anno: Evidence Act, S. 114 N. 11; Cri. P. C., S. 208 N. 7; S. 252 N. 5; S. 286 N. 6.

(b) Penal Code (1860), Ss. 302 and 149 — Group of persons, found guilty of murder — Who inflicted what blows not established — Lesser punishment, if warranted — Discretion — Accused drunk — Extenuating circumstances — (Criminal P. C. (1898), S. 367 (5)).

A combined reading of the provisions of S. 302, I. P. C. and S. 367(5), Cr. P. C., makes it clear that the normal punishment in the case of murder is death, but a mitigated punishment can be given for stated extenuating circumstances. When the Statute laid down in express terms that reasons shall be given for a lesser sentence, it presupposed that the normal sentence for murder is death. The section, therefore, does not confer an absolute discretion in the Court to give one or the other of the alternative sentences. The normal sentence is indicated and the lesser can only be given for definite extenuating circumstances. AIR 1953 All 220, Not followed. (Paras 16, 17)

It cannot be laid down as a rule of law that in every case where it is not possible to allocate the wounds inflicted to a particular accused, a lesser penalty should be given. Where a group of persons brutally murdered the deceased, they all deserve the same punishment. But there may be cases where part taken by each of the accused may vary, one of the accused taking a main part & other taking a subsidiary part, though their common object is to commit murder. In such a case, perhaps, there may be a good ground for differentiating the accused for inflicting punishment. (Para 17)

Where it was found that all the accused who were guilty of murder, were in the habit of manufacturing illicit toddy and were drunk as usual when they committed the murder, but had not primed themselves with drink for the purpose of committing the murder, it was held that this was sufficient extenuating circumstance for awarding the lesser punishment of transportation for life. (Para 18)

Anno: Penal Code, S. 302 N. 19, 24, 28; S. 149 N. 13, Criminal P. C., S. 367 N. 14.

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 51: 1953 SCJ 678: 1954 Cri LJ 338 (SC) 7
(B) (V9) AIR 1922 Low Bur 32: 23 Cri LJ 437 16
(C) (V20) AIR 1933 Nag 307: 34 Cri LJ 1168 16
(D) (V30) AIR 1943 Mad 69: 44 Cri LJ 299 16
(E) (V40) AIR 1953 All 220: 1953 Cri LJ 580 16
(F) (V40) AIR 1953 SC 364: 1953 Mad WN Cr 210: 1953 Cri LJ 1465 (SC) 17
(G) (V31) AIR 1944 FC 35: 46 Cri LJ 305 17

P. Basi Reddi (for Nos. 1 to 3), and K. Venkataramaiah (for Nos. 4 & 5), for Accused; Public Prosecutor, for the State.

JUDGMENT: These are appeals against the judgment of the Court of Sessions of Kurnool division, convicting the accused under Section 302 and Section 148, Indian Penal Code and sentencing them to death and also to undergo rigorous imprisonment for 3 years.

(2) One Lingareddi was hacked to death, on 18-1-1954 at about 10 P. M. near a well called Kurakulavandla Bhavi in the village of Pedda Hothur in Eluru Taluk.

The case for the prosecution is, the 1st accused is the father of accused 2 and 3, and accused 4 and 5 are illegitimate sons of a divided brother of the 1st accused. They were manufacturing arrack illicitly in the hillock of Kurithegudda, which is close to the field of Lingareddi, the deceased. Lingareddi was a fairly well-to-do ryot of respectability and he naturally protested

against the actions of the accused. Not only did they not heed to his advice, but they also shifted the materials used for distillation close to the field of the deceased.

Two months prior to the occurrence, the deceased broke the pots with a forked stick. Two days prior to the incident, the 5th accused drove his flock of sheep into the field of the deceased and his standing crops grazed. The deceased beat the 5th accused. At about 10 P. M. on 18-1-1954, when the deceased, as usual, was going to his field to keep watch over the standing crops, the five accused who were lying in wait in their 'maliga' in their garden armed with deadly weapons, came to the Marakat rastha, surrounded him and stabbed him with spears and hatchets, which resulted in his death.

(3) Exhibit P-11, the plan filed in the Sessions Court shows at a glance the locality, where the dastardly crime was committed. It will be seen from the plan that Marakat road is a cart track, which starts from the village and leads to another village called Marakat in the north. The 1st accused owned a garden with a house and a well thereon to the west of the cart track. The deceased also owned fields on the western side of the cart track and north of the accused's fields. Between the two, besides other fields, there is a cremation ground. On the eastern side of the Marakat road after passing the fields of the accused, there is a well called Kurakulavandla Bhavi. From that well, a footpath leads towards the east to Sakkana's land. The dead body of the deceased was found at the point marked in the plan, which is 22 yards from the well.

(4) That the deceased was hacked to death in a brutal manner is beyond dispute. The post mortem certificate Ex. P-6 shows that as many as 17 wounds were inflicted on his body. P. W. 5, the Civil Assistant Surgeon who conducted the autopsy on the body described the nature of the wounds. According to him, injuries Nos. 1, 2, 3, 5, 6, 7, 9, 12, 13 and 14 could have been caused by sharp edged weapons such as hand axes and spears and that injuries Nos. 8, 10, 11, 15, 16 and 17 could have been caused by a blunt weapon like a stick. He expressed the view that death would have been instantaneous and might have occurred about 15 hours prior to his examination. When the weapons seized in the case viz., M. Os. 1 to 5 were shown to him he gave his opinion that the injuries could have been caused with the said weapons. Therefore who caused the injuries to the deceased must be held to be guilty of murder.

But the real question is whether the accused are the persons who inflicted the injuries on the deceased and caused his death.

(5) Exhibit P-1 is the complaint dated 18-1-1954 made by P. W. 1, a nephew of the deceased, to the Village Munsif. It purports to have been given at 12 mid-night on 18-1-1954. In the complaint, the incident is described as follows:

At about 10 o'clock in the night the deceased after taking his meals, went for watching his field Kondachenu. Along with him Chakkala Siddappa also went. On the way when they were passing Kurakulavandla Bhavi, the five accused came from the field of Boya Burranna and began to abuse in foul language. The 5th accused pierced Lingareddi's neck with a screw-spear. The 2nd accused pierced him with a screw-spear on his throat. The 4th accused cut his head with a hatchet. The 1st accused beat him on his head and with a hatchet and the 3rd accused beat him with a stick on his back. After Lingareddi fell down, his body was pierced with screw-spears and cut with hatchets and he was killed. Chakkala Siddappa came running and informed these facts to the complainant, who went to the scene of occurrence and saw Lingareddi's dead body.

(6) The report of the Village Munsif shows that when questioned, the complainant told him that Chakkala Siddappa (P. W. 3) and Hulikappa (P. W. 4) were witnesses to the incident. This complaint, which was given two hours after the incident gives all material particulars.

P. W. 1 is the Linga Reddi who gave the complaint. He gives the relationship of the accused to each other and the previous incidents which created bad blood between the accused and the deceased. He says that the accused were illicitly manufacturing arrack and that the deceased protested against their illegal activities. He speaks to the fact that the deceased broke 20 or 30 pots of fermented liquor. He also mentions the incident 10 days prior to the occurrence of the 5th accused driving his flock of sheep into the field of the deceased and getting his karra crop grazed up and of the beating by the deceased of the 5th accused.

Finally he narrates the circumstances how Chakkala Siddappa, who was watching his field during the night time went along with the deceased, how on that fateful night Chakkala Siddappa returned home within half an hour and told him that his uncle was killed, how he woke up the two wives of the deceased and along with them went to the place where the dead body was found, how he saw near the dead body the 1st accused who was sitting fully intoxicated on a boulder and remarking sarcastically "Where is your junior paternal uncle now?" and how he gave the ring of his uncle to him.

He proves Exhibit P-1 and says that he gave it to the Village Munsif. No material circumstances have been elicited in cross-examination to discredit this witness. A suggestion is made that Madiga Narasappa is his farm servant and that he came and informed him of the murder of the deceased, but he denies it. When it is put to him whether he mentioned the incident to P. W. 6, the Village Constable, he denied it.

The suggestion is made to discredit P. W. 6 than P. W. 1. P. W. 6 says in his evidence, that one Lingareddi told him of the murder, and that he made that entry in his diary. P. W. 6 explains that that Linga Reddy who told him is a young boy who is examined as P. W. 7. An attempt is made to suggest that there is faction in the village between Gangadhara Reddi and others in connection with the Panchayat Board elections and that Gangadhara Reddi is assisting the prosecution in this case, but he denies it.

Indeed the learned counsel for the accused does not base his criticisms on the alleged factions in

the village. There are certain slight discrepancies between what this witness stated in the Sessions Court and that which he stated before the Magistrate. Here he said that he was fully drunk, whereas in his deposition before the Magistrate, Ex. D-1, he said that he was not drunk. After going through his evidence, carefully, we see no reason to reject his evidence.

(7) P. W. 3 is one of the eye-witnesses. According to him he followed the deceased up to the moment he was beaten to death. His evidence, if accepted, would bring home the guilt to the accused. (After narrating his evidence the judgment proceeded:) The learned counsel for the accused tried his best to establish that this witness is a liar, but he had failed in his attempt. It is said that Valim Sahib to whom this witness had given first information of the incident should have been examined by the prosecution and the non-examination of that witness indicates that the version of P. W. 3 that he told him of the incident is not true.

In support of the contention that a duty lies on the prosecution to examine all the witnesses necessary to unfold the narration of the events that led to the incident, reliance is placed upon the judgment of the Supreme Court in — 'Habeeb Mohamed v. State of Hyderabad', AIR 1954 SC 51 (A). But in this case, Valim Sahib was not a very important witness. If he is examined, he could but have advanced the case of the prosecution, except to the extent of proving that P. W. 3 was the messenger who carried the evil news to the nephew P. W. 1. Further the prosecution took steps for summoning him, but the Court refused to grant any adjournment. In the circumstances, we cannot draw any adverse inference against the prosecution though it would have been better if they had examined Valim Sahib also.

Some discrepancies in the evidence of P. W. 3 are also relied upon. In the statement made by him under S. 164, Criminal Procedure Code, he stated that he was the farm servant of P. W. 1, whereas in the Sessions Court, he stated that he was a cooly working under P. W. 1. Before the Magistrate, he deposed that the accused surrounded them i.e., himself and the deceased, whereas before the Sessions Court he would say that the deceased was surrounded, and that he was standing at a distance of about 16 feet from them. To the Sub-Inspector he stated that he saw the assailants stabbing and beating the deceased after he fell down. In the Sessions Court he says that he did not see them stabbing the deceased after he fell down. In the Magistrate's Court he said that the 1st accused gave a gold ring, whereas in the Sessions Court he said it was a silver ring.

These are all small discrepancies that would always be found in the deposition of the same person at different points of time. The learned counsel comments that it is not possible for a man standing at about 16 feet from the deceased, even in moonlight, to depose in minute detail how each one of the accused gave a particular blow with a particular weapon on a specific part of the body. There may be some justification for the comment, but we cannot say from the detailed description that P. W. 3 has not witnessed the occurrence. They are only embellishments in an otherwise truthful version. This witness's name was also mentioned in Ex. P-1 i.e., even at the earliest moment, when the complaint was made to the Village Munsif. The learned Judge, who had seen this witness and observed his demeanour in the witness box, accepted his evidence. After carefully considering his evidence we cannot discover any valid reason for rejecting the evidence of this eye-witness.

(8) P. W. 4 is Hulithappa, whom P. W. 3 saw at a distance of 16 feet from the place where the murder took place, when he turned back to go to the village. He says that he was about 40 feet from the deceased when he was near the Kurakulavandla Bhavi. He practically describes the incident in the same manner in which P. W. 3 described it. (Their Lordships considered his evidence and proceeded:)

Though it is very difficult to accept a detailed description of the manner of beating, there is absolutely no reason to reject his evidence, when he states that he saw the accused hacking the deceased with spears and hatches. This witness has stood the test of cross-examination very well and has impressed the Judge who had seen him in the witness box and after going through his evidence, we do not see any justification to take a different view of his evidence, from that taken by the Sessions Judge.

There is only one corroborating evidence in the case. P. W. 9 is a Muslim. (After considering the evidence of this witness, the judgment proceeded:) P. W. 9 appears to be a disinterested witness and we cannot see any tangible motive for him to give false evidence to incriminate the accused in a murder case. His evidence clearly shows that he heard the cry of the deceased and also that he saw the five accused surrounding the deceased armed with weapons.

(9) The weapons used in committing the murder and the blood-stained clothes were discovered in the garden of the accused.

P. W. 10 is a Head Constable. At about 1-30 P.M., he along with Panchayatdars went to the garden of the accused. At about 2 P.M. they searched the hay rick in that garden and found M. Os. 1 to 5 the weapons used. They were all blood-stained. Exhibit P-7 is a Panchayatnama. At about 2-40 P.M. he searched in the presence of the Panchayatdars the house in the garden and they found M. Os. 7 and 8, which were also blood-stained. They are the clothes alleged to have been worn by the accused. Exhibit P-8 is the Panchayatnama in regard to the said M. Os.

It was only suggested to this witness that the hay-rick is in the field, which has no enclosure and that there is no shutter to the doorway of that house. Though there is a remote possibility of somebody putting the weapons in the hay-rick of the accused, his evidence cannot be rejected on that speculation.

P. W. 11, the Village Munsif identifies M. Os. 7 and 8. He says M. O. 7 belongs to the 1st accused and that M. O. 8 belongs to the 5th accused. In cross-examination he says that he had seen the 1st accused wearing M. O. 7. His evi-

dence clearly shows that M. O. 7 and M. O. 8 belong to two of the accused. The discovery of the blood-stained weapons in the hay-rick in the field of the accused and of the clothes in their house in the garden certainly reinforce the conclusion that the accused must have been the culprits.

(10) As against this positive evidence, the accused have examined six witnesses. Three of the five accused have admitted their presence at the scene of offence. To explain their presence, they examined witnesses to show that, while they were at the shop of D. W. 3, one Madiga Narasappa who was running towards the village, told them of the incident and that they went to the place of occurrence, out of curiosity. They sought to explain the incident of the ring by stating that the 1st accused joined P. W. 1 when he was searching for something near the corpse and finding the ring he gave it to him, that thereafter they were taken to the house of P. W. 11 where Gangadhara Reddi and Dasi Reddi were sitting and that after staying there for one hour, they returned home. D. Ws. 1, 2 and 3 were examined to support this story. The suggestion that Madiga Narasappa came running towards the village was put to P. Ws. 1, 3 and 4, but they denied it.

(11) (Their Lordships perused the evidence of D. W. 1 and continued:) We have no doubt that this witness has been improvised for the occasion.

(12) D. W. 2 is a Madiga. (Their Lordships considered his evidence and continued:) His evidence is not worthy of credence.

(13) (Then their Lordships considered the evidence of D. W. 3 and proceeded:) A perusal of the evidence leaves no doubt in our mind that he had perjured himself in the witness box in a belated attempt to support the accused.

(14) D. W. 4 is one Chinna Lakshmanna. He is the younger brother of Govindappa. He says that there is party faction in the village between them, Gangadhara Reddi and Dasi Reddi, that the deceased (sic) & the accused belong to Govindappa's party and that P. Ws. 1, 3, 4, 8 and 9 belong to the Ganghadhara Reddi's party. We have already considered this aspect of the case. There is no material to show nor could the learned counsel substantiate the plea that the witness, who gave evidence for the prosecution were all partisans of Gangadhara Reddi and they were using the incident to wreak vengeance of Govindappa party-men. We, therefore, hold, agreeing with the learned Sessions Judge that the five accused murdered Lingareddi at about 10 P.M. on 18-1-1954.

(15) The next and more difficult question is what is the sentence to be inflicted on the accused. Mr. Basi Reddi contends that, where a number of accused commit a murder and where it is not possible to connect a particular accused with a particular injury on the dead body and where the accused are convicted for murder by reason of their constructive liability, Courts always have given the lesser sentence of transportation for life. In the alternative, he would say that, in the present case, the accused committed the murder in a state of drunkenness and that when it has not been established that they had primed themselves with drink to commit the murder, the lesser sentence of transportation for life would meet the situation.

(16) The statutory provisions prescribing the nature of the penalty in a case of murder are Section 302, Indian Penal Code and Sec. 367 (5), Cr. P. C. Under Section 302, I. P. C., whoever commits murder shall be punished with death, and (sic) the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed. A combined reading of these provisions makes it clear that the normal punishment in the case of murder is death, but a mitigated punishment can be given for stated extenuating circumstances. That that is the law has been laid down in innumerable cases by all the High Courts. See — Emperor v. Nga Shwe Ula U', AIR 1922 Low Bur 32 (B); — Local Government v. Sitrya Arjuna', AIR 1933 Nag 307 (C) and — 'In re, Ramudu', AIR 1943 Mad 69 (D).

A different note was struck by Agarwala J. in — 'Moolchand v. State', AIR 1953 All 220 (E), wherein the learned Judge says as follows at page 222:

> "Under Sec. 302, I. P. C., a discretion is vested in Courts either to impose a sentence of death or of transportation for life. Discretion must always be exercised according to principles and not according to the humour of the Judge, arbitrary or fanciful. The principle upon which discretion is to be exercised not being fixed by any statute may be interpreted progressively in accordance with the spirit of the times, so that real and not technical justice may be secured. To my mind the true principle of exercising the discretion of imposing either the penalty of death or of transportation for life should be that the sentence of death is awarded in cases in which the act is very brutal and highly repugnant to morals and the sentence of transportation for life is imposed in all other cases."

(17) The learned Judge's observations may be in accord with the social conscience of the changing times, but with respect to the learned Judge they are in conflict with the express provisions of Section 367(5), Cr. P. C. When the Statute lays down in express terms that reasons shall be given for a lesser sentence, it pre-supposed that the normal sentence for murder is death. The section, therefore, does not confer an absolute discretion in a Court to give one or the other of the alternative sentences. The normal sentence is indicated and the lesser can only be given for definite extenuating circumstances.

The question is what are the extenuating circumstances in a case where a group of persons were convicted of murder under Section 302, I. P. C., read with Sec. 149, I. P. C. Strong reliance is placed upon some observations in the judgment of the Supreme Court in — 'Dalip Singh v. State of Punjab', AIR 1953 SC 364 (F) in support of the contention that, wherever the wounds inflicted are not traced to a particular accused, the lesser sentence of transportation should invariably be given. The observations relied upon are found at page 368. They are:

limits otherwise imposed on such prices or rates.

Rule 81(4) :— If any person contravenes any order made under this rule, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

(4) Under Section 2(9) of the Madras Rationing Order of 1943, a "rationing document" includes a rationing book, a ration card or any part of any ration book or ration card or any coupon or any declaration, authority, permit or other document issued or made by or under the provisions of this Order.

Section 13:— "A ration document shall not be issued for obtaining any rationed article, except by or on behalf of the person to whom such document was issued."

Section 16:— "No person shall transfer, to any other person a ration document issued to himself."

(5) It is seen from the aforesaid provisions that the Ration Order was passed for maintaining the supplies and services essential to the life of the community. It was intended to ensure an equitable distribution of rice to the members of the public at controlled rates. To achieve that object, it was necessary that the person who buys and sells rice, should be under the control of the authorities concerned and subject to the regulations made to prevent abuse. The Order, therefore, enabled the authorities concerned to issue an authorisation to a retail dealer to buy and sell rice subject to the conditions laid down in the said Order. Under S. 13, the authorisation cannot be used by any person other than the person to whom it was issued. Under S. 16, such a person is prohibited from transferring a ration document to any other person.

Under the Defence of India Rules, any contravention of an order made in exercise of the powers conferred under that rule was made an offence punishable as such. It is, therefore, obvious that any contract involving the transfer of a ration document not only contravenes the express prohibition contained in S. 13 of the Order, but also relates to an act which is made an offence punishable under the Defence of India Rules. Such a contract would be void under S. 23, Contract Act, as the object of that contract involves something illegal or contrary to public policy.

(6) There are innumerable cases on the analogous provisions in different statutes such as the Opium Act, the Abkari Act, etc. It would be enough if two of the relevant cases laying down the principles are noticed.

'Nalan Padmanabhan v. Badrinath', 35 Mad 582 (A) deals with a question arising under the Opium Act. There two persons were farmers of opium revenue under Government. They obtained a licence from the Collector for the sale of opium subject to the condition among others that they should not sell, transfer or sub-rent their privileges without the permission of the Collector. They, without the sanction of the Collector entered into an agreement with C, by which they admitted him as a partner in the opium business. The third party admitted as partner brought a suit for dissolution and winding up of the business. Benson and Sundara Ayyar JJ. held that the agreement was void and the suit was not maintainable. At page 586, the learned Judges observed:

"It is well established that the provisions of the Abkari and Opium Acts are not intended merely to protect the public revenue and that the prohibitions contained therein are based on public policy."

The learned Judges proceeded to state:

"We are also of opinion that the partnership in this case was illegal for another reason, as it contravened the provisions of cl. 26 of the licence which prohibits the transfer of the right of sale granted to the defendants."

As regards the meaning to be attributed to the word "transfer" the learned Judges observed:

"But if one person carrying on a trade and possessing stock and capital, admits another into partnership with himself, making the stock and capital, the joint property of both, it is impossible to contend that there is not a transfer in such a case. The word "transfer" says James L. J. in the — 'Gathercole v. Smith', (1881) 17 Ch D 1 (B) is 'one of the widest terms that can be used' and according to Lush L. J. in the same case, the word "transferable" is a word of the widest import and includes every means by which the property may be passed from one person to another. We are not concerned in construing a statute like the Opium Act with the mere form of the transaction, but with the substance of it."

(7) It will be seen from the aforesaid decision that the learned Judges held that the partnership was illegal for two reasons (i) that it offended the rule of public policy and (ii) that it contravened an express statutory prohibition. A Full Bench of the Madras High Court elaborately considered the question arising from the Madras Abkari Act in — 'Velu Padayachi v. Sivasooriam Pillai', AIR 1950 Mad 444 (C). The facts there are: The parties to the partnership agreement sold arrack themselves or through the other partners as their agents on a licence granted to the defendant alone in which there was a term prohibiting him from transfering his rights. The partnership agreement was entered into prior to the issue of the licence to the defendant. The suit was filed by one of the partners for recovery of the amounts due to him under a settlement of account in respect of the said partnership. The defence was that the suit partnership was illegal and, therefore, the suit was not maintainable. At pp. 446-447, Horwill J. who delivered the judgment observed:

"When a licence, which is a personal privilege to vend, is acquired by one partner, it is certainly his licence and not the licence of the partnership. Since it was granted to him on the express understanding that it was to be used by him and by him alone, its use by the partnership would involve a transfer in precisely the same way as it would if the partnership were entered into after the licence was issued. On the question of public policy, it is difficult to see any difference between the object of the partnership entered into before the

licence was granted and one entered into after it was granted. In either case, the partnership would be entered into for the purpose of bringing about a result prohibited by law, i.e., the vending of arrack by a person who had no licence to do so."

At page 449, the learned Judge concluded his discussion in the following words:

"From the above discussion, it is evident that there is a long and consistent body of opinion of this High Court from — 'Marudamuthu Pillai v. Rangaswamy', 24 Mad 401 (D) onwards with which we agree, that a partnership entered into for the purpose of conducting a business in arrack or toddy on a licence granted or to be granted to only one of them is void 'ab initio' whether the contract was entered into before the licence was granted or afterwards, in that it either involves a transfer of the licence, which is prohibited under Rule 27 and punishable under S. 56 or a breach of S. 15, Akbari Act, punishable under S. 55, because the unlicensed partner by himself or through his agent, the other partner, sells without a licence."

(8) In my view, the principles laid down in the aforesaid decisions equally apply to the facts of the instant case. The partnership business of buying rice and selling same in the retail shop was carried on with the aid of the licence, in favour of the 1st defendant. When the licence was issued to the 1st defendant, it was intended that he should, and none else, use that for doing business. Instead the plaintiff and other partners, who had no ration card along with the 1st defendant bought and sold rice. It certainly was a user of the ration card by persons other than the one to whom it was issued in contravention of Section 13 of the Rationing Order. It also involved the transfer of a ration document prohibited by S. 16 of the Rationing Order.

(9) Learned counsel for the appellant sought to make a distinction between the Opium and Abkari Acts and the Rationing Order and argued that no principle of public policy underlay the provisions of the Rationing Order. I cannot agree. As I have already stated, the Rationing Order was introduced in the interests of the public for the equitable distribution of rice during those days of scarcity. If there was a question of public policy in enacting the Abkari and Opium Acts, I do not see how the Rationing Order of 1943 could be put in a different category. It was not issued in the interests of public revenue. It was essentially intended to protect the public interests and to effectuate that purpose, certain acts deleterious to the public interests were prohibited and the breach thereof was made punishable. The suit partnership entered into between the plaintiff and his partners in direct contravention of the statutory prohibitions is illegal and unenforceable. The judgment of the lower Court is correct.

(10) The appeal fails and is dismissed with costs. No leave.

V.S.B. Appeal dismissed.

A.I.R. 1954 ANDHRA 53 (Vol. 41, C.N. 25)

SUBBA RAO C. J. AND UMAMAHESWARAM J.
(8-7-1954)

Tangirala Somasekhara Rao, Plaintiff-Appellant v. Tangirala Lakshminarasamma and others, Defendants-Respondents.

A. A. O. No. 134 of 1953, against decree of Sub. J., Tenali, D/- 5-9-1952.

Civil P. C. (1908), O. 33 R. 11 — Petition registered as suit without payment of batta — Subsequent withdrawal of petition — Suit dismissed — Liability of petitioner to pay court-fees.

The Court has jurisdiction to make an order directing registration of a pauper petition as a suit without receiving batta. Where such an order for registration was made at the request and for the benefit of the pauper applicant, and the petition was registered as a suit, but subsequently dismissed on an application by the pauper for the return of the original petition the petitioner is liable to pay the court-fees due on it, to the Government. (Para 2)

Anno: Civil P. C., O. 33 R. 11 N. 3.

G. Venkatarama Sastry, for Appellant; Govt. Pleader (P. Satyanarayana Raju), on notice.

SUBBA RAO C. J.:

This is an appeal against the Order of dismissal of O. S. No. 83 of 1952, a suit filed by the appellant in forma pauperis.

The Appellant filed O. P. No. 2 of 1952 on the file of the Subordinate Judge's Court, Tenali on 15th December 1951, for a declaration that he was the adopted son of one Subrahmanyam and for possession of the plaint schedule properties. The Subordinate Judge granted leave by his Order 17th July 1952. He adjourned the petition to 24th July 1952 for payment of batta. It was again adjourned for the same reason to 31st July 1952. The petitioner failed to pay batta even by that date.

On 31st July 1952, the learned Judge made the following Order:

"Batta memo not filed. Register this petition, and then call on for the party to pay batta and notice."

On that day, the learned Subordinate Judge could have dismissed the application on the ground the batta was not paid. Instead, he showed indulgence to the appellant and gave him another opportunity by directing the petition to be registered and calling on him to pay batta subsequently. The order was made obviously either at the request of the appellant's advocate or, at any rate with his acquiescence.

Till that date, it is apparent that the appellant wanted to pursue the suit. But, subsequently, he changed his mind, and on August 1st, 1952 he filed a petition I. A. No. 921 of 1952 for return of the original petition to him. But unfortunately for him, in pursuance of the order dated 31st July 1952, the application was registered as a suit and summons were directed to be issued on the same date. The learned Subordinate Judge presumably because he expected that the application

would have been registered by that time made an order in the following terms: "Return if it has not been numbered".

As the pauper application had already been registered, this order was of no help to the appellant. As the suit was dismissed after it was registered, the plaintiff was directed to pay the court-fee due to Government. The aforesaid appeal is against that order.

(2) Mr. Venkatarama Sastry, learned counsel for the appellant, argued that the Subordinate Judge had no jurisdiction to register a pauper application as a suit unless batta for the issue of summons was paid. But none of the provisions of the Civil Procedure Code or the Rules of Practice cited before us state that the Court had no jurisdiction to make an order directing registration of a pauper petition as a suit without receiving batta. As no question of jurisdiction was involved, we find it very difficult to accept this appeal.

The appellant, for whose benefit the order was made and who either requested for such an order to be made in his favour or had taken benefit of it when made, cannot now question the correctness of the order made. Indeed, it was an order in his favour and he cannot be allowed to turn round and say that the Judge should not nave made it in his favour and presumably at his request. There are no merits in this appeal.

(3) The appeal fails and is dismissed with costs.

(4) The Civil Revision Petition is also dismissed. No costs.

R.G.D. Appeal and revision dismissed.

A.I.R. 1954 ANDHRA 54 (Vol. 41, C.N. 26)

UMAMAHESWARAM J. (11-8-1954)

Kommu Venkadu and others, Defendants-Appellants v. Candrakota Subbaramaiah and others, Plaintiffs-Respondents.

Second Appeals Nos. 1716 and 1717 of 1951, against decree of Sub. J., Narasaraopet, in Appeal Suit Nos. 97 and 98 of 1950.

(a) Civil P. C. (1908), O. 6, R. 2 — Omission to state exact nature of right — (Easements Act (1882), S. 18).

Omission to use the words "customary right" in the pleadings or state the exact nature of the legal right does not prevent the Court from upholding the customary rights if the facts warrant that conclusion. Where the defendants have pleaded in their written statements that for a period of over 100 years they have been passing through the fields of the plaintiffs and through the fields of some other ryots for going to Mecherla, it is open to the defendants to make out a customary right. AIR 1950 PC 56, Foll. (Para 2)

Anno: C. P. C., O. 6, R. 2 N. 9; Easements Act, S. 18 N. 10.

(b) Custom — Ingredients of — (Easements Act (1882), S. 18).

The custom should be immemorial in origin, certain and reasonable in nature and continuous in use. Where the right set up by the defendants is to pass through cultivable lands belonging to the plaintiffs, and it is found that the owners of the respective fields over which the pathway passed plough the entire land without leaving the pathway the custom is not proved. So also where the lands are of black-cotton soil on which dry crops are grown, a custom to pass over cultivable lands of this description is certainly unreasonable and cannot be recognised by the Courts. (Where the case as set out in the written statements was that the customary right was being enjoyed for over 100 years, the user for over 40 years was held in the circumstances not sufficient to warrant the conclusion that the custom was ancient.) (Paras 3, 6)

Anno: Easements Act, S. 18 N. 10.

(c) Civil P. C. (1908), S. 100 — Existence of customary right.

The conclusion arrived at by the lower Appellate Court that the defendants did not make out the customary right is not a pure question of fact and may be interfered with under S. 100. Still a case where the question, whether it is reasonable or not has been gone into by the lower Appellate Court, the High Court will not lightly interfere with that finding of fact. AIR 1927 Mad 653, Rel. on. AIR 1950 PC 56, Dist. (Para 3)

Anno: C. P. C., S. 100 N. 21.

(d) Custom — Reasonableness.

The period for ascertaining as to whether the custom is reasonable or not is the period of its inception. AIR 1937 Cal 245; AIR 1948 Pat 425, Rel. on. (Para 4)

(e) Custom — Certainty.

The user whereby it is sought to prove custom must not be of a nature too wide to support the custom as alleged. Where the evidence is that all the members of the public are entitled to use the pathway and not merely residents of the villages of the parties, the custom is not proved to be certain. (1881) 17 Ch D 535; AIR 1938 Cal 202; (1876) 24 WR 603, Rel. on. (Para 5)

CASES REFERRED: Paras

(A) (V37) AIR 1950 PC 56: 29 Pat 1 (PC) 2
(B) (V14) AIR 1927 Mad 653: 52 Mad LJ 674 3
(C) (V24) AIR 1937 Cal 245: ILR (1937) 2 Cal 86 4
(D) (V35) AIR 1948 Pat 425: 29 PLT 415 4
(E) (1881) 17 Ch D 535: 50 LJ Ch 754 5
(F) (V25) AIR 1938 Cal 202: 175 Ind Cas 252 5
(G) (1876) 24 WR 603 5
(H) ('95) 17 All 87: 1895 All WN 10 6
(I) ('97) 20 Mad 389 6

U. Bhimasankaran, S. V. Kondagu, A. Viswanatha Iyer and D. C. Krishnamurti, for Appellants; K. Kotayya, for Respondents.

JUDGMENT: These two Second Appeals arise out of two suits instituted against the residents of Mallepalli and Madigapalli for restraining

them from passing through the fields of the plaintiffs by means of a permanent injunction. The defendants pleaded that for over 100 years they were passing through the fields of the plaintiffs and through the fields of some other ryots for going to Mecherla. The District Munsif of Guserala held that the defendants had established a customary easement and dismissed the suits. On appeal, the Subordinate Judge of Narasaraopet allowed the appeals on two grounds, namely that the defendants did not plead customary right in their written statements, and that they did not make out the customary right. The Second Appeals are filed on behalf of the villagers of Malepalli and Madigapalli.

(2) The main contentions urged by the learned advocate for the appellants are that though the expression "customary right" is not specically mentioned in the written statements, the facts set out therein are sufficient to establish a customary right in the villagers of Malepalli and Madagapalli. It was also contended that the custom was not unreasonable as found by the lower Appellate Court and that the mere fact that other villagers were also using that pathway did not negative their customary right. I agree with the contentions of the learned advocate for the appellants that having regard to the Privy Council's decision reported in — 'Lakshmidhar Misra v. Ranglal', AIR 1950 PC 56 (A), the omission to use the words "customary right" in the pleadings or state the exact nature of the legal right does not prevent the Court from upholding the customary rights if the facts warrant that conclusion.

At page 57, Lord Radcliffe in delivering the judgment of the Judicial Committee observed as follows:

> "The appellants, as they were entitled to, confined their plaint to the allegation of fact that "The said plot has been reserved from time immemorial and the people of the locality are using it for the said purpose from generation to generation" without pleading any special legal conclusion from these facts."

Their Lordships held that the facts pleaded were sufficient to make out a customary right. As in the Privy Council case, the defendants have pleaded in their written statements that for a period of over 100 years they have been passing through the fields of the plaintiffs and through the fields of some other ryots for going to Mecherla. I therefore disagree with the view of the Subordinate Judge and hold that it is open to the defendants to make out a customary right.

(3) The essential ingredients of customary right are set out in the Privy Council decision referred to supra. The custom should be immemorial in origin, certain and reasonable in nature and continuous in use. So, the short question that falls to be determined is whether the defendants have established that the custom is ancient, certain and not unreasonable. I have perused the entire oral evidence of the defendants' witnesses and I agree with the Subordinate Judge that the defendants have not established that the custom is either ancient or reasonable in character. The right set up by the defendants is to pass through cultivable lands belonging to the plaintiffs. D. W. 2 admitted in cross-examination that the owners of the respective fields over which the pathway passed plough the entire land without leaving the pathway. There was no re-examination of this witness on this point.

D. W. 6 admitted "The lands are cultivated without having a pathway, but yet people pass along it". The lands are admittedly of black-cotton soil on which dry crops are grown. I agree with the conclusion of the learned Subordinate Judge that a custom to pass over cultivable lands of this description is certainly unreasonable and cannot be recognised by the Courts. Though, as pointed out by Lord Radcliffe in — 'AIR 1950 PC 56 at p. 58 (A)', the conclusion arrived at by the lower Appellate Court is not a pure question of fact and may be interfered with under Section 100, C. P. C., still a case where the question, whether it is reasonable or not has been gone into by the lower appellate Court, the High Court will not lightly interfere with that finding of fact as observed by Ramesam J. in — 'Paddayya v. Krishnamurthy', AIR 1927 Mad 653 at p. 654 (B).

The observations of Ramesam J. are apt and are in the following terms:

> "Generally, questions whether a custom of this kind which is set up by one party and denied by the other in agricultural tracts in this country, is reasonable or certain, are eminently questions of fact more of common sense than any abstract questions of law and unless there is clearly a misdirection as to the principles of law that ought to be applied, eminently questions for the lower Appellate Court."

I do not, therefore, wish to interfere with the finding of the lower Appellate Court. Moreover, I am also satisfied on the evidence that the custom pleaded is unreasonable.

(4) The learned advocate for the appellants contended that the period for ascertaining as to whether the custom is reasonable or not is the period of its inception and relied upon the decision reported in — 'Asaraulla v. Kiamatulla Haji Chaudhuri', AIR 1937 Cal 245 (C). I agree with that contention. There is no evidence in the present case that the lands were not cultivable lands when the custom originated. The evidence is to the effect that the lands are always being cultivated with dry crops. So, the question of the custom having been reasonable at the inception, but having become unreasonable later on does not arise for consideration on the facts of the case. The learned advocate for the respondents relied on the decision reported in — 'Baldeo Bind v. Abdul Aziz', AIR 1948 Pat 425 (D) in support of the proposition that a customary right claimed by the plaintiffs to go in procession through land bearing valuable crops should fail on the ground that the custom was unreasonable. I adopt the reasons of that case and hold that the custom pleaded in the present case is also not reasonable.

(5) The next question is whether the custom pleaded is certain. The evidence of the defendants' witnesses on this question is not uniform. D. W. 1 stated that the pathways were useful for the villagers of Malepalli and Madagapalli, Dwarakapuram and the mountain and that it was

a public pathway. D. W. 2 stated that all who wish to use the pathway might use it. D. W. 3 said that all persons were entitled to the pathway. In the chief examination, D. W. 4 said that the way was a public way. As the defendants have not pleaded that the pathway is a public pathway and the evidence is not sufficient to make out a dedication by the plaintiffs, the defendants rightly did not contend that the pathway is a public pathway.

The learned advocate for the appellants, however, contended that the mere fact that other villagers used the pathway, did not, in any way, affect their claim of customary right. The answer to this contention is to be found in the observations of Lord Justice Cotton in — '(Earl) Delawarr v. Miles', (1881) 17 Ch D 535 at p. 598 (E):

> "In that case what was attempted to be asserted was a claim of all the inhabitants of a village to use a green for the purpose of recreation. The evidence given was that all people, whether of the village or not, had used it, and it was held that this evidence would not support a claim of right in respect of the inhabitants of that village. Some of the persons who used it happen to be inhabitants of the village, but there was no distinction at all as between their user and that of all the rest of Her Majesty's subjects, and therefore the user by all Her Majesty's subjects as such, the villagers not using it as villagers, but as Her Majesty's subjects, did not afford any evidence in support of the claim sought to be established."

Biswas J. followed these observations in the case reported in — 'Harisadhan De v. Radhika Prasad', AIR 1938 Cal 202 (F). In Halsbury's Laws of England, Volume 10, para 14 — 'Hammerton v. Honey', (1876) 24 WR 603 (G) is cited in support of the proposition that the user whereby it is sought to prove custom must not be of a nature too wide to support the custom as alleged. The observations of Jessel, Master of Rolls cited in foot-note (c) are instructive:

> "It must not only be consistent with the custom alleged but, if I may use the expression, not be too wide. For instance, if you allege a custom for certain person, to dance on a green and you prove in support of that allegation not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom. It is not confined to what you say it is, and if your evidence is good for anything you prove a great deal more than you have alleged. You cannot select a bit of the practices proved which might possibly have a legal origin and say that the evidence must be rejected which would show that bit to be only a small part, say one-twentieth of the whole usage of which the remaining nineteen-twentieth may be utterly incapable of legal origin, and therefore that the one-twentieth must be assumed to have had a legal origin. I know there have been some observations made in cases which come to this— that the general legal usage is not destroye because an occasional illegal usage is sho but that does not apply where you have dence of a totally different state of thin does not support a local custom at all.

The learned advocate for the appellants on the last sentence in the observati Jessel (M. R.). I do not think that the in this case falls within the exception mention by the learned Master of Rolls. What is spoke to by the defendants' witnesses is that all th members of the public are entitled to use th pathway and not merely residents of Malepall and Madagapalli.

(6) The last question that falls to be decided is whether the custom is sufficiently ancient. The two plans filed in the case, Exs. A-1 and A-2 show that there was no pathway in 1902. T question is whether the customary right was a quired later. The decision reported in — 'Ku Sen v. Mamman', 17 All 87 (H) followed in 'Palaniandi Tevan v. Pathirangonda Nanda 20 Mad 389 (I) no doubt lays down that the pr ciple of English Common law that a custom is i proved if it is shown not to have been immemo rial is not to be applied to this country. Sir Jo Edge in — '17 All 87 (H)' cited above obser as follows:

> "To apply such a principle as we have bee urged by the counsel for the appellant to would be to destroy many customary rights modern growth in villages and other places."

If really the defendants pleaded that the cu tomary right came into existence after 1902, th decision in — '17 All 87 (H)' and — '20 Mad 38 (I)' might support him. The case as set ou in the written statements was that the customar right was being enjoyed for over 100 years. Th plaintiffs confronted the defendants with th two survey plans for which the defendants wer not able to furnish any answer. Is it now ope to the defendants to plead a customary righ as having come into existence after 1902? Is th user for over 40 years sufficient to warrant th conclusions that the custom is ancient? I do no think in the circumstances it is possible for to hold that the defendants have established th the custom is an ancient one.

(7) In the result the Second Appeals fail an are dismissed with costs. No leave.

D.H.Z. Appeals dismissed.

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